

**CITY OF EL PASO, TEXAS
AMENDED SERVICE POLE COLLOCATION ATTACHMENT LICENSE
AGREEMENT**

THE STATE OF TEXAS §
 §
COUNTY OF EL PASO §

This **Service Pole Collocation Attachment License Agreement** (“Agreement”) is made by and between the City of El Paso, Texas, (“City”), a home-rule municipal corporation of the State of Texas, and _____, (“Network Provider” or “Licensee”), a _____ with its principal offices at _____ Pursuant to Tex. Loc. Gov. Code, Chapter 284 (“Chapter 284”), § 284.056 and § 284.101 (a) (3), the City enters into this Agreement to further detail the terms and conditions of attachments of wireless Network Nodes to and on City Service Poles.

RECITALS

WHEREAS, Licensee, a Network Provider, as that term is defined in Chapter 284, is requesting to Collocate Network Nodes to and on the City’s Service Poles, as those terms are defined in Chapter 284, that are in the Public Right-of-Way to the extent permitted by Chapter 284; and

WHEREAS, Chapter 284 states “to the extent this state has delegated its fiduciary responsibility to municipalities as managers of a valuable public asset, the public right-of-way, this state is acting in its role as a landowner in balancing the needs of the public and the needs of the network providers by allowing access to the public right-of-way to place network nodes in the public right-of-way strictly within the terms of this chapter”; and

WHEREAS, Chapter 284 states “[i]t is the policy of this state, subject to state law and strictly within the requirements and limitations prescribed by this chapter, that municipalities: (1) retain the authority to manage the public right-of-way to ensure the health, safety, and welfare of the public; and (2) receive from network providers fair and reasonable compensation for use of the public right-of-way and for collocation on poles”; and

WHEREAS, Section 253 of the Federal Communications Act of 1934, as amended, including 47 U.S.C. § 253, acknowledges that the City has the authority to manage and control access to and use of the Public Right-of-Way within the City limits; and

WHEREAS, the City has been authorized by the State to act as fiduciary and trustee for the public, in exercising proprietary rights in its discretion to grant use of the Public Right-of-Way within the City limits and condition that use in accordance with Chapter 284; and

WHEREAS, Chapter 284 sets forth the conditions to access and Collocate on the City’s Service Poles that are in the Public Right-of-Way of the Network Nodes to include compliance

with the Applicable Codes, and Public Right-of-Way Management Ordinances, and the Chapter 284 limits to the height, width, safety and aesthetic requirements of Network Nodes; and

WHEREAS, the Licensee shall compensate the City pursuant to applicable state law and City ordinances for the Collocation of the Network Nodes on Service Poles in the City’s Public Right-of-Way; and

WHEREAS, the Licensee’s non-exclusive use at locations in Public Right-of-Way are subject to the terms and conditions set forth herein and in City Ordinance 018717, and pursuant to Permits issued by the City; and

WHEREAS, the City and Licensee desire by this Agreement to set forth their understanding of such matters.

NOW, THEREFORE, in consideration of the mutual covenants and agreements contained herein below, City and Licensee agree as follows:

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ARTICLE 1. PARTIES

1.1 Addresses.

The initial address of the Parties, which either Party may change at any time by giving written notice to the other Party pursuant to the terms of this Agreement, are as follows:

City of El Paso

Attn: City Manager’s Office
P.O. Box 1890
El Paso, Texas

Network Provider and Licensee (Notice Address/Invoice Address):

Attn: _____

ARTICLE 2. DEFINITIONS

2.1 As used in this Agreement, the definitions as used in Tex. Loc. Gov. Code, Chapter 284, § 284.002 and in City Ordinance 018717 shall be used, unless otherwise noted below. When not inconsistent with the context, words used in the present tense include the future, words used 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. “Include” and “including,” and words of similar import, shall be deemed to be followed by the words “without limitation.”

- 2.1.1. *Agreement* means this contract between the Parties, including any exhibits and any written amendments as authorized by this Agreement.
- 2.1.2. *Collocate* and *Collocation* mean the installation, mounting, maintenance, modification, operation, or replacement of Network Nodes on a Public Right-of-Way on or adjacent to a Service Pole.
- 2.1.3. *Collocation Application* means an application filed by Licensee to obtain City’s permission to Collocate Network Nodes on specific Service Poles.
- 2.1.4. *Director* means the Director of Public Works Department, or its successor department, or a person he or she designates.
- 2.1.5. *Effective Date* means the last date this Agreement has been signed by both Parties.

- 2.1.6. *Licensee* and *Network Provider* mean _____ and includes its successors and assigns.
- 2.1.7. *Licensed Locations* means the Service Poles set forth in Exhibit A where Licensee is authorized by this Agreement to place its Network Nodes.
- 2.1.8. *Party* or *Parties* mean the Licensee and City, individually or collectively as indicated in the context in which it appears.
- 2.1.9. *Rental Fees* means as described in Article 4 herein.

ARTICLE 3. GRANT AND SCOPE OF AUTHORIZATION TO COLLOCATE

3.1 Grant of Permission in Accordance with Chapter 284.

- 3.1.1. Only to the extent required by Chapter 284, § 284.056 and § 284.101 (a)(3) does the City grant Licensee the right to enter the Public Right-of-Way and to Collocate Network Nodes on Service Poles in the Public Right-of-Way, subject to the terms of this Agreement, City Ordinance 018717, Chapter 13.08, Chapter 284, and all other applicable local, state, and Federal laws.
- 3.1.2. The grant of this License is a prerequisite to Licensee obtaining a Permit to install its Network Nodes on Service Poles in the Public Rights-of-Way. This License Agreement alone does not authorize Licensee to place anything in the Public Right-of-Way, and can take effect only upon City's grant of a Permit under the provisions of City Ordinance 018717 to Licensee for the Service Pole Location described in such Permit.
- 3.1.3. This Agreement does not confer any other rights not described herein nor does it permit Licensee or third parties to use the Public Right-of-Way or Service Poles for purposes not specified in this Agreement, except to the extent otherwise expressly allowed by law.
- 3.1.4. This Agreement does not authorize the Licensee to install equipment or facilities associated with or for Macro Towers in the Public Right-of-Way.
- 3.1.5. This Agreement must be executed in order for a Network Provider to apply for and be granted a Permit to use or to in any manner Collocate Network Nodes on Service Poles.

3.2 Licensed Locations.

- 3.2.1. The permission granted to Licensee by this Agreement is limited to the Licensed Location(s) as described and mapped on Exhibit A, attached hereto and made a part hereof.

- 3.2.2. In the event Licensee desires to obtain additional Licensed Locations, it shall submit a Collocation Application for each such Location. Upon approval by City, an amendment to Exhibit A will be made, which shall be signed by both parties, dated, and attached hereto.

3.3 Compliance with City Ordinances.

Licensee's use and occupancy of Public Right-of-Way and Service Poles shall be subject to the provisions of all additional requirements of the City's Ordinances regulating Public Rights-of-Way, City Ordinance No. 018717, and directions of the City concerning collocating Network Nodes on any Service Pole.

3.4 Scope of Agreement.

- 3.4.1. This Agreement is not exclusive and the City reserves the right to grant permission to Collocate Network Nodes to other eligible and qualified entities under Chapter 284 and City Ordinance 018717.
- 3.4.2. This Agreement only authorizes Collocation of Network Nodes on Service Poles in the Public Right-of-Way in conjunction with a Permit issued by the City under City Ordinance No. 018717, and does not confer any rights or permission to install or otherwise Collocate Network Nodes on any other Poles or to place such Network Nodes in the Public Right-of-Way.
- 3.4.3. No use, however lengthy, of any of Public Right-of-Way, and no payment of any fees or charges required under this Agreement, shall create or vest in Licensee any easement or other ownership or property right of any nature in any Service Pole. After issuance of any Permit, Licensee shall be and remain a mere licensee. Neither this Agreement, nor any Permit granted under City Ordinance 018717, shall constitute an assignment of any of City's rights to the Service Pole.
- 3.4.4. No part of Licensee's Network Nodes or Transport Facilities or other equipment constructed, modified, or erected or placed on Service Pole will become, or be considered by the City as being affixed to or a part of, the Service Pole. All portions of Licensee's Network Nodes and Transport Facilities and other equipment constructed, modified, erected, or placed by Licensee on a Service Pole will be and remain the property of Licensee and may be removed by Licensee at any time.
- 3.4.5. Nothing in this Agreement shall be construed as granting Licensee any right to attach Licensee's Network Nodes or Transport Facilities to any specific Service Pole (unless described on Exhibit A) or to compel City to grant Licensee the right to attach to any specific Service Pole.
- 3.4.6. This Agreement does not in any way limit City's right to locate, operate, maintain or remove Service Poles in the manner that the City deems appropriate. If the City plans to move a Service Pole, it will give Licensee 60 days' notice thereof

and will, in good faith, assist Licensee in locating its facilities on such Service Pole at a new location, and will in good faith work with Licensee in permitting such location.

- 3.4.7. Licensee is obligated to obtain all necessary certification and permitting, from Federal, State and Local authorities prior to making any installations of Network Nodes or Transport Facilities on Service Poles.
- 3.4.8. Nothing in this Agreement shall be construed to require City to install, retain, extend, or maintain any City Facility for use by the Licensee when such City Facility is not needed for City's own requirements.
- 3.4.9. Nothing in this Agreement shall limit, restrict, or prohibit City from fulfilling any agreement or arrangement regarding a Service Pole into which City has previously entered, or may enter in the future, with other entities, including, but not limited to, agreements or arrangements for the removal of Service Poles.
- 3.4.10. In the event the City determines to deny the use by Licensee of any particular Service Pole or any particular location in the Public Right-of-Way, such denial shall not be construed to be a prohibition on, or to have the effect of prohibiting, the provision of Wireless Services. Any such denial by the City shall be undertaken in its capacity as proprietor of the Public Right-of-Way, and not in its regulatory capacity, but is subject to the provisions of Chapter 284 and other applicable laws. Nothing in this subsection shall prevent Licensee from pursuing any remedy it may have at law.
- 3.4.11. Any authorization provided under this Agreement is limited to the uses specifically authorized herein and any other use shall be considered a material breach of this Agreement. Nothing in this Agreement shall be construed to require City to allow Licensee to use Service Poles after the termination of the authorization or of this Agreement.

3.5 Unauthorized Network Node on Service Pole.

- 3.5.1. The City shall deem as unauthorized any type of Network Node attached or Collocated to a Service Pole if there is no Collocation attachment agreement for such Network Node and/or Service Pole, or if there is no Permit issued by the City for such Location, even if the attachment was inadvertently or incorrectly permitted. The City, in its sole discretion, may upon 30 days' written notice, remove or require the Licensee to remove unauthorized Network Node at Licensee's expense without any liability to the City. The City will invoice and Licensee shall reimburse the City within 30 days of receipt of the invoice for the City's cost of removal of unauthorized Network Node.
- 3.5.2. All approvals granted by the City for installation of Network Nodes on Service Poles are specific to the Network Node as described in the application. Proposed modifications to Network Nodes subsequent to their attachment to Service Poles

that would increase the weight of the Network Node above the weight specified in the initially-approved application, shall not be performed without prior approval in writing by the City Engineer. Requests for such approval shall be made in writing by Licensee and shall be accompanied by documentation identifying the weight of the proposed modification. The City Engineer shall grant approval for the modification only if the City Engineer determines that the additional weight will not jeopardize the integrity of the Service Pole and will not pose a risk to public health or safety.

3.6 Transport Facilities.

Licensee may either install its own Transport Facilities, subject to Transport Facility fee payments as set out in City Ordinance 018717, or obtain transport service from a person that is paying the City fees to occupy the Public Right-of-Way for Transport Facilities. For third-party Transport Facilities, the City shall require independent reasonable verification that the provider of Transport Facility services to the Licensee Provider has paid the City the required Transport Facility fee, and that such payments are current. The burden shall be on Licensee to provide such verification, and to ensure that the City receives no less than the required Transport Facility Fee.

Licensee is a “network provider” under Sec. 284.002(13) of the Texas Local Government Code as (check one of the following) either:

- (1) ___ a wireless service provider, or
- (2) ___ builder or installer of wireless network facilities on behalf of a wireless service provider.

ARTICLE 4. COMPENSATION

4.1 Collocation Fee.

Licensee shall pay City a fee for the Collocation of Network Nodes on Service Poles as set forth in City Ordinance 018717. The Collocation fee shall be in addition to annual Network Node site rental fees, Transport Facility rental fees, and all ad valorem taxes, special assessments for municipal improvements, and other lawful obligations of the Licensee to the City.

4.2 Non-functioning Network Nodes.

Licensee shall continue to pay rental fees for Collocated Network Nodes that are no longer in service or operational for as long as the Network Nodes are attached to Service Poles in the Public Right-of-Way. Rental fees shall cease after Licensee obtains permits to remove Network Node and completes removal of the applicable Network Nodes.

4.3 Payment.

Collocation fees shall be payable by check, with detailed schedule of locations included in the payment, payable to the City of El Paso, Texas, and sent to the following address:

ATTN: Office of the Comptroller
City of El Paso
P.O. Box 1890
El Paso, TX 79950-1890

Or, by ACH. Please contact the City Treasurer for bank information to facilitate ACH Payments. Collocation fees shall be payable by ACH direct deposit or check payable to the City of El Paso, Texas, and sent to the following address:

ATTN: City Treasurer
City of El Paso
P.O. Box 1890
El Paso, TX 79950-1890

4.4 Reimbursement.

When, under the terms of this Agreement, the City at its own expense has removed or remediated Licensee's Network Nodes attached to Service Poles or the Licensee is required to reimburse the City, the Licensee shall remit payment to the City within 30 days after receipt of the invoice for removal, remediation, or requirement.

4.5 Compliance Review.

The City may, at its discretion, upon no less than 30 days prior written notice, require that the Licensee produce its records related to this Agreement for review by the City to ascertain the correctness of the payments made hereunder. If the City's review identifies amounts owed by the Licensee from prior periods, the Licensee shall pay the amount identified within 30 days after the receipt of an invoice from the City. If the review determines that payment of the Collocation fee was not made in accordance with the terms of this Agreement and that such payment represents an overpayment of any amount, City will credit such overpayment against Licensee's future obligations to City under this Agreement.

ARTICLE 5. INSTALLATIONS

5.1 Compliance With Standards.

Licensee shall, at its own cost and expense, install the Network Nodes on Service Poles in a good and workmanlike manner and in accordance with the requirements promulgated by the City, as such may be amended from time to time. Licensee's work shall be subject to the regulation, control and direction of the City. All work done in connection with the installation, operation, maintenance, repair, and/or replacement of the Network Nodes Collocated on Service Poles shall be in compliance with all Applicable Codes and Laws.

5.2 Inspections.

5.2.1. The City may perform visual inspections of any Network Nodes attached to Service Poles as the City deems appropriate, without notice to Licensee. If the

inspection requires physical contact with the Network Node, the City will provide written notice to the Licensee five (5) days prior to the planned inspection. Licensee may have a business representative present during such inspection.

- 5.2.2. In the event of an emergency situation, the City may, but is not required to, notify Licensee prior to an inspection by calling Licensee's emergency contact at _____. The City may take action necessary to remediate the emergency situation and the City shall notify Licensee as soon as practically possible after remediation is complete.

ARTICLE 6. RADIO INTERFERENCE BY NETWORK NODE PROHIBITED

6.1 No Liability.

- 6.1.1. The City shall not be liable to Licensee for any damage caused by other entities with Network Nodes in close proximity to the Service Pole.
- 6.1.2. The City shall not be liable to Licensee by reason of inconvenience, annoyance, or injury to the Network Node, or Ground Equipment, or activities conducted by Licensee therefrom, arising from the necessity of repairing any portion of the Service Pole or Public Right-of-Way, or from the making of any necessary alteration or improvements in or to any portion of the Public Right-of-Way, or in or to its fixtures, appurtenances, or equipment. The City will use reasonable efforts to not cause material interference with Licensee's operation of its Network Node.

6.2 No Interference.

Licensee's Network Node shall strictly comply with Chapter 284, § 284.304 and City Ordinance 018717.

ARTICLE 7. ABANDONMENT, RELOCATION, AND REMOVAL

7.1 Termination or Expiration of Permit.

If any Permit granted to Licensee for location of Network Nodes or Transport Facilities within the Public Right-of-Way terminates, expires, or is revoked, Licensee's authorization to Collocate the formerly-permitted Network Node under this Agreement shall also terminate on the same date, without the necessity of further notification by City to Licensee. In such event, Exhibit A hereto shall be revised to remove the affected Collocation facility from such exhibit.

- 7.1.1. Within sixty (60) days after termination or expiration of any Collocation authorization under this Agreement, Licensee shall remove the affected Network Nodes and Ground Equipment from the Service Pole(s) in the Public Right-of-Way and peaceably surrender the Service Pole and the Public Right-of-Way to City in the same condition the Service Pole and the Public Right-of-Way was in on the Effective Date.

7.1.2. If Licensee fails to complete removal of the Network Node and Ground Equipment on or before the 60th day after the Collocation authorization expires or terminates, or fails to complete removal within 90 days, the City may remove, store, or dispose of any remaining portion of the Network Nodes and Ground Equipment in any manner the City Engineer deems appropriate. Licensee shall, within 30 days after receipt of the City's written request and invoice, reimburse the City for all costs incurred by the City in connection therewith (including any reasonable overhead and storage fees).

7.2 Termination of Agreement.

If all of Licensee's Permits terminate, expire, or are revoked, then this Agreement shall likewise terminate. The removal of Licensee's Network Nodes and Ground Equipment shall proceed as provided in this Article.

ARTICLE 8. SECURITY

Network Provider shall comply with the City's Public Right-of-Way Management Ordinance concerning security requirements on any of its Network Nodes or Ground Equipment. A Network Provider is permitted to provide a bond or, in the alternative, a letter of credit from its bank, at the Network Provider's option, as compliance with such security requirements. The bond or letter of credit is required to be reviewed by the City Attorney's Office prior to acceptance of this security.

ARTICLE 9. INDEMNIFICATION, INSURANCE, AND LIABILITY

9.1 Indemnity.

Licensee shall be subject to City Ordinance 018717, Chapter 284, and all applicable laws concerning indemnification requirements on any of its Network Nodes or Ground Equipment.

9.2 Insurance.

Licensee shall comply with City Ordinance concerning insurance requirements on any of its Network Nodes or Ground Equipment.

9.3 Liability.

Licensee shall be responsible for any damages to any person or entity that occur due to the installation, maintenance or failure to maintain, the removal or failure to remove Network Nodes for which it would be liable under Law, except where the same are caused by the negligence or willful misconduct of the City, to the extent permitted by state law.

ARTICLE 10. TERM AND TERMINATION

10.1 Term.

This Agreement is effective on the Effective Date, and unless sooner terminated under other provisions of this Agreement, will remain in effect for a term of five (5) years ("Initial Term").

10.2 Renewals.

Upon expiration of the Initial Term, this Agreement will automatically renew for up to two (2) successive five (5) year terms (each a “Renewal Term”) on the same terms and conditions, unless either the City or Licensee chooses not to renew, for so long as Licensee has any valid Permits with the City for any Collocation Location. If either the City or Licensee chooses not to renew this Agreement, the City shall notify the Licensee or the Licensee shall notify the City of non-renewal at least 180 days before the expiration of the then-current term. Licensee must be in compliance with all material provisions of this Agreement in order for the automatic renewal to be effective.

10.3 Termination for Cause by City.

10.3.1. If Licensee defaults under this Agreement, the City may terminate this Agreement subject to Licensee’s ability to cure such defaults below. The City’s right to terminate this Agreement for Licensee’s default is cumulative of all its rights and remedies which exist now or in the future. Default by Licensee includes, but is not limited to:

10.3.1.1. Failure of the Licensee to comply with any material term of this Agreement;

10.3.1.2. Licensee becomes insolvent;

10.3.1.3. The Licensee’s failure to obtain all licenses, permits, and certification required by the City under this Agreement and pay all fees associated therewith after the City has notified the Licensee that licenses, permits, and certifications must be obtained to work in the Public Right-of-Way;

10.3.1.4. All or a substantial part of Licensee’s assets are assigned for the benefit of its creditors;

10.3.1.5. A receiver or trustee is appointed for Licensee; or

10.3.1.6. Licensee fails to apply for permits to Collocate on Service Poles in the Public Right-of-Way within one year of the Effective Date of this Agreement.

10.3.2. If a default occurs, the City shall deliver a written notice to Licensee describing the default and the termination date. If the City sends a default notice, the Licensee shall have 60 days from the receipt of such notice to cure the default (unless the nature of the event takes longer to cure and the Licensee commences a cure within such 60-day period and thereafter diligently pursues it but will not exceed 180 days unless agreed to by the City which agreement will not be unreasonably withheld). If Licensee cures the default before the proposed termination date, the proposed termination is ineffective.

- 10.3.3. If the default is not cured in the time and manner set out above or by the City, then the City may immediately terminate this Agreement by notifying Licensee in writing of such termination. After receiving the notice, Licensee shall, immediately cease operations and remove Network Nodes from the Service Poles in accordance with the Section 7.1 of this Agreement, and any payment due through the date of termination shall be remitted by Licensee within 30 days of the receipt of the notice to the address in the Section 1.1 of this Agreement.
- 10.3.4. The City may revoke Licensee’s permit to occupy one or more Service Poles for non-compliance with the permit provisions for the impacted Service Poles or this Agreement. Such revocation will not operate to terminate the Agreement unless the City determines Licensee’s failure to comply constitutes a failure to comply with a material term of the Agreement, as provided in Section 10.3.1.1.

10.4 Termination by Licensee.

- 10.4.1. The Licensee may terminate this Agreement at any time without cause by giving 30 days advance written notice to the City.
- 10.4.2. If the Licensee does not remove all Network Nodes from the Service Poles within the time period required by Section 7.1 of this Agreement, the Network Nodes may be removed by the City, subject to reimbursement for its cost from the Licensee as allowed by the Agreement.

10.5 Automatic Termination.

If Chapter 284 of the Local Government Code, or any part thereof is at any time, in whole or in part, revoked, found to be unconstitutional, struck down, preempted or otherwise becomes void or invalid based on a final and non-appealable order or judgment, then the parties shall first meet and confer in good faith to agree on and make appropriate amendments to this Agreement in order to effectuate its purposes. If Chapter 284 is rendered wholly unconstitutional based on a final and non-appealable order or judgment then the Parties shall negotiate in good faith to either enter into a new agreement or agree on a protocol for addressing Network Nodes already installed, including but not limited to removal or payment of additional fees for use of the City’s Public Rights-of-Way and Service Poles.

ARTICLE 11. NON-ASSIGNMENT OF RIGHTS

11.1 No Assignment Without City Consent.

Rights granted to Licensee hereunder may not be assigned, transferred, sold, or disposed of by Licensee without the prior written consent of City. Notwithstanding the foregoing, this Agreement and/or any permits may be sold, assigned or transferred by Licensee, without advance notice to or the consent of City, to (i) any entity in which Licensee holds a controlling or similar interest; (ii) any entity which holds a controlling equity or similar interest in Licensee; or (iii) any entity under common control with Licensee, all of which are referred to herein as “affiliated entities.” Licensee

shall provide written notice to the City within thirty (30) days of Licensee completing a transaction with an affiliated entity.

Prior to this Agreement and/or any permits being sold, assigned or transferred by Licensee to a non-affiliated entity, Licensee must notify the City and obtain prior written consent from the City in the event any entity wishes to acquire all or substantially all of Licensee's assets in the market defined by the FCC in which the subject facilities are located by reason of a merger, acquisition or other business reorganization, and agrees to comply with federal, state, and local laws.

11.2 Assumption of Obligations.

No assignment or transfer shall be allowed unless and until the assignee or transferee assumes all obligations of Licensee arising under the Agreement. Notwithstanding any assignment or transfer, Licensee shall remain fully liable under this Agreement and shall not be released from performing any of the terms, covenants or conditions of the Agreement without the written consent to the release of Licensee by City. The consent provided by the City under Section 11.1 of this Agreement is sufficient for purposes of release under this section.

11.3 No Lease of Rights.

11.3.1 Licensee shall not lease its rights under this Agreement to an unaffiliated third party, including but not limited to allowing third parties to place Network Nodes on Service Poles for the benefit of such third parties, without City's prior written consent. Any such action shall constitute a material violation of this Agreement.

11.3.2. Notwithstanding the foregoing, Licensee may install and maintain Network Nodes on behalf of third-party wireless carriers ("Carriers") with whom it has a contractual relationship. The Network Nodes so installed shall remain under Licensee's custody, care, and control, and shall be treated for all purposes herein as Licensee's Network Nodes. Licensee shall remain responsible and liable for all performance and payment obligations hereunder for all such Network Nodes, and Licensee shall remain the sole point of contact by the City for such Network Nodes. Licensee shall notify the City in writing of the identity of the Carrier, and contact information for the Carrier, for whom it installs, constructs, and/or maintains such Network Nodes, such notification to take place when the Collocation Application is filed by Licensee.

11.4. Business Structure and Assignments.

Nothing in this Article, however, prevents the creation of a security interest in the Network Nodes as described in the Texas Business & Commerce Code. In the case of such an enforcement of that security interest by the holder of the security interest, as an assignee, Licensee shall immediately furnish to the City proof of the assignment and the name, telephone number, and address of the assignee and a clear contractual obligation that the assignee shall and does assume all the liabilities and responsibilities of Licensee under this Agreement, including responsibilities for any unpaid past due payments, and current and future payments that may be due the City. Such assignment

does not release Licensee of its obligations and payments due or to be due the City, unless there is an express written release agreed to by the City.

ARTICLE 12. INVENTORY AND INSPECTIONS

12.1 Inventory Records.

Licensee shall comply with the inventory requirements of City Ordinance 018717 Section 2.2.D.

12.2 Inspections.

City representatives shall have the right to perform, or to have performed, (1) inspections of the inventory records described in 12.1, and (2) inspections of all places in the Public Right-of-Way where work is undertaken in connection with this Agreement.

ARTICLE 13. MISCELLANEOUS

13.1 Force Majeure.

13.1.1. Other than the Licensee's failure to pay amounts due and payable under this Agreement, the Licensee shall not be in default or be subject to sanction under any provision of this Agreement when its performance is prevented by Force Majeure. Force Majeure means an event caused by epidemic; act of God; fire, flood, hurricanes, tornadoes, or other natural disasters; explosions; terrorist acts against the City or Licensee; act of military or superior governmental authority that Licensee is unable to prevent by exercise of reasonable diligence; war; riots; or civil disorder; provided, however, that such causes are beyond the reasonable control and without the willful act, fault, failure or negligence of the Licensee. The term does not include any changes in general economic conditions such as inflation, interest rates, economic downturn or other factors of general application; or an event that merely makes performance more difficult, expensive or impractical. Performance is not excused under this section following the end of the applicable event of Force Majeure. Licensee is not relieved from performing its obligations under this Agreement due to a strike or work slowdown of its employees. Force Majeure does not entitle Licensee to reimbursement of payments.

13.1.2. This relief is not applicable unless the affected Party does the following:

13.1.2.1. uses due diligence to remove the effects of the Force Majeure as quickly as possible and to continue performance notwithstanding the Force Majeure; and

13.1.2.2. provides the other Party with prompt written notice of the cause and its anticipated effect.

- 13.1.3. The City will review claims that a Force Majeure that directly impacts the City or Licensee has occurred and render a written decision within 14 days. The decision of the City is final, but also appealable under law.
- 13.1.4. Licensee is not relieved from performing its obligations under this Agreement due to a strike or work slowdown of its employees. Licensee shall employ only fully trained and qualified personnel during a strike.

13.2 Dispute Resolution.

- 13.2.1. In the event of a dispute between the Parties that arises during the Term of this Agreement, the Parties shall attempt to expeditiously and amicably resolve any dispute through good faith discussions in the ordinary course of business at the level at which the dispute originates.
- 13.2.2. If the Parties are not able to resolve the dispute in the ordinary course of business, the City Manager and representatives of other City departments that are involved in the dispute will meet with Licensee's authorized representative in an attempt to resolve the dispute.
- 13.2.3. Except in emergencies, no lawsuit under or related to this Agreement by one Party against the other may be filed until at least a meeting has occurred between the City Manager and executives of Network Provider with full authority to resolve the claims in the meeting or that are available contemporaneously with the meeting via live telephonic communications where the Parties agree to attempt in good faith to resolve or narrow the issues; and if not resolved, and the Parties agree that before initiating litigation, either Party shall notify the other Party of its intent to sue, and provide a copy of the draft pleading, with supporting facts and legal authorities at least fourteen (14) days before suit is filed.
- 13.2.4. This section does not apply to disputes that involve a question of law.
- 13.2.5. Notwithstanding the existence of any dispute between the Parties, insofar as is possible under the terms of this Agreement, each Party shall continue to perform the obligations required of it during the continuation of any such dispute, unless enjoined or prohibited by a court of competent jurisdiction or unless this Agreement terminates or expires under the terms provided herein.

13.3 Acceptance and Approval; Consent.

An approval by any City representative of any part of the Licensee's performance shall not be construed to waive compliance with this Agreement or to establish a standard of performance other than required by this Agreement or by law. Where this Agreement contains a provision that either Party approve or consent to any action of the other Party, such approval or consent shall not be unreasonably withheld or delayed.

13.4 Representations and Warranties.

In addition to the representations, warranties, and covenants of the Licensee to the City set forth elsewhere herein, the Licensee represents and warrants to the City and covenants and agrees (which representations, warranties, covenants and agreements shall not be affected or waived by any inspection or examination made by or on behalf of the City) that, as of the Effective Date and throughout the term of this Agreement:

13.4.1. *Organization, Standing and Power.* The Licensee is a Network Provider duly organized, validly existing and in good standing under the laws of the state of its organization and is duly authorized to do business in the State of Texas and in the City. The Licensee has all requisite power and authority to own or lease its properties and assets, subject to the terms of this Agreement, to conduct its businesses as currently conducted and to execute, deliver and perform this License and all other agreements entered into or delivered in connection with or as contemplated hereby.

13.4.2. *Truthful Statements.* The Licensee warrants, to the best of its knowledge and belief, that information provided and statements made in connection with its application for this Agreement were true and correct when made and are true and correct upon execution hereof.

13.4.3. *Condition of Public Right-of-Way.* Licensee accepts the Public Right-of-Way where Network Node are authorized to be located “as is” without any express or implied warranties of any kind.

13.5 Statement of Acceptance.

Licensee and City, for themselves, their successors and assigns, hereby accept and agree to be bound by all terms, conditions and provisions of this Agreement.

13.6 Relationship of the Parties.

Licensee shall be responsible and liable for its contractors, subcontractors, and sublicensees. The City has no control or supervisory powers over the manner or method of Licensees’ contractors’ and subcontractors’ performance under this Agreement. All personnel Licensee uses or provides are its employees, contractors, or subcontractors and not the City’s employees, agents, or subcontractors for any purpose whatsoever.

13.7 Severability.

If any part of this Agreement is for any reason found to be unenforceable, all other parts remain enforceable unless the result materially prejudices either Party.

13.8 Entire Agreement.

This Agreement merges the prior negotiations and understandings of the Parties and embodies the entire agreement of the Parties. No other agreements, assurances, conditions, covenants (express or implied), or other terms of any kind, exist between the Parties regarding this Agreement.

13.9 Written Amendment.

Unless otherwise specified elsewhere in this Agreement, this Agreement may be amended only by written instrument executed on behalf of the City (by authority of an ordinance adopted by the City Council) and Licensee.

13.10 Applicable Laws and Venue.

13.10.1. This Agreement is subject to all Applicable Codes and Laws, and all rules and regulations of any regulatory body or officer having jurisdiction, including any lawful court or administrative decisions, judgments or orders that have been fully and finally adjudicated, including any appeals of such decisions judgments, or orders (“Decisions”). This Agreement shall be governed, construed, and enforced according to the laws of the State of Texas, without regard to its choice of law provisions.

13.10.2. If any material provision of this Agreement is superseded or affected by Law, then the Parties shall negotiate in good faith to revise this Agreement.

13.10.3. Subject to the Parties’ obligation to submit to the dispute resolution process or mediation as described in this Agreement, Licensee shall submit any and all litigation and legal proceedings between any of the Licensee and the City to the exclusive jurisdiction of the state or federal courts in the State of Texas and waive any objections or right as to forum non conveniens, lack of personal jurisdiction, or similar grounds. Venue for any litigation relating to this Agreement is El Paso County, Texas.

13.11 Notices.

All notices to either Party to the Agreement must be in writing and must be delivered by hand, facsimile, United States registered or certified mail, return receipt requested, United States Express Mail, Federal Express, Airborne Express, UPS or any other national overnight express delivery service. The notice must be addressed to the Party to whom the notice is given at its address set out in Article I, Section 1.1 of this Agreement or other address the receiving Party has designated previously by proper notice to the sending Party. Postage or delivery charges must be paid by the Party giving the notice.

13.12 Captions.

Captions contained in this Agreement are for reference only, and, therefore, have no effect in construing this Agreement. The captions are not restrictive of the subject matter of any section in this Agreement.

13.13 Non-Waiver.

If either Party fails to require the other to perform a term of this Agreement, that failure does not prevent the Party from later enforcing that term and all other terms. If either Party expressly waives the other's breach of a term, that waiver does not waive a later breach of this Agreement.

13.14 Enforcement.

The City may enforce all legal rights and obligations under this Agreement without further authorization. Licensee shall provide to the City all documents and records pertaining to this Agreement that the City requests to assist in determining Licensee's compliance with this Agreement, with the exception of those documents made confidential by federal or State law or regulation.

13.15 Ambiguities.

If any term of this Agreement is ambiguous, it shall not be construed for or against any Party on the basis that the Party did or did not write it.

13.16 Survival.

Licensee and the City shall remain obligated to the other Party under all provisions of this Agreement that expressly or by their nature extend beyond the termination or expiration of this Agreement, including, but not limited to, the provisions regarding warranty, indemnification and confidentiality. All representations and warranties contained in this Agreement shall survive the term of the Agreement.

13.17 Parties in Interest.

This Agreement does not bestow any rights upon any third party, but binds and benefits the City and Licensee only.

13.18 Remedies Cumulative.

Unless otherwise specified elsewhere in this Agreement, the rights and remedies contained in this Agreement are not exclusive, but are cumulative of all rights and remedies which exist now or in the future. Neither Party may terminate its duties under this Agreement except in accordance with its provisions.

IN WITNESS WHEREOF, the Original Signatories, through their duly authorized officers, have executed this Agreement in multiple counterparts, each of equal force and effect, effective as of the as of the date signed by the later to sign.

LICENSEE/NETWORK PROVIDER:

CITY:

By: _____

CITY OF EL PASO, TEXAS

Signed by: _____

Name: _____

Tomas Gonzalez

Title: _____

City Manager

Tax Identification No.: _____

Date Signed: _____

ATTEST/SEAL:

ATTEST/SEAL:

Name:

City Clerk

Date Signed: _____

Date Signed: _____

Approved as to Form:

Assistant City Attorney,
City of El Paso, Texas