

DEPARTMENT HEAD'S SUMMARY REQUISITION FOR COUNCIL ACTION  
(RCA)

DEPARTMENT: Information Technology

INTRODUCTION DATE: December 6, 2011

PUBLIC HEARING DATE: December 20, 2011

CONTACT PERSON/PHONE: Miguel A. Gamiño, IT Director/ 541-4746  
Bertha Ontiveros, City Attorney/ 541-4550

DISTRICT(S) AFFECTED: All

**SUBJECT:** Discussion and action on the request that Council approve an Ordinance granting a lease to Transtelco, Inc. of a portion of the City's existing underground conduit system in downtown and south El Paso for a fiber optic cable telecommunications system. That the City Manager be authorized to execute a Lease Agreement on behalf of the City terms listed in the Ordinance. The consideration is to be paid to the city for an annual lease fee of \$12,524.70.

**BACKGROUND/DISCUSSION:**

Transtelco, Inc. is a Certificated Telecommunications Utility and issued a Service Provider Certificate of Operating Authority under the Public Utility Regulatory Act of Texas. Transtelco desires the use of certain City of El Paso underground conduit within public rights-of-way for the purpose of installing a fiber optic cable communication network to transport electronic information.

The City is willing to grant the lease according to the terms of the lease without waiving any of its rights under applicable law. The City Manager is authorized to execute a lease agreement on behalf of the city upon the following terms to Transtelco, Inc.:

1. The Lease agreement shall be in a form that is attached to the Ordinance and incorporated as Exhibit A.
2. The lease Agreement is to permit Transtelco the use of the Conduit solely for the installation and maintenance of the Fiber.
3. As consideration for the Lease Agreement, Transtelco, Inc. shall pay to the City the sum set forth in Paragraph four of Exhibit A, subject to the terms and conditions of this ordinance and Lease Agreement.
4. The Lease Agreement shall be for a term of five years from the date the Lease is executed by the City and may be extended by three additional

Mayor  
John F. Cook

City Council

District 1  
Ann Morgan Lilly

District 2  
Susie Byrd

District 3  
Emma Acosta

District 4  
Carl L. Robinson

District 5  
Dr. Michiel R. Noe

District 6  
Eddie Holguin Jr.

District 7  
Steve Ortega

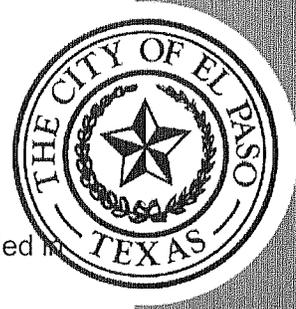
District 8  
Cortney Carlisle Niland

City Manager  
Joyce A. Wilson



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five year terms from the expiration date of the initial term as provided in the Lease Agreement.

The City is to be paid an annual lease fee of \$12, 524.70, as determined by the parties as adequate consideration.

**PRIOR COUNCIL ACTION:**

No.

**AMOUNT AND SOURCE OF FUNDING:**

Department: Information Technology  
Amount: \$0  
Funds Available: Not applicable  
Funds Source: Not applicable

**BOARD/COMMISSION ACTION:** N/A

\*\*\*\*\*REQUIRED AUTHORIZATION\*\*\*\*\*

DEPARTMENT HEAD:

  
Miguel A. Gamino, Information Technology Director

Information copy to appropriate Deputy City Manager

Mayor  
John F. Cook

**City Council**

*District 1*  
Ann Morgan Lilly

*District 2*  
Susie Byrd

*District 3*  
Emma Acosta

*District 4*  
Carl L. Robinson

*District 5*  
Dr. Michiel R. Noe

*District 6*  
Eddie Holguin Jr.

*District 7*  
Steve Ortega

*District 8*  
Cortney Carlisle Niland

City Manager  
Joyce A. Wilson



**AN ORDINANCE GRANTING A LEASE TO TRANSTELCO, INC. OF A PORTION OF THE CITY'S EXISTING UNDERGROUND CONDUIT SYSTEM IN DOWNTOWN AND SOUTH EL PASO FOR A FIBER OPTIC CABLE TELECOMMUNICATIONS SYSTEM. THE FOLLOWING CONSIDERATION IS TO BE PAID TO THE CITY: ANNUAL LEASE FEE (\$12,524.70).**

**WHEREAS**, TRANSTELCO, INC. (hereinafter called "Lessee") is a Certificated Telecommunications Utility (CTU) that has been issued a Service Provider Certificate of Operating Authority (SPCOA) under the Public Utility Regulatory Act of Texas, and desires the use of certain City of El Paso (hereinafter called "City") underground conduit within public rights-of-way in the City of El Paso (the "Conduit") for the purpose of installing a fiber optic cable communication network of Lessee solely to transport electronic information; and,

**WHEREAS**, Lessee has installed within the Conduit certain fiber belonging to Lessee (the "Fiber") in connection with a fiber optic telecommunications network; and,

**WHEREAS**, the City is willing to grant this Lease according to the terms in the attached agreement without waiving any of its rights under applicable law.

**NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF EL PASO:**

That the City Manager be authorized to execute a Lease Agreement, on behalf of the City upon the following terms, to TRANSTELCO, INC., hereinafter referred to as "Lessee":

1. The Lease Agreement shall be in a form that is attached and incorporated as Exhibit "A"; and,

2. The Lease Agreement is to permit Lessee the use of the Conduit solely for the installation and maintenance of the Fiber; and,

3. As consideration for the Lease Agreement, Lessee shall pay to the City the sum set forth in Paragraph Four of Exhibit "A," subject to the terms and conditions of this ordinance and the Lease Agreement; and,

4. The Lease Agreement shall be for a term of five (5) years from the date the Lease is executed by the City and may be extended by three (3) additional five (5) year terms from the expiration date of the initial term as provided in the Lease Agreement.

PASSED AND APPROVED this \_\_\_\_ day of \_\_\_\_\_, 2011.

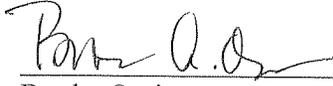
**THE CITY OF EL PASO**

**ATTEST:**

\_\_\_\_\_  
Richarda Momsen  
City Clerk

\_\_\_\_\_  
John F. Cook  
Mayor

**APPROVED AS TO FORM:**

  
\_\_\_\_\_  
Bertha Ontiveros  
Assistant City Attorney

**APPROVED AS TO CONTENT:**

\_\_\_\_\_  
Joyce Wilson, City Manager



## **SECTION 2. LOCATION OF CONDUIT**

The 4 inch Conduit leased to Lessee is located along two separate routes in downtown El Paso specifically described as follows:

Route No.1. Commencing at the intersection of Durango Street and Overland Avenue: Thence North along Durango Street for three blocks until arriving at the intersection of Durango Street and Missouri Avenue, then turning eastward on Missouri Avenue for five blocks until arriving at the intersection of Missouri Avenue and Stanton Street, then turning southward on Stanton Street for one block to arrive at the intersection of Stanton Street and Franklin Avenue for a total of 3,464.34 lineal feet.

Route No. 2. Commencing at the intersection of Main Street and Mesa Street: Thence East along Main Street for three blocks until arriving at the intersection of Main Street and Campbell Street, then turning southward on Campbell Street for four blocks until arriving at the intersection of Campbell Street and San Antonio Avenue, then turning westward on San Antonio Avenue for two blocks until arriving at the intersection of San Antonio Avenue and Stanton Street, then turning southward on Stanton Street for ten blocks until arriving at the Stanton Street Bridge for a total of 6,820.85 lineal feet.

Both Route No. 1 and Route No. 2 are hereinafter sometimes collectively referred to as the "Route". A map of the Route is attached hereto and made a part hereof as Exhibit "1".

## **SECTION 3. TERM**

The term of this Lease shall be five (5) years from the date the Lease is fully executed ("Effective Date"), unless terminated earlier as provided herein ("Initial Term"). At the end of the Initial Term, Lessee shall have the option (the "Option") to extend this Lease for three (3) additional consecutive five (5) year terms (each an "Option Term"). Lessee shall notify the City of its intent to exercise its Option in writing to the City no later than ninety (90) days prior to the expiration date of the Initial Term or the applicable Option Term. Should Lessee fail to submit its notice of its intent to exercise its Option, the Lease shall expire by its own terms. At the time of exercising an Option, Lessee must be in good standing with the applicable regulatory authorities and not be in default of any provision of this Lease.

## **SECTION 4. CONSIDERATION**

For the Conduit within the City Property the annual and monthly fee (the Lease Fee) is as follows:

The Lease Fee shall be paid monthly in advance, beginning on December 1, 2011, in the amount of \$1,043.72. Commencing January 1, 2013 and each January 1<sup>st</sup> thereafter, the monthly rental throughout the Initial Term and any Option Term shall increase by 5% annually.

A. Failure to remit payment as provided in this Section shall be cause for termination, under the terms of Paragraph 8 (Termination). Lessee's failure to make the payment within ten days (10) after the payment is due shall constitute a late payment and Lessee shall pay the City a late charge of five (5) percent.

B. The first month's payment shall be in the form of a check payable to "The City of El Paso" and delivered to the Financial Services Department, Capital Assets Management Division for remittance to the Office of the City Comptroller. If the Lease is disapproved by the City Council, the Office of the City Comptroller shall make a full refund of the payment within fifteen (15) days of the denial action.

C. The Lease Fee shall be exclusive of and in addition to all costs of obtaining required permits, plans and other approvals as necessary to conform to all other applicable City, state or federal ordinances and regulations.

#### **SECTION 5. RESTRICTIONS ON LEASED INTEREST.**

A. Security Interests/Liens. In the event that Lessee intends to grant a third party creditor a security interest in the Fiber located within the Conduit, Lessee shall ensure that the security interest in the Fiber is subject to all of the terms and conditions of the Lease. Lessee shall promptly provide the City evidence of the name of any third party creditor.

B. Nature of Interest. Nothing herein shall grant any real property interest to Lessee except a nonexclusive leasehold estate in the Conduit for a term of years subject to all of the terms provided herein. Nothing herein contained shall be construed as granting an exclusive use or right to the Lessee in the Conduit or any City Property, and the City may grant additional leases or rights in the Conduit to any other applicant. Except for scheduled preventative maintenance services or in the event of an emergency, Lessee may not make physical entry, replace, splice, relocate or in any way use the Conduit or any fiber within the Conduit, without first notifying the City's Engineering Department in writing or by electronic mail 48 hours in advance. This notification must include plans in sufficient specificity as determined by the City Engineer and shall be approved by the City Engineer in writing or by electronic e-mail prior to any activity taking place.

## **SECTION 6. CITY'S USE OF CITY PROPERTY**

The City reserves the right to use the surface or subsurface or airspace around and above the Conduit for any public purposes allowed by law and deemed necessary by the City and to do or permit to be done any work in connection therewith which may be deemed necessary or proper by the City on, across, along, under or over said Conduit. Further the City expressly reserves the right to install, repair, reconstruct and relocate not only the Conduit used or occupied by Lessee, but also any streets, alleys, drainage facilities and structures. The City shall give Lessee at least ten (10) days notice in writing prior to relocating the Conduit containing the Fiber.

The City reserves the right to lay and permit to be laid, utility lines including, but not limited to, storm and sanitary sewer, gas, water, and other pipelines or cables and conduits, and to do and permit to be done, any underground and overhead installation or improvement that may be deemed necessary or proper by the governing body of the City in, across, along, over or under any City Property occupied by Lessee, and to change any curb or sidewalk or the street grade of any street. The City shall not be liable to Lessee for any damage resulting thereof, nor shall the City be liable to Lessee for any damages arising out of the performance of any work by the City, or its contractors or subcontractors, not willfully and unnecessarily occasioned; provided, however, nothing herein shall relieve any other persons or entities from liability for damage to Lessee's Fiber.

If the City requires Lessee to remove, alter, change, adapt, or conform the Fiber because of changes in the Conduit for any reason, Lessee shall make the alterations or changes as soon as practicable when ordered in writing by the Director without claim for reimbursement or damages against the City. Notwithstanding anything contained to the contrary in this Lease, the Lease Fee shall be abated for the time period for which the Lessee does not have use of its communication system. Additionally, the term of the Lease shall be extended equal to the time that Lessee's communication system is inoperable due to the alterations or changes required by the City.

## **SECTION 7. INDEMNIFICATION AND INSURANCE**

Lessee agrees to indemnify, defend and hold harmless the City, its officers, agents, servants and employees from any and all claims, loss, damages, causes of action, suits, and liability of any kind or character, including all expenses of litigation for injury or death to any person, or for damage to any property, arising out of or in connection with Lessee's, Lessee's agents, servants or

employees' use of the Fiber or other City Property, regardless of whether such injuries, death, or damages are caused in whole or in part by the negligence of the City.

Prior to the approval of this Lease by City Council, Lessee shall provide the City with a certificate of liability insurance and shall maintain such insurance in effect during the term of this Lease, in the amount of six million dollars; one million dollars (\$1,000,000.00) primary plus five million dollars (\$5,000,000.00) umbrella or other securities as acceptable to the City's Risk Manager. These amounts are not a limitation upon Lessee's agreement to indemnify and hold the City harmless.

Lessee shall procure said insurance with a solvent insurance company authorized to do business in Texas. The policy shall provide in substance that the insurer will defend against all claims and lawsuits which arise and will pay any final judgment of a court of competent jurisdiction against the City, its officers, agents, servants or employees and the licensee, its agents, servants or employees. The coverage must be on an "occurrence" basis and must include coverage for personal injury, contractual liability, premises liability, medical damages, underground, and explosion and collapse hazards. Each policy must include a cancellation provision in which the insurance company is required to notify the City in writing not fewer than ten (10) days before canceling, failing to renew, or reducing policy limits. The certificate shall state the policy number; name of insurance company; name and address of the agent or authorized representative of the insurance company; name, address and telephone number of insured; policy expiration date; and specific coverage amounts.

All policies shall name the City of El Paso, its officers, agents, servants and employees as an additional insured. Lessee shall file an original of the policy or certificate of insurance with the City Clerk, the Street Department, the Development Services Department, and the Capital Assets Management Division prior to the execution of this Lease. The policy shall contain a provision that the policy will not be terminated without providing the City with thirty (30) prior written notice of termination.

So long as any construction or maintenance work of Lessee is limited to the Fiber and will not be on the Conduit no payment and performance bond is required before any new work or repair work begins. Before any work on the Conduit begins by Lessee where construction costs

are estimated to be \$25,000 or more, Lessee shall be required to provide Lessor with a payment and performance bond in the estimated amount of the project.

#### **SECTION 8. TERMINATION**

A. Right to Cure. If the termination by the City is solely for failure to pay the rent, the City shall give Lessee ten (10) days written notice to cure, unless Lessee has not timely paid the rent and the City has sent written notice more than twice during the immediately preceding 6 month period, in which event there shall be no cure period. If the termination by the City is solely for a non-monetary default, the City shall give Lessee thirty (30) days written notice to cure. If the default is such that it cannot be cured in thirty (30) days despite diligent efforts, Lessee shall not be in default if it commences the cure at the beginning of the thirty-day period and thereafter diligently performs such action as may be necessary to cure such default. In no event shall Lessee have more than ninety days to cure a non-monetary default.

B. Removal or Abandonment of Fiber. Immediately prior to the termination of the lease term at the end of the Lease period or any extension thereof Lessee may, at Lessee's option, remove all of its Fiber from the Conduit. If Lessee does not remove all of its Fiber from the Conduit prior to the termination date any Fiber shall be deemed abandoned and shall become the property of the City free and clear of all liens, regardless of the cause of the termination.

C. Cross-Default. At the City's option, failure of Lessee to cure a monetary or non-monetary default within the cure period in any other agreement that Lessee has with the City shall be an event of default under this Lease, provided that the City shall simultaneously give written notice to Lessee of the City's intention to assert the cross-default, with specific reference to this Lease, in the notice of default sent by the City under such other agreements. Furthermore, a non-monetary default in any other agreement that Lessee has with the City shall not trigger a default under this Lease so long as the following occurs: (i) prior to the expiration of the cure period of the applicable agreement Lessee gives the City written notice of the factual basis for its position that a non-monetary default in the applicable agreement did not occur, has been adequately cured or that Lessee was not responsible to cure the default under the terms of the applicable agreement; (ii) within 30 days from any City written response that the City disagrees with Lessee's position Lessee submits the dispute to mediation before a mutually-agreed upon mediator and diligently pursues a mediated resolution of the dispute; and (iii) thereafter, the mediator determines that a default did not

occur, any default has been cured, or that the default was not the responsibility of the Lessee under the terms of the applicable agreement.

**SECTION 9. RECORDS**

Lessee shall keep complete and accurate maps, construction drawings and specifications describing the location of Fiber within the City Property. The City shall have the right, at reasonable times to inspect such maps, construction drawings and specifications.

**SECTION 10. NOTICE**

Any notice or communication required in the administration of this Lease shall be sent as follows:

City of El Paso  
ATTN: City Manager  
2 Civic Center Plaza  
El Paso, Texas 79901-1196

with copies to:

City of El Paso  
ATTN: Director of Information Technology  
2 Civic Center Plaza  
El Paso, Texas 79901-1196

City of El Paso  
ATTN: Capital Assets Manager  
2 Civic Center Plaza  
El Paso, Texas 79901-1196

and:

TRANSTELCO, INC.  
500 W. Overland, Suite 110  
El Paso, Texas 79901-1196

or to such other addresses as the parties designate from time to time by written notice.

**SECTION 11. ASSIGNMENT**

A. The rights granted by this Lease inure to the sole benefit of Lessee. Lessee shall not sublease or assign all or a portion of the Conduit to any third party unless the third party agrees that its interest is subject to the terms of this Lease. The foregoing is not intended to prohibit or restrict Lessee from allowing the use of the Fiber by one or more of its customers.

B. Lessee shall have the right to assign this Lease subject to the prior written approval of the City, not to be unreasonably withheld. Any assignment of this Lease shall be void unless it is approved by the City Council prior to the assignment. Before a request for

assignment is placed on the Council agenda Lessee must not be in default of any provision of this Lease or any other agreement that Lessee has with the City, and the assignee must have agreed in writing to the terms of this Lease.

## **SECTION 12. MISCELLANEOUS**

**Remedies:** This Lease shall be enforceable in any court of competent jurisdiction by any of the parties or by an appropriate action at law or in equity to secure the performance of the restrictions, conditions and covenants herein contained. In the event the defaulting party fails to cure the breach within the applicable period provided in section 4A above, then the non-defaulting Party may pursue any remedy provided at law or in equity.

**Force Majeure:** In the event any Party is rendered unable, wholly or in part, by force majeure to carry out any of its obligations under this Lease, it is agreed that on such Party's giving of notice and the full particulars of such force majeure in writing to the other Party as soon as possible after the occurrence of the cause relied upon, then the obligations of the Party giving such notice, to the extent it is affected by force majeure and to the extent that due diligence is being used to resume performance at the earliest practicable time, shall be suspended during the continuance of any inability but for no longer period.

The term "force majeure" as used herein, shall include, but not be limited to, acts of God, strikes, lockouts or other industrial disturbances, acts of the public enemy, war, terrorism, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, droughts, tornadoes, hurricanes, arrests and restraints of governments and people, explosions, breakage or damage to machines or pipelines and any other inability of either Party, whether similar to those enumerated or otherwise, and not within the reasonable control of the Party claiming such inability.

**Severability:** If any provision of this Lease is held invalid by a court of competent jurisdiction, such provision shall be deemed to be excised herefrom and the invalidity thereof shall not affect any of the other provisions contained herein, provided that any invalid provisions are not deemed by the City or the Lessee to be material to the overall purpose and operation of this Lease. If the City or Lessee determines that the invalid provision is material, then, if the City has made such determination, the City shall have the option to terminate this Lease, and if the Lessee has made such determination, the Lessee shall have the option to terminate this Lease.

Such judgment or decree shall relieve the City and the Lessee from performance under such invalid provision of this Lease.

**Entire Agreement:** This Lease contains the entire agreement of the Parties, and there are no other agreements or promises, oral or written, between the Parties regarding the subject matter of this Lease. This Lease may be amended only by written agreement signed by the Parties.

**Governing Law, Jurisdiction & Venue:** This Lease shall be governed by and construed in accordance with the laws of the State of Texas, as it applies to contracts performed within the State of Texas and without regard to any choice of law rules or principles to the contrary. The Parties acknowledge that this Lease is performable in El Paso County, Texas and hereby submit to the jurisdiction of the courts of that County, and hereby agree that any such Court shall be a proper forum for the determination of any dispute arising hereunder.

**No Third Party Beneficiary:** This Lease is not intended, nor will it be construed, to create any third-party beneficiary rights in any person or entity who is not a Party, unless expressly otherwise provided.

**Waiver:** Any failure by a Party hereto to insist upon strict performance by the other Party of any material provision of this Lease shall not be deemed a waiver thereof or of any provision hereof, and such Party shall have the right at any time thereafter to insist upon strict performance of any and all of the provisions of this Lease.

**Incorporation of Exhibits and Other Documents by Reference:** All exhibits and other documents attached to or referred to in this Lease are incorporated herein by reference for the purposes set forth in this Lease.

**Headings:** The headings as to contents of particular articles or sections herein are inserted only for convenience, and they are in no way to be construed as a limitation on the scope of the particular articles or sections to which they refer.

**Ambiguities:** In the event of any ambiguity in any of the terms of this Lease, it shall not be construed for or against any Party on the basis that such Party did or did not author the same.

**Counterparts:** It is understood and agreed that this Lease may be executed in any number of counterparts; each shall be deemed an original for all purposes.

**Authority for Execution:** Each Party hereby certifies, represents, and warrants that the execution of this Lease has been duly authorized.

**Administration:** The Director of Information Technology is the principal City official responsible for the administration of this Lease and Lessee recognizes that questions regarding the interpretation or application of this Lease shall be referred to the Director or his designee.

**IN WITNESS WHEREOF**, the parties have hereunto set their hands and seals and have caused this instrument to be executed by their duly authorized officials and the corporate seal affixed hereto, all on the day and year first above written.

**THE CITY OF EL PASO**

\_\_\_\_\_  
Joyce Wilson  
City Manager

**ACKNOWLEDGEMENT**

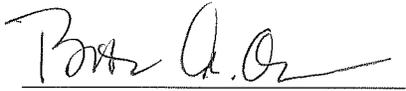
**THE STATE OF TEXAS    )**  
**COUNTY OF EL PASO    )**

This instrument is acknowledged before me on this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, by Joyce Wilson as City Manager on behalf of the **CITY OF EL PASO**.

\_\_\_\_\_  
Notary Public, State of Texas

My Commission Expires:

**APPROVED AS TO FORM:**

  
\_\_\_\_\_  
Bertha A. Ontiveros  
Assistant City Attorney

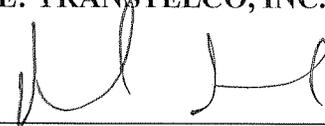
**APPROVED AS TO CONTENT:**

  
\_\_\_\_\_  
Miguel Gamino, Director Information Technology

**ACCEPTANCE**

The attached Lease, with all conditions thereof, is hereby accepted this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

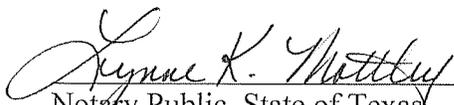
**LESSEE: TRANSTELCO, INC.**

By:   
Miguel Fernandez, President

**ACKNOWLEDGEMENT**

THE STATE OF TEXAS )  
COUNTY OF EL PASO )

This instrument is acknowledged before me on this 21<sup>st</sup> day of November, 2011, by Miguel Fernandez as President on behalf of TRANSTELCO, INC., as Lessee.

  
Notary Public, State of Texas

My Commission Expires:

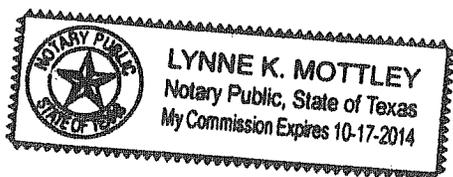
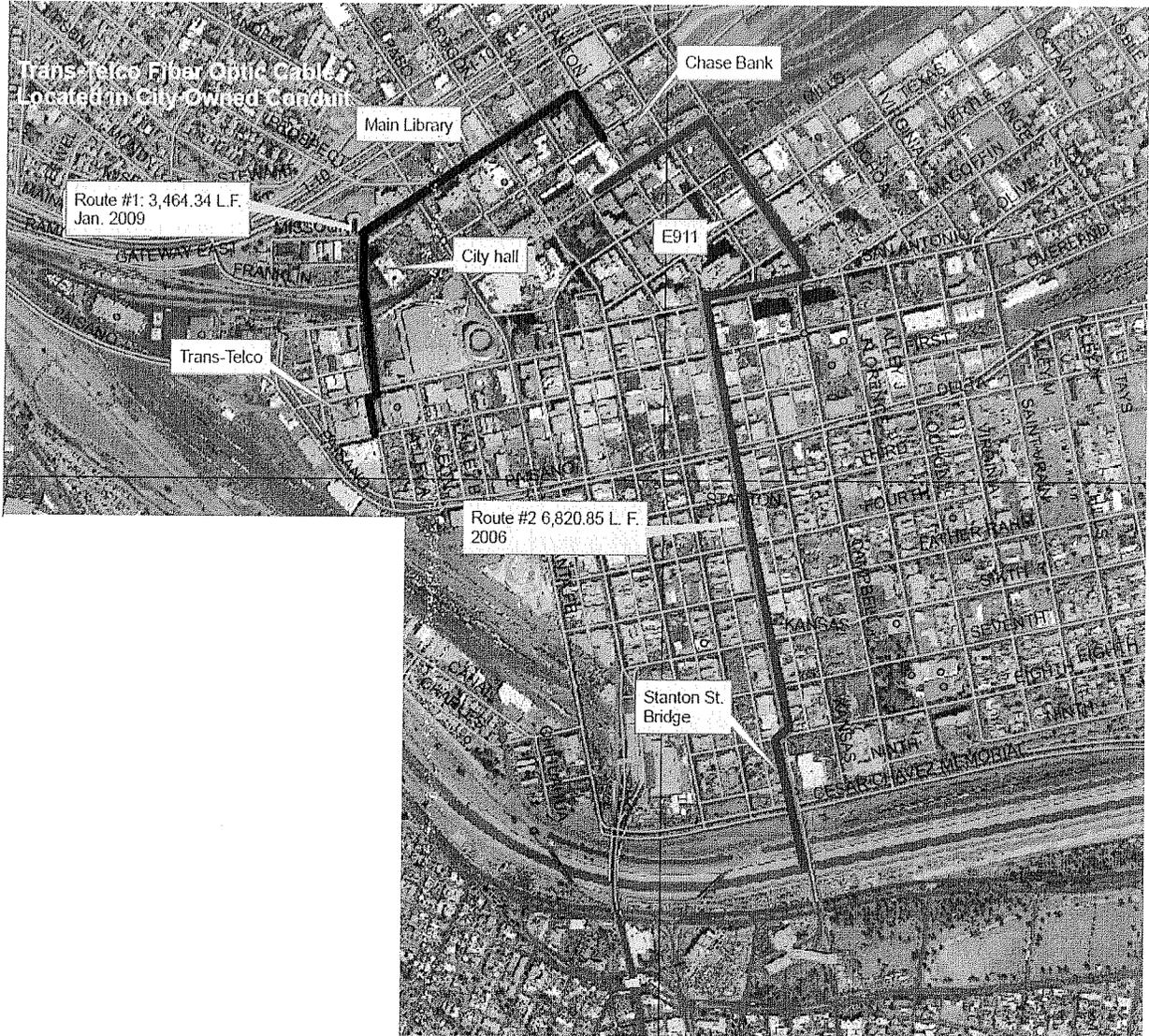
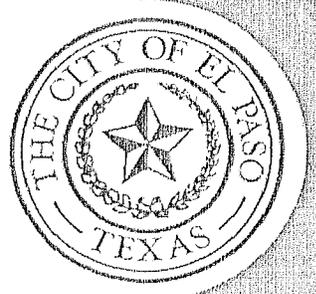


EXHIBIT "1"  
ROUTE





MEMORANDUM

TO: Mayor and City Council

FROM: Bertha A. Ontiveros *BAO*  
Assistant City Attorney

SUBJECT: Transtelco, Inc.

DATE: November 28, 2011

Attached is a memorandum from Risher Gilbert, our outside counsel, explaining the transaction documents negotiated with Transtelco Inc. for fiber optic backbone and projects in the downtown area.

cc: Joyce A. Wilson  
City Manager

Mayor  
Tom E. Cragg

City Council

District 1  
Ann Morgan Kelly

District 2  
Susanna W. Byrd

District 3  
Emma Acosta

District 4  
Carl L. Robinson

District 5  
Dr. Michael R. Noe

District 6  
Eddie Holguin Jr.

District 7  
Seyla Ortega

District 8  
Cynthia Carlisle Nollan

City Manager  
Joyce A. Wilson

OFFICE OF THE CITY ATTORNEY

2 Civic Center Plaza, 9<sup>th</sup> Floor / El Paso, Texas 79901 / 915 541-4550 / Facsimile 915 541-4710 [www.elpasotexas.gov](http://www.elpasotexas.gov)  
11-1040-004/PL#92096/MEMO TO COUNCIL/BAO



THE GILBERT LAW FIRM  
A PROFESSIONAL CORPORATION

201 E. Main Dr., Suite 1501  
P.O. Box 472  
El Paso, Texas 79943-0472  
Phone: (915) 532-6622  
Fax: (915) 541-6490

## Memo

**To:** City Council  
**From:** Risher S. Gilbert  
**Date:** November 28, 2011  
**Re:** Transtelco-Executive Summary of Documents

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City Council Agenda Items. On December 6, 2011 two Ordinances related to the fiber optic company Transtelco, Inc. will be introduced on the Council agenda. On December 13, 2011 the public hearing on these items will take place and Council will be asked to vote on them as well as on five other documents discussed below.

Overview. The City has been doing business with Transtelco, Inc. in some capacity for at least five years. Transtelco is both a lessee of City property and a lessor to the City of Transtelco property. Transtelco also maintains the primary fiber backbone of the City. The following described seven documents serve to bring Transtelco current on its lease fees to the City and clarify, clean up and strengthen what were sometimes informal or vague terms of the City's agreements with Transtelco.

Conduit Lease. This is a new document that memorializes the unwritten lease terms between the City as lessor and Transtelco as lessee of approximately 10,285 lineal feet of the City's downtown conduit, part of which has been leased since 2006. The Lease has a new 5 year term with 3 additional 5 year options. The annual lease payment is \$12,524.70 which will increase by 5% each year starting in 2012. If Council approves this Lease it must be by Ordinance that will be introduced on December 6, 2011.

Memorandum of Conduit Lease. This is a new document that will be recorded in the Real Property records to give third parties notice of the Conduit Lease described above.

Stanton International Bridge License Agreement. Since 2006 Transtelco has used a City conduit for its fiber to cross the Stanton International Bridge. This new agreement sets forth the terms for the License. The bridge fees increase annually by 5% and for 2012 will be \$34,233. This License Agreement includes language that an uncured default in any other agreement that Transtelco has with the City will constitute a default in this License. After 2014 either party may terminate the License upon 6 months notice. If Council approves this License it must be by Ordinance that will be introduced on December 6, 2011.

Memorandum of Agreement. This is a new document that summarizes the settlement between the parties and recites the computation of the \$193,980.42 amount that Transtelco owes for past fees through the end of November 2011. One-fourth of the fees will be paid when the Agreement is approved; the remainder will accrue interest at 2.5% and will be paid in three payments over the next 12 months.

Amendment to Fiber Lease Agreement. This is a new amendment to the existing Fiber Lease between the City and Transtelco dated December 18, 2007, by which the City leases 144 fiber optic strands within approximately 25.5 miles of Transtelco conduit. The initial 10 year term has been extended to restart in December of 2011 and the City has two additional 10 year terms it can exercise. This amendment clarifies that all rental has been prepaid so that the City owes nothing further for the entire term of the Lease. It also clarifies that Transtelco must keep current any creditor with a lien on the conduit and a failure to do so will be a default unless the creditor executes a non-disturbance agreement in favor of the City so that the City's Lease will continue regardless of any foreclosure of the conduit.

Memorandum of Fiber Lease. This is a new document that will be recorded in the Real Property records to give third parties notice of the existing Fiber Lease and its basic terms. This is to give legal notice of the City's leasehold interest in the fiber to any subsequent creditors or customers of Transtelco.

Amended Maintenance Agreement. This Amendment is to the existing Maintenance Agreement that the City has had with Transtelco since December of 2007, whereby Transtelco performs routine maintenance on the 144 fiber optic strands of the City for a set monthly fee of approximately \$5,370 computed at \$0.04 per lineal foot times the almost 25.5 miles of Transtelco conduit. Unscheduled maintenance will be billed at cost plus an overhead factor of 25% with proportional sharing of this cost by any other beneficiaries of the work. The Amendment incorporates stronger and more current industry procedures and standards for maintenance. It extends the term of the Agreement by starting with a new 10 year term, but allows either party to terminate within 90 days written notice.

Conclusion. It has taken approximately 24 months to negotiate, research and resolve the technical and complex terms of these documents. Although the City has given up and/or compromised on several points, it has gained much more than it has given up, and will be benefited by these agreements. If you would like more details about the agreements or have any questions please contact Bertha Ontiveros in the City Attorney's office for her to schedule a briefing with you.