

CITY OF SAN ANTONIO
INTERDEPARTMENTAL CORRESPONDENCE
Finance Department

TO: Mayor and City Council

FROM: Ben Gorzell Jr., CPA, Public Utilities Supervisor/Assistant Director of Finance

THROUGH: Terry M. Brechtel, City Manager

COPIES TO: Melissa Byrne Vossmer, Assistant City Manager; Milo D. Nitschke, Finance Director; Keith Martin, Assistant City Attorney; Celia Murphy, Legal Administrator, City Attorney's Office

SUBJECT: Payphone, Default Long Distance and Internet Kiosk Service with Southwestern Bell

DATE: May 14, 2004

SUMMARY AND RECOMMENDATION

This ordinance authorizes an agreement with Southwestern Bell Public Communications to provide exclusive payphone, related default long distance, and internet kiosk service in City Facilities and non-exclusive payphone and related default long distance service in the City's public rights-of-way.

Staff recommends approval of this ordinance.

BACKGROUND INFORMATION

Historically, payphone service and the related default long distance for all payphones located on City property and in the City's public rights-of-way were provided for under separate agreements. In 1990, the City authorized an exclusive contract with Southwestern Bell Telephone Co. (SBC) to provide payphone service in City facilities and in City Rights-of-Way. The initial term of the contract was for five years with the option to renew for three one (1) year terms. In 1995 and 1996, the City exercised its option to renew the agreement and as such, the agreement has been operating on a month-to-month basis since September 1997.

With respect to the related default long distance service on payphones, the City selected U.S. Long Distance, Inc. (USLD) to provide this service in September 1995. The initial term of this agreement was December 7, 1995 through December 7, 1998 with two (2) additional extensions of two (2) years exercised by the City which extended the agreement to December 7, 2002. This agreement also included a minimum annual guaranteed commission payment of \$333,500 for each consecutive twelve month period of the agreement. In 1998, Qwest Communications (Qwest) purchased USLD and continued to provide the default long distance services under the agreement with the City.

In November 1999, the City issued a Request of Proposals (RFP) for payphone service in City facilities. As the City was proceeding through the RFP process on the payphones, Qwest began to assert issues under the default long distance agreement related to the requirement to continue to make the minimum annual guaranteed commission payment. Some of these allegations included issues which overlapped between the payphone agreement and the default long distance agreement. As such, the City opted to postpone the RFP process on the payphones pending resolution with Qwest on the minimum annual guaranteed commission payment under the default long distance agreement. In November 2001, the City and Qwest agreed to settle the dispute with the City receiving a payment of \$650,000 in satisfaction of the minimum annual guaranteed payments and the default long distance agreement with Qwest reverted to a

month-to-month agreement. The agreement continued on a month-to-month basis until March 6, 2003, when Qwest gave the City notice of its intention to terminate the agreement effective April 10, 2003. On April 11, 2003, the City requested that SBC assume providing default long distance service on payphones located in City facilities and in the City's public rights-of-way.

After resolution of the dispute with Qwest, the City issued a comprehensive RFP in July 2002 to include the following services:

- Payphone Service
- Default Long Distance
- Internet Kiosk Service at City Facilities

The City received two proposals in response to the RFP, one from Southwestern Bell and the other from Triad Telecom. In October of 2002, the City requested clarification on various aspects of each of the respondent's proposals, and subsequently, Triad Telecom withdrew its proposal from consideration. As the only remaining proposal from SBC included changes related to SBC's ability to remove payphones for low usage, the Public Utilities Office has worked with SBC to coordinate payphone requirements with City departments including the Airport, Alamodome, Municipal Courts, Library, Health, Parks, Department of Community Initiatives, Asset Management, Public Works and the Police Department. In determining which payphones may potentially be removed, the City balanced low usage with its desire to maintain adequate customer service. Currently, there are 498 payphones located within City facilities and 382 payphones located in the City's public rights-of-way

A copy of the agreement in substantially final form is attached as Exhibit I. Following is a summary of some of the key provisions of the agreement:

- Term of the Agreement – June 1, 2004 to May 31, 2006 with two (1) year options to extend with mutual consent of the parties;
- City Facilities - Exclusive right to provide payphone, related default long distance, and internet kiosk service in City facilities;
- Public Rights-of-Way - Non-exclusive right to provide payphone and related default long distance service in the City's public rights-of-way;
- Removal of Payphones – SBC may remove payphones that fail to generate daily average revenue of \$2.00 per payphone;
- Restoration Requirements – Establishes restoration requirements for open stations, enclosure payphones, and pedestal outdoor payphones;
- Payphones at Alamodome & Convention Center – Establishes a minimum number of payphones at the Alamodome and the Convention Center for the duration of the agreement;
- Compensation – City will receive 25% of revenue received by SBC as defined in the agreement on payphones which average \$3.00 or more in total daily average revenue; 25% of revenue received by SBC as defined in the agreement on default long distance; and 10% of revenue received on internet kiosk payphone calls;
- Audit – The City has the right to audit for compliance with the agreement;
- Advertising – Permits the advertising of payphone services, however, any other advertising requires an amendment to the agreement and negotiation of revenue sharing;
- Public Policy Payphones – City is allowed to designate (20) payphones which do not meet the minimum threshold in terms of average daily revenue and that otherwise might be removed.

POLICY ANALYSIS

Over the last several years, traffic on payphones has dramatically declined, probably due to a variety of factors including cellular phone use. Payphones in City facilities and in the public rights-of-way have also experienced a decline in usage. Additionally, the 1996 Telecommunications Act prohibited exclusive payphone agreements for use of the public rights-of-way, however, existing agreements were allowed to continue. As such, the proposed agreement grants an exclusive right to provide payphone service in City facilities and a non-exclusive right in the City's public rights-of-way.

FINANCIAL IMPACT

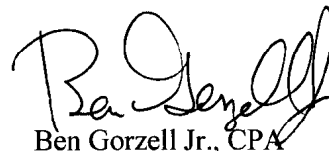
Projected revenues for payphone commissions in Fiscal Year 2005 is \$171,000 which is approximately \$10,000 less than the Fiscal Year 2004 re-estimate. Compensation is based on 25% of total gross revenues on each payphone which averages three dollars or more in total daily average revenue, 25% of gross revenue received by SBC for default long distance, and 10% of gross revenue from internet kiosks payphone calls.

COORDINATION

This Council action has been coordinated with the Airport, Alamodome, Convention Facilities, Library, Municipal Courts, Public Works, Asset Management and City Attorney's Office. On May 6, 2004, the Quality of Life Committee was briefed and recommended that this item be forwarded to City Council for consideration.

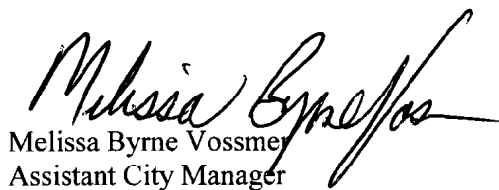
SUPPLEMENTARY COMMENTS

The required ethics disclosure form is attached.



Ben Gorzell Jr., CPA
Public Utilities Supervisor/
Assistant Director of Finance

Approved:



Melissa Byrne Vossme
Assistant City Manager



Terry M. Brechtel
City Manager

City of San Antonio Discretionary Contracts Disclosure*

For use of this form, see City of San Antonio Ethics Code, Part D, Sections 1&2

Attach additional sheets if space provided is not sufficient.

State "Not Applicable" for questions that do not apply.

* This form is required to be supplemented in the event there is any change in the information under (1), (2), or (3) below, before the discretionary contract is the subject of council action, and no later than five (5) business days after any change about which information is required to be filed.

Disclosure of Parties, Owners, and Closely Related Persons

For the purpose of assisting the City in the enforcement of provisions contained in the City Charter and the Code of Ethics, an individual or business entity seeking a discretionary contract from the City is required to disclose in connection with a proposal for a discretionary contract:

(1) the identity of any individual who would be a party to the discretionary contract:

None.

(2) the identity of any business entity that would be a party to the discretionary contract:

Southwestern Bell Telephone L.P.

and the name of:

(A) any individual or business entity that would be a **subcontractor** on the discretionary contract:

Q3 Telecom, Inc.

and the name of:

(B) any individual or business entity that is known to be a **partner**, or a **parent** or **subsidiary** business entity, of any individual or business entity who would be a party to the discretionary contract:

SBC Communications Inc.

¹ A business entity means a sole proprietorship, partnership, firm, corporation, holding company, joint-stock company, receivership, trust, unincorporated association, or any other entity recognized by law.

- (3) the identity of any lobbyist or public relations firm employed for purposes relating to the discretionary contract being sought by any individual or business entity who would be a party to the discretionary contract

None.

Political Contributions

Any individual or business entity seeking a discretionary contract from the city must disclose in connection with a proposal for a discretionary contract all political contributions totaling one hundred dollars (\$100) or more within the past twenty-four (24) months made directly or indirectly to any current or former member of City Council, any candidate for City Council, or to any political action committee that contributes to City Council elections, by any individual or business entity whose identity must be disclosed under (1), (2) or (3) above. Indirect contributions by an individual include, but are not limited to, contributions made by the individual's spouse, whether statutory or common-law. Indirect contributions by an entity include, but are not limited to, contributions made through the officers, owners, attorneys, or registered lobbyists of the entity.

Political Contributions			
San Antonio City Council & Mayor			
CANDIDATE	DATE	Amount	PAC and/or Individual Employee
Garza, Ed	9 /29 /00	\$200	PAC
Garza, Ed	9 /29 /00	\$100	Jerry Fuentes
Garza, Ed	5 /29 /01	\$2,000	PAC
Garza, Ed	5 /25 /01	\$200	PAC
Garza, Ed	5 /16 /01	\$150	PAC
Garza, Ed	6 /27 /01	\$111.50	PAC
Ed Garza	2 /20 /02	\$250	Wayne Alexander
Ed Garza	2 /20 /02	\$250	Forrest Miller
Ed Garza	2 /20 /02	\$250	Jim Kahan
Ed Garza	2 /20 /02	\$250	Stan Sigman
* List based on available information			

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Attach additional sheets if space provided is not sufficient.

State "Not Applicable" for questions that do not apply.

* This form is required to be supplemented in the event there is any change in the information under (1), (2), or (3) below, before the discretionary contract is the subject of council action, and no later than five (5) business days after any change about which information is required to be filed.

Disclosures in Proposals

Any individual or business entity seeking a discretionary contract with the city shall disclose any known facts which, reasonably understood, raise a question² as to whether any city official or employee would violate Section 1 of Part B, Improper Economic Benefit, by participating in official action relating to the discretionary contract.

Signature: 	Title: Director- Inmate sales Company: SBC- Texas	Date: May 5, 2004

² For purposes of this rule, facts are "reasonably understood" to "raise a question" about the appropriateness of official action if a disinterested person would conclude that the facts, if true, require recusal or require careful consideration of whether or not recusal is required.

**Agreement Between The City Of San Antonio And SBC
Permitting The Placement Of Payphones At City Facilities**

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AGREEMENT

This **AGREEMENT** is made and entered into by and between the **CITY** of San Antonio, a Texas Municipal Corporation and Home-Rule municipality, hereinafter called "**CITY**" acting through its **CITY** Manager pursuant to Ordinance No. _____, passed and approved on _____, 2003, and Southwestern Bell Telephone, L.P., d/b/a SBC Southwest ("**SBC**").

WHEREAS, pursuant to Ordinance 70967 passed and approved on January 25, 1990, **SBC** was authorized to install and maintain payphones at **CITY** facilities and in **CITY** rights-of-way in exchange for commissions as defined herein, and

WHEREAS, in the summer of 2002, the **CITY** initiated a proposal process to select a payphone provider which gave vendor's other than **SBC** the opportunity to participate in providing payphones at **CITY** facilities;

WHEREAS, the criteria used to evaluate the vendors which responded to the **CITY'S** Request for Proposals consisted of revenue to the **CITY**, customer service policies, technical capabilities and local and minority participation; and

WHEREAS, based on these criteria and pursuant to Ordinance No. _____ passed and approved on _____ 2004, **CITY** Council awarded **SBC** an exclusive contract to provide public payphone service at **CITY** facilities; and

WHEREAS, it is in the **CITY'S** interest to set forth rights, duties and obligations of **SBC** in this Agreement; **NOW THEREFORE**:

THE ABOVE PARTIES AGREE TO THE FOLLOWING:

SECTION 1. DEFINITIONS

For purposes of this Agreement the following terms, phrases, words, abbreviations, and their derivations shall have the same meanings herein. When not inconsistent with the context, words used in the present tense include the future; words in the plural number include the singular number, and words in the singular include the plural. The word "shall" is always mandatory and not merely permissive.

(a) "Supervisor of Public Utilities" and "Supervisor" shall mean the Supervisor or Acting Supervisor of the Public Utilities Division of the **CITY** of San Antonio as from time to time appointed by the City Manager and shall include such person or persons as may

from time to time be authorized by the City Manager or by the Supervisor to act for him/her with respect to any or all matters pertaining to this Agreement.

(b) "CITY of San Antonio" and "CITY" shall include such public officials and public bodies as may, by operation of law, succeed to any or all of the rights, powers or duties which lawfully reside in the City Council of the CITY of San Antonio.

(c) "Payphone" shall mean a coin operated payphone available for use by the general public, placed by SBC in a CITY'S facility.

(d) "Pedestal" shall mean a post or similar structure used to hold a public payphone at a certain height.

SECTION 2. GRANTING CLAUSE

(a) CITY represents and warrants that it is authorized to grant and hereby grants SBC the right to access, install and maintain payphone(s) and associated equipment, including enclosures, associated wiring and hardware (hereinafter collectively referred to as "payphone equipment") in CITY facilities at those locations specified in Exhibit A.

(b) Except as otherwise set forth herein, upon mutual Agreement between CITY and SBC, payphones at those locations in Exhibit A, may be removed or relocated. CITY agrees to pay SBC's standard relocation fee for any pay phone which, at the request of CITY, is relocated from its original placement at a Location. Provided that the revenue potential after the relocation meets with SBC's revenue requirements, SBC will relocate the phone and will commit to capping the relocation fees for the life of the Agreement as follows; Open stations(affixed to a wall, no enclosures): \$140.00; Indoor Station w/enclosure; \$260; Outdoor stations: \$300. For any customized work required to relocate a phone that would result in additional cost to SBC, fees will be communicated in writing to the City in advance, and if necessary, negotiated on a case by case basis. SBC must provide the Supervisor of Public Utilities written notice of its desire to remove or relocate any payphone under this Agreement. Upon mutual Agreement between the CITY and SBC, payphones may be added to locations in Exhibit A or at new locations. Any addition to Exhibit A during the term of this Agreement shall automatically expire on the termination date of this Agreement. SBC may, upon thirty (30) days' prior written notice, remove any pay phone (with the exception of the Alamodome and Convention

Center phones has described herein) that has failed to generate sufficient revenue to meet revenue requirements determined by SBC or when a significant safety hazard to telephone users or **SBC** employees exists.

For those payphones located at the Alamodome or the San Antonio Convention Center the average revenue shall be calculated based on "event days" instead of "calendar days". At the time this Agreement is signed, SBC and the City agree there shall be 44 phones at the Convention Center, 22 phones at the AlamoDome and 2 phones at the Auditorium. On the first anniversary of this agreement SBC and the City agree to review the average revenue based on event days and SBC agrees to remove no more than 15 additional phones at the Convention Center and 5 phones at the AlamoDome.

In the event SBC gives notice of its intent to remove a payphone for failing to generate sufficient revenue, the City shall have the option of converting the phone to a Convenience Line (billable) for a nominal monthly fee, not to exceed \$50 per month. The **CITY** reserves the right of final approval regarding the installation of any payphone at any location. Upon the reasonable request of the **CITY**, **SBC** must remove its payphone(s) from any location in any **CITY** facility and **SBC** must remove its payphone(s) within 7 business days identified by the **CITY** in its request. If **SBC** fails to remove any payphones in accordance herewith, then the **CITY** may remove the payphones and SBC shall pay all of the **CITY'S** costs of removal.

(c) The **CITY** and **SBC** will negotiate and reach mutual Agreement on the method of payphone equipment installation, the selection of a standardized instrument, wiring and methods used, enclosure and related structures. Armored cords shall not be longer than safety allows. Except as provided in 2.b. above, the total cost of all such installations, including but not limited to, installations charges, relocation costs, permanent or otherwise, materials and labor costs, shall be borne by **SBC**. Payphone equipment shall remain the property of **SBC**.

(d) Any removal of Payphone equipment shall include restoring the location as soon as practicable to a safe and clean condition allowing for normal wear and tear and ensuring no safety hazard is created by the removal of the payphones. For the following payphones this is generally determined as follows: Open Stations- ready to paint; Enclosure phones- enclosure opening covered with complimentary material;

Pedestal Outdoor Phones- pedestals removed and bolts cut to assure surface is flush. In any instance where necessary the parties shall use best efforts to reach an agreement regarding the condition of the premises and any restoration necessitated by the removal of a payphone. If **SBC** fails to restore the premises to as such to **CITY'S** reasonable satisfaction, the **CITY** shall have the right to restore the premises and **SBC** shall be responsible for paying all of the **CITY'S** costs (e) **SBC** shall maintain its Payphone equipment in proper working order with regular routine inspections. Service calls shall be made by **SBC** within forty-eight (48) hours after a problem is reported to **SBC**, Monday through Friday, exclusive of Saturdays, Sundays and government recognized holidays, in which event service calls shall be made by **SBC** within twenty-four (24) hours after the following work day of the reported problem.

(f) Upon request of the Supervisor, **SBC** shall submit to the **CITY**, a controller's report of all records pertinent to this Agreement, including, but not limited to, payphone numbers and location records. In the event the **CITY** disputes any part of this report, **CITY** shall have the right to conduct a full contract compliance audit, performed by the **CITY** or an auditor selected by the **CITY**, or to require an audited statement supplied by **SBC** covering the period in question.

(g) **CITY** shall report to **SBC** any misuse, destruction, damage or vandalism to the payphone equipment at its locations as soon as practicable after **CITY** learns of, discovers, or has reason to know of such event.

(h) **CITY** agrees that no liability shall attach to **SBC** by reason of any defacement or damage to its premises when such defacement or damage is not the result of the negligence of **SBC** or its employees. If the payphone equipment is willfully damaged or destroyed by the **CITY** or **CITY'S** employees in the course of employment, **CITY** shall be responsible for paying **SBC'S** cost of repairing equipment.

(i) **SBC** shall have the right to select the default long distance carrier on **SBC'S** payphones located in **CITY** facilities, however, **SBC** shall notify the **CITY** within 7 days with its selection. **SBC** shall ensure payment to the City for Default Long Distance Commissions.

SECTION 3. INSTALLATION AND REMOVAL OF PAYPHONES

(a.) **SBC** may not install any payphone in any **CITY** facility without first securing the written permission of the Supervisor of Public Utilities. Requests to install payphones must be sent to the Supervisor of Public Utilities. The Supervisor of Public Utilities will notify **SBC** within sixty (60) days after receiving the request for permission to install payphones, whether the request has been approved, denied or if **SBC** must modify its request in order to receive the approval to proceed.

(b.) Each request for permission to install a payphone must include the number of payphones to be installed at the proposed location and a physical description of the pedestal or other structure which will be used to mount or hold the payphone. The **CITY** has the right to require a specific type of payphone, enclosure and pedestal. When a payphone is installed in any **CITY** facility the payphone and other equipment used should be current production models of proven reliability and comply with the most current Federal Communications Commission rules and regulations. All payphones must conform to the manufacturer's published specifications. Equipment and services provided must comply with current and future Texas Public Utility Commission rules and regulations. All payphones must be located in areas that are accessible by persons with disabilities. Equipment must comply with all the requirements of the Americans with Disabilities Act (ADA), which pertain to payphones, or any future related laws, provided however, **SBC's** responsibility under this Agreement regarding the accessibility of its equipment under ADA shall be limited to the placement and functionality of the equipment, and **SBC** shall not be required under this Agreement to construct ramps, make curb cuts, or otherwise render accessible the site where the equipment is placed. Equipment should also comply with the following provisions:

- (1) Equipment must have a rugged, tamper-proof and vandal resistant housing, handsets and cords.
- (2) Handsets must be hearing aid compatible.
- (3) Each payphone must display operating instructions and the default long distance carrier.
- (4) Equipment must be housed in either a wall-mounted or free-standing pedestal enclosure. The **CITY** will approve any proposed enclosure type.

(5) All payphones must be compatible with the **CITY's** enhanced 911 emergency payphone service. All 911 emergency and 311 information calls in San Antonio will be available at no charge.

(6) All payphones must provide access to:

(a.) All long distance carriers,

(b.) Numbers for refunds & repairs service at no charge

(7) Local calls must allow unlimited time.

(8) **SBC** must provide "outgoing calls only" equipment at locations specified by the **CITY**.

(c.) **SBC** will assume all responsibility for the installation, maintenance and operation of all payphones installed under this Agreement.

(d.) The **CITY** will require **SBC** to cooperate with all law enforcement agencies and supply all records requested to conduct criminal investigations.

(e.) Before removing or relocating a payphone at a **CITY** facility, **SBC** must provide the Supervisor of Public Utilities with written notice of its desire to relocate or remove a payphone(s). Except as otherwise provided for herein, Payphones may be removed or relocated only with the mutual consent of the **CITY** and **SBC**. Within thirty (30) days of receiving written notice from **SBC**, the Supervisor of Public Utilities will contact **SBC** to discuss the removal or relocation of the payphone and the restoration of surface which was covered by the payphone, if both parties agree to the removal of a payphone.

(f) Except as to payphones in the right-of-way, in the event any third party pay phone provider should interfere with **SBC's** exclusive contractual rights to any **CITY** location as set forth herein, either through the unauthorized displacement of **SBC's** equipment or the placement of unauthorized pay phone equipment where **SBC** has such rights, **CITY** agrees to take reasonably prompt and material action to remove the third party payphones in the exclusive locations. **SBC** will use best efforts to notify the **CITY** in the event it becomes aware there are unauthorized pay phones placed in the right of way or in **SBC** locations that are not the pay phones of **SBC**.

SECTION 4. TERM

(a) The Agreement term and the rights, privilege and authority hereby granted shall take effect on June 1, 2004 and shall continue in force and effect until April 30, 2006. Upon mutual written agreement between **SBC** and the **CITY**, this agreement may be renewed for two additional one year terms.

(b) As a condition to this agreement becoming effective **SBC** shall agree to make available to the **CITY**, upon the City Manager's request, its ---books, records, contracts, accounts, documents and papers relating to its placement of payphones at **CITY** facilities under this agreement, including its obligations to compensate the **CITY**, expressly excluding any records, documents or other writings the disclosure of which are irreconcilably prohibited by state or federal law, including the Electronic Communications Privacy Act, 18 U.S.C. §2701 et seq.

(c) Should the **SBC** cease to provide public payphone service and leave the payphone business, **SBC** agrees to provide written notice to the Supervisor of Public Utilities. Such written notice must be delivered at least 12 months before **SBC** ceases to provide public payphone service.

(d) Upon application by **SBC**, this Agreement may be renewed by the City Council pursuant to the procedures established in this Section, and in accordance with the applicable laws, regulations, and the rules of the state of Texas.

(e) At least ninety (90) days prior to the expiration of this Agreement, **SBC** shall inform the Supervisor of Public Utilities in writing of its intent to seek renewal of the Agreement.

(f) Upon determination by the **CITY** Council that **SBC'S** performance is satisfactory, a renewal with any amendments may be granted for a period of two (2) year(s).

SECTION 5. MAINTENANCE AND REPAIR WORK REGULATION

The work done by **SBC** in connection with the maintenance, repair, extension, improvement, or operation of its payphones and related equipment at a **CITY** facility must conform to any and all of the **CITY'S** rules, policies and regulations.

SECTION 6. RESTRICTIONS ON THE USE OF PAYPHONES

CITY acknowledges that payphones installed by **SBC** are primarily for the use of the general public in making outgoing calls. **CITY** acknowledges that it will have no right to utilize the payphone numbers for its listing in any directory, nor shall the **CITY** be permitted to advertise such payphone numbers. **CITY** reserves the right to specify which payphones shall be equipped for outgoing calls only.

SECTION 7. ADVERTISING

SBC shall be allowed to use portions of any Payphone or enclosure for advertising or signage specifically related to **SBC'S** company name, logo and information placards that support revenue of the payphone. The **CITY** has the right to review and approve the final form of **SBC'S** advertising or signage, which agreement shall not be unreasonably withheld or delayed. Upon mutual agreement if space is available, the **CITY** retains the right to advertise 311 or other **CITY** programs. No other signage or advertising shall be allowed unless this Agreement is amended and approved by City Council. The **CITY** and **SBC** have expressed an interest in the development of a payphone advertising program for other services, goods or information, however, the **CITY** expects to receive additional compensation, including a percentage of revenue generated from the additional advertising, in exchange for its cooperation and consent in allowing the additional advertising program.

SECTION 8. RELOCATION OF FACILITIES

SBC shall, upon the written request of the **CITY**, relocate its payphones and equipment situated within any **CITY** facility, at no expense to the **CITY**, where reasonable and necessary to accommodate renovation or construction at the **CITY** facility.

SECTION 9 COMPARATIVE NEGLIGENCE

(a) **SBC** covenants and agrees to FULLY INDEMNIFY and HOLD HARMLESS, the **CITY** and the elected officials, employees, officers, directors, and representatives of the **CITY**, individually or collectively, from and against any and all costs, claims, liens, damages, losses, expenses, fees, fines, penalties, proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including

but not limited to, personal or bodily injury, death and property damage, made upon the **CITY** directly arising out of, resulting from or related to **SBC's** activities under this Agreement, including any acts or omissions of **SBC**, any agent, officer, director, representative, employee, consultant or subcontractor of **SBC**, and their respective officers, agents, employees, directors and representatives while in the exercise of performance of the rights or duties under this Agreement. This paragraph shall not apply to any liability resulting from the negligence of **CITY**, its officers or employees, in instances where such negligence causes personal injury, death, or property damage. IN THE EVENT **SBC** AND **CITY** ARE FOUND JOINTLY LIABLE BY A COURT OF COMPETENT JURISDICTION, LIABILITY SHALL BE APPORTIONED COMPARATIVELY IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS, WITHOUT, HOWEVER, WAIVING ANY GOVERNMENTAL IMMUNITY AVAILABLE TO THE **CITY** UNDER TEXAS LAW AND WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER TEXAS LAW.

(b) The provisions of this Agreement are solely for the benefit of the parties hereto and not intended to create or grant any rights, contractual or otherwise, to any other person or entity.

(c) **SBC** shall promptly advise the **CITY** in writing of any claim or demand against the **CITY** or **SBC** known to **SBC** related to or arising out of **SBC's** activities under this Agreement.

SECTION 10. INSURANCE REQUIREMENTS

(a) Except as otherwise provided for in subparagraph (h) of this Section, prior to the commencement of any work, under this Agreement, **SBC** shall furnish an original completed Certificate of Insurance to the Public Utilities Division and City Clerk's Office, which shall be completed by an agent authorized to bind the named underwriter(s) and their company to the coverage, limits, and termination provisions shown thereon, and which shall furnish and contain all required information referenced or indicated thereon. The original Certificate(s) must have agent's original signature, include the signer's company, affiliation and title, and be mailed directly from the agent to the **CITY**. The **CITY** shall have no duty

to pay or perform under this Agreement until such certificate shall have been delivered to the Public Utilities Division and the City Clerk's Office, and no officer or employee shall have authority to waive this requirement

(b) The **CITY** reserves the right to review the insurance requirements of this section during the effective period of this Agreement and any extension or renewal hereof and to modify insurance coverage and their limits when deemed necessary and prudent by the **CITY'S** Risk Manager based upon changes in statutory law, court decisions, or circumstances surrounding this Agreement, but in no instance will the **CITY** allow modification whereupon the **CITY** may incur increased risk.

(c) **SBC'S** financial integrity is of interest to the **CITY**, therefore, subject to **SBC'S** right to maintain reasonable deductibles in such amounts as are approved by the **CITY**. **SBC** shall obtain and maintain in full force and effect for the duration of this Agreement, and any extension hereof, at **SBC'S** sole expense, insurance coverage written on an occurrence basis, by companies authorized and admitted to do business in the State of Texas and rated A- or better by A.M. Best Company and/or otherwise acceptable to the **CITY**, in the following types and amounts:

<u>TYPE</u>	<u>AMOUNT</u>
1. Workers' Compensation Employers' Liability	Statutory \$ 1,000,000/\$1,000,000/\$1,000,000
2. Commercial General (public) Liability Insurance to include coverage for the following:	
a. Premises /operations	
*b. Independent Contractors	For <u>Bodily Injury</u> and
c. Products/completed operations	Property Damage of
d. Contractual liability	\$ 1,000,000 per occurrence; with
e. Personal Injury	a general aggregate of \$2,000,000 or or its equivalent in umbrella or excess liability coverage.
*If applicable	
3. Business Automobile Liability	
a. Owned/leased vehicles	<u>Combined</u> <u>Single</u> <u>Limit</u> for <u>Bodily</u>

- | | | |
|----|--------------------|---|
| b. | Non-owned vehicles | <u>Injury and <u>Property Damage</u> of</u> |
| c. | Hired vehicles | \$1,000,000 per occurrence |

(d) The **CITY** shall be entitled, upon request and without expense, to receive copies of the policies and all endorsements or verification of an appropriate self-insurance plan, which ever is applicable, thereto as they apply to the limits required by the **CITY**, and may make a reasonable request for deletion, revisions, or modification of particular policy terms, conditions, limitations or exclusions (except where policy provisions are established by law or regulations binding upon either of the parties hereto or the underwriter of any such policies). Upon such request by the **CITY**, **SBC** shall exercise reasonable efforts to accomplish such changes in policy coverage, and shall pay the cost thereof.

(e) **SBC** agrees that with respect to the above required insurance, all insurance contracts and Certificate(s) of Insurance will contain the following required provisions.

(1) Name the **CITY** and its officers, employees, agents and elected representatives as additional insureds as respects operations and activities of, or on behalf of, the named insured performed under contract with the **CITY**, with exception of the workers' compensation and employers' liability policy;

(2) Provide for an endorsement that the "other insurance" clause shall not apply to the **CITY** of San Antonio where the **CITY** is an additional insured shown on the policy;

(3) Workers' compensation and employers' liability policy will provide a waiver of subrogation in favor of the **CITY**.

(4) **SBC'S** insurance shall be deemed primary with respect to any insurance or self insurance carried by the **CITY** of San Antonio for liability arising out of operations under this Agreement with the **CITY**.

(f) **SBC** shall notify the **CITY** in the event of any notice of cancellation, non-renewal or material change in coverage and shall give such notice not less than 30 days prior to the change, or ten (10) days for non-payment of premiums, which notice must be accompanied by a replacement Certificate of Insurance. All notices shall be given to the **CITY** at the following address:

Supervisor of Public Utilities
City of San Antonio

City Clerk's Office
City of San Antonio

P.O. Box 839966
San Antonio, Texas 78283-3966
(210) 207 - 8620

P.O. Box 839933
San Antonio, Texas 78283-3933
(210) 207 - 7253

(g) With respect to SBC'S obligation to comply with the requirements for Commercial General (Public) Liability Insurance coverage, the **CITY** may allow SBC to self-insure upon annual production of evidence that is satisfactory to the **CITY'S** Risk Manager. With respect to **SBC'S** obligation to comply with the requirements for automobile liability insurance and for workers' compensation insurance, **SBC** may self-insure, provided **SBC** tenders satisfactory evidence of self-insurance as contemplated by the State motor vehicle financial responsibility law, Tex. Transp. Code §601.124, and the Texas Workers' Compensation Act, Tex. Labor Code §407.001 *et seq.*

(h) Nothing herein contained shall be construed as limiting in any way the extent to which **SBC** may be held responsible for payments of damages to persons or property resulting from **SBC'S** or its subcontractor's performance of the work covered under this Agreement.

SECTION 11. PERFORMANCE BOND

SBC agrees to post with the **CITY**, no later than fifteen (15) days following execution of this Agreement, and maintain throughout the term hereof, either an irrevocable letter of credit or a performance bond. The amount of the performance bond or irrevocable letter of credit shall be thirty thousand dollars (\$30,000). The performance bond or irrevocable letter of credit shall insure the full and faithful performance by **SBC** of all covenants, terms and conditions of this Agreement and shall stand as security for payment by **SBC** of all valid claims by **CITY**.

SECTION 12. ADMINISTRATION OF AGREEMENT

(a) The City Manager or her designee is the principal **CITY** officer responsible for the administration of this Agreement and shall review the operations of **SBC** under this Agreement.

(b) Notices required by this Agreement may be given by registered or certified mail by depositing the same in the United States mail in the continental United States, postage

prepaid. Either party shall have the right, by giving written notice to the other, to change the address at which its notices are to be received. Until any such change are made, notices to **CITY** shall be delivered as follows:

Supervisor of Public Utilities
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966
(210) 207 - 8620

City Clerk's Office
City of San Antonio
P.O. Box 839933
San Antonio, Texas 78283-3933
(210) 207 - 7253

Until any such change is made, notices to **SBC** shall be delivered as follows:

With copy to:

Mr. Adan Munoz, Jr.
SBC Director of Inmate Sales
105 Auditorium Circle
Floor 12-M-01
San Antonio, TX 78205
(210) 487 - 4019

Mr. Kirk Moser
SBC Public Communications
225 W. Randolph St.
Floor 15C
Chicago, Illinois 60606
(312) 727-4374

(c) Notices of all petitions, applications, communications and reports submitted by **SBC** to the Public Utilities Commission of Texas and the FCC, which materially affect this agreement, shall be provided to the **CITY** and copies will be provided upon request.

SECTION 13. RECORDS

(a) **SBC** shall keep complete and accurate records of its payphones and their locations. The **CITY** may require the keeping of additional records which are reasonably necessary for purposes of identifying, accounting for, and reporting changes in the number of payphones and their locations.

(b) The **CITY** may, at reasonable times and for reasonable purposes under this Agreement, examine, verify or review the documents and other records of **SBC** pertaining to this Agreement. The review may be conducted by **CITY** employees or outside auditors hired by the **CITY**. **SBC** shall make the above records available to the **CITY** for review within ten (10) working days after receiving a request from the Supervisor of Public Utilities. The **CITY** agrees to comply the Texas Public Information Act in handling all requests for public information. This may include any records, documents or other

writings the disclosure of which is prohibited by state or federal law, including the Electronic Communications Privacy Act, 18 U.S.C. §2701 *et seq.*

(c) The **CITY** may, at any time, make inquiries pertaining to this Agreement relating to **SBC'S** payphones at **CITY** facilities. **SBC** shall respond to such inquiries on a timely basis.

(d) **SBC** shall maintain its books and a system of accounts in accordance with methods of accounting applicable to the payphone business.

(e) **SBC** shall keep accurate books and accounts of the matters upon which payments are specified in this agreement, including records from which fees are to be computed and ascertained. Such books and records shall be open and available at an office located within the City of San Antonio for inspection and audit by the **CITY** upon the written request of the **CITY** during regular working hours between Monday and Friday at reasonable intervals during the term of this Agreement.

SECTION 14. MONETARY COMPENSATION

(a) **SBC** agrees to pay the **CITY**: (i) a monthly commission of twenty-five percent (25%) of the total gross revenues on each payphone which averages three dollars (\$3.00) or more in total daily average revenue. Gross revenue shall include: the total gross revenue collected on all coin paid local exchange and IntraLATA calls, the total gross billed on all non-coin paid local exchange and IntraLATA calls, and operator handling revenues received from payphones at **CITY** facilities (ii) a monthly commission of twenty-five percent (25%) percent of the total revenue received by **SBC** from its contracted interexchange carrier for InterLATA calls placed as collect, paid by calling card, or billed to a third party (non-coin paid) and if applicable, coin paid InterLATA calls placed from each individual **SBC** payphone covered by this Agreement (iv) a monthly commission of ten (10) percent of the gross revenue received on all internet kiosk payphone calls.

(b) **SBC** shall remit such commissions to the Office of the Supervisor of Public Utilities on a monthly basis. Payments shall be due on the thirtieth (30th) day following the close of month for which the payment is calculated. Four separate payments shall be accompanied by a statement which provides information by phone number and which

shows gross revenues and commissions due at the following locations; Airport, Convention Center, Alamodome and all other City facilities combined. The statement shall also identify the type of call and commission being paid (e.g. local, intraLATA, long distance, operator services, and internet kiosk payphone calls).

(c) SBC will pay any charges incurred by the CITY for selecting and/or implementing SBC or its preferred InterLATA carrier as the CITY'S choice as the PIC for InterLATA operator service calls.

SECTION 15. PUBLIC POLICY PHONES

Public policy payphones are defined as payphones which may operate at a loss, but are necessary to ensure payphone service in certain areas of the CITY. SBC agrees to install and maintain twenty (20) public policy payphone(s) under this Agreement. Any revenues generated from public policy payphones will be subject to the requirements of SECTION 14.

SECTION 16. AUDITING AND ASSESSMENT OF LATE FEES

(a) The CITY will utilize all the information provided by SBC under this agreement to conduct random audits to ensure SBC'S payment of all commissions due the CITY. This Agreement may be subject to revocation if the results of such an audit prove that SBC has been delinquent in paying commissions due under SECTION 14.

(b) If SBC fails to pay commissions in a timely manner as required in (b) of SECTION 14, then the CITY shall impose a late payment fee. The late payment fee shall be equal to five (5) percent of the delinquent amount.

SECTION 17. ASSIGNMENT OF AGREEMENT

The rights granted by this ordinance inure to the benefit of SBC. The rights granted by this Agreement shall not be assigned, transferred, sold or disposed of, leased, sub-leased, licensed, sub-licensed, let, or sub-let, in whole or in part, by voluntary sale, merger, consolidation or otherwise by force or involuntary sale, without the written consent of the CITY, approved by passage by the City Council of the CITY of San Antonio of an ordinance. For the purposes of this Section, assignment, transfer, sale, disposal, merger or consolidation shall include a change of operating control of SBC, expressly excepting an

assignment or transfer to entities that control, are controlled by or are under common control with **SBC**. Any such consent by the **CITY** shall not be withheld unreasonably.

SECTION 18. FUTURE CONTINGENCY

Notwithstanding anything contained in this Agreement to the contrary, in the event that (a) this Agreement or any part hereof, (b) any tariff provision by which **SBC** seeks to collect the charge imposed by this Agreement, or (c) any procedure provided in this Agreement, or (d) any compensation due the **CITY** under this Agreement, becomes, or is declared or determined by a judicial, administrative or legislative authority exercising its jurisdiction to be excessive, unrecoverable, unenforceable, void, unlawful, or otherwise inapplicable, in whole or in part, **SBC** and the **CITY** shall meet and negotiate either a modification to this Agreement, or a new Agreement that is in compliance with the authority's decision or enactment and, unless explicitly prohibited, the modified Agreement or new Agreement shall provide the **CITY** with a level of compensation comparable to that set forth in this Agreement provided that such compensation is recoverable by **SBC** in a mutually agreeable manner permitted by law for the unexpired portion of the term of this Agreement.

SECTION 19. VENUE AND GOVERNING LAW

(a) VENUE OF ANY COURT ACTION BROUGHT DIRECTLY OR INDIRECTLY BY REASON OF THIS AGREEMENT SHALL BE IN BEXAR COUNTY, TEXAS. THIS AGREEMENT SHALL BE CONSTRUED UNDER, AND IN ACCORDANCE WITH, THE LAWS OF THE STATE OF TEXAS, AND ALL OBLIGATIONS OF THE PARTIES CREATED HEREUNDER ARE PERFORMABLE IN BEXAR COUNTY, TEXAS.

(b) This Agreement shall be construed in accordance with the City Charter and City Code(s) in effect on the date of passage of this Agreement, and as may be subsequently amended, to the extent that such Charter and Code(s) are not in conflict with or in violation of the Constitution and laws of the United States or the State of Texas.

SECTION 20. SBC AGREEMENT VIOLATIONS

The City Council shall have the option to declare this Agreement terminated at any time for failure of SBC to comply with any material term, condition, or provision of the Agreement, in accordance with the following procedures:

(a) If **SBC** continues to violate or fails to comply with the terms and provisions of this Agreement for a period of thirty (30) days after **SBC** shall has been notified in writing by the **CITY** to cure such specific alleged violation or failure to comply, then the **CITY** may pursue the procedures set forth below to declare that **SBC** has terminated all rights and privileges consented to in this Agreement; provided, however, that if **SBC** is alleged to be in violation of any provision of this Agreement and if **SBC** commences efforts to cure such alleged violation(s) within thirty (30) days after receipt of written notice and shall thereafter prosecute such curative efforts with reasonable diligence until such curative efforts are completed, then such alleged violation(s) shall cease to exist and this Agreement shall not be declared terminated.

(b) The City Council upon finding a violation or failure to comply, may either declare this Agreement terminated or excuse the violation or failure to comply upon showing by SBC of mitigating circumstances or good cause for that violation or failure to comply.

(c) Neither SBC'S acceptance of this Agreement, or any action taken by the City Council, including a declaration of termination or a finding of a violation or failure to comply, shall be construed to waive or otherwise affect **SBC'S** right to seek a judicial determination of the rights and responsibilities of the parties under this Agreement.

(d) **SBC** shall not be excused from complying with any of the terms and conditions of this Agreement by the previous failure of the **CITY** to insist upon or seek compliance with such terms and conditions.

SECTION 21. NON-BINDING MEDIATION

(a) Prior to filing suit, the parties to this Agreement shall use non-binding mediation to resolve any controversy, claim or dispute arising under this contract, expressly excluding disputes involving the applicability or effect of superior laws, the constitutionality of any requirement in this Agreement or the preemptive effect of federal law. If any of the provisions of this Section are determined to be invalid or

unenforceable, the remaining provisions shall remain in effect and binding on the parties to the fullest extent permitted by law.

(b) To initiate non-binding mediation, a party shall give written notice to the other party or parties. In the mediation process, the parties will try to resolve their differences voluntarily with the aid of an impartial mediator, who will attempt to facilitate negotiations. The mediator will be selected by mutual agreement of the parties. If the parties cannot agree on a mediator, a mediator shall be designated by JAMS/Endispute at the request of a party. Any mediator so designated must be acceptable to all parties.

(c) The mediation will be conducted as specified by the mediator and agreed upon by the parties. The parties agree to discuss their differences in good faith and to attempt with the assistance of the mediator, to reach an amicable resolution of the dispute. Any finding by the mediator shall be a non-binding determination.

(d) The mediation will be treated as a settlement discussion and therefore will be confidential in accordance with Tex. Civ. Prac. & Rem. Code §154.073. The mediator may not testify for either party in any later proceeding relating to the dispute. No recording or transcript shall be made of the mediation proceedings.

(e) Each party will bear its own costs in the mediation. The fees and expenses of the mediator will be shared equally by the parties.

SECTION 22. WAIVER

None of the provisions of this Agreement may be waived or modified except expressly in writing signed by both parties. Failure of either party to require the performance of any term in this Agreement or the waiver by either party of any breach thereof shall not prevent subsequent enforcement of this term and shall not be deemed a waiver of any subsequent breach.

SECTION 23. SEVERABILITY

If any clause or provision of the Agreement is illegal, invalid, or unenforceable under present or future laws effective during the term of this Agreement, then and in that event it is the intention of the parties hereto that the remainder of this Agreement shall not be affected thereby, and it is also the intention of the parties of this Agreement that in lieu of

each clause or provision of this Agreement that is illegal, invalid, or unenforceable, there be added as part of this Agreement a clause or provision as similar in terms to such illegal, invalid, or unenforceable clause or provision as may be possible and be legal, valid, and enforceable.

SECTION 24. CAPTIONS

The captions contained in this Agreement are for convenience of reference only and in no way limit or enlarge the terms and conditions of this Agreement.

SECTION 25. CONFORMITY TO CONSTITUTION, STATUTES, CHARTER AND CITY CODE

(a) This Agreement and referenced ordinance is passed subject to the provisions of the Constitution and the laws of the State of Texas and the Charter provisions of the **CITY** of San Antonio and applicable sections of the San Antonio City Code.

(b) In addition to these provisions, **CITY** expressly reserves the right to adopt, from time to time, ordinances, rules and regulations it may deem necessary in the exercise of **CITY'S** governmental powers. **SBC** agrees to abide by any laws of the **CITY** within a reasonable time after passage thereof.

(c) **CITY** expressly reserves the right to enforce reasonable regulations concerning **SBC'S** access to **CITY** facilities and access or use of streets and other public ways or property, including requirements for permit applications. It is understood and agreed that **SBC** is responsible for obtaining all necessary permits.

SECTION 26. EXTENT OF AGREEMENT

This Agreement, together with its attached exhibits, and the City's Request for Proposals and **SBC's** Proposal, which are attached hereto and incorporated herein, embodies the complete Agreement of the parties, superseding all oral or written previous and contemporary Agreements between the parties and relating to matters in this Agreement, and except as otherwise provided in this Agreement, it cannot be modified without written Agreement of the **CITY** and **SBC** to be attached to and made a part of this Agreement and subject to approval of the City Council of the **CITY** of San Antonio. In the event that there is a conflict in language between this Agreement, the RFP or the Proposal then the language

found in this Agreement shall control over the RFP and the Proposal; and the language in the RFP shall control over the Proposal.

SECTION 27. AUTHORITY

The signer of this Agreement for SBC hereby represents and warrants that he or she has full authority to execute this Agreement on behalf of SBC.

In witness of which this Agreement has been executed this _____ day of _____, 2004

CITY OF SAN ANTONIO

SBC

Terry M. Brechtel
City Manager

By: _____

Title: _____

ATTEST:

City Clerk

APPROVED AS TO FORM: _____

City Attorney