



College Station, TX

City Hall
1101 Texas Ave
College Station, TX 77840

Meeting Agenda - Final

City Council Workshop

Monday, May 18, 2015

4:30 PM

City Hall Council Chambers

1. Call meeting to order.
2. Executive Session will be held in the Administrative Conference Room.

Consultation with Attorney {Gov't Code Section 551.071}; possible action. The City Council may seek advice from its attorney regarding a pending or contemplated litigation subject or settlement offer or attorney-client privileged information. Litigation is an ongoing process and questions may arise as to a litigation tactic or settlement offer, which needs to be discussed with the City Council. Upon occasion the City Council may need information from its attorney as to the status of a pending or contemplated litigation subject or settlement offer or attorney-client privileged information. After executive session discussion, any final action or vote taken will be in public. The following subject(s) may be discussed:

Litigation

- a. Deluxe Burger Bar of College Station, Inc. D/B/A Café Excell v. Asset Plus Realty Corporation, City of College Station, Texas and the Research Valley Partnership, Inc., Cause No. 13 002978 CV 361, In the 361st Judicial District Court, Brazos County, Texas
- b. Margaret L. Cannon v. Deputy Melvin Bowser, Officer Bobby Williams, Officer Tristan Lopez, Mr. Mike Formicella, Ms. Connie Spence, Cause No. 13 002189 CV 272, In the 272nd District Court of Brazos County, Texas
- c. Bobby Trant v. BVSWMA, Inc., Cause No. 33014, In the District Court, Grimes County, Texas, 12th Judicial District
- d. Juliao v. City of College Station, Cause No. 14-002168-CV-272, In the 272nd District Court of Brazos County, Texas
- e. City of College Station, Texas, v. Embrace Brazos Valley, Inc., Cause No. 15-000804-CV-85, In the 85th Judicial District Court, Brazos County, Texas

5:30 P.M.

3. Take action, if any, on Executive Session.

4. Presentation, possible action and discussion on items listed on the consent agenda.
5. [15-0206](#) Presentation, possible action, and discussion concerning the City Internal Auditor's Delinquent Accounts Audit.
- Sponsors:** City Auditor Elliott
- Attachments:** [Delinquent Accounts Report w Responses.pdf](#)
6. [15-0230](#) Presentation, possible action and discussion on a license agreement with ExteNet for the installation and operation of a Distributed Antenna System (DAS).
- Sponsors:** Nettles
- Attachments:** [20150501-NoRedline_Draft College Station DAS System License Agreement-E](#);
[20150501-NoRedline_Draft College Station Pole Attachment License Agreement](#)
7. Council Calendar - Council may discuss upcoming events.
8. Presentation, possible action, and discussion on future agenda items and review of standing list of Council generated agenda items: A Council Member may inquire about a subject for which notice has not been given. A statement of specific factual information or the recitation of existing policy may be given. Any deliberation shall be limited to a proposal to place the subject on an agenda for a subsequent meeting.
9. Discussion, review and possible action regarding the following meetings: Animal Shelter Board, Arts Council of Brazos Valley, Arts Council Sub-committee, Audit Committee, Bicycle, Pedestrian, and Greenways Advisory Board, Bio-Corridor Board of Adjustments, Blinn College Brazos Valley Advisory Committee, Brazos County Health Dept., Brazos Valley Council of Governments, Bryan/College Station Chamber of Commerce, Budget and Finance Committee, BVSWMA, BVWACS, Compensation and Benefits Committee, Convention & Visitors Bureau, Design Review Board, Economic Development Committee, Gigabit Broadband Initiative, Historic Preservation Committee, Interfaith Dialogue Association, Intergovernmental Committee, Joint Relief Funding Review Committee, Landmark Commission, Library Board, Metropolitan Planning Organization, Parks and Recreation Board, Planning and Zoning Commission, Research Valley Partnership, Research Valley Technology Council, Regional Transportation Committee for Council of Governments, Sister Cities Association, Transportation and Mobility Committee, TAMU Student Senate, Texas Municipal League, Twin City Endowment, Youth Advisory Council, Zoning Board of Adjustments, (Notice of Agendas posted on City Hall bulletin board).
10. Adjourn

The City Council may adjourn into Executive Session to consider any item listed on this agenda if a matter is raised that is appropriate for Executive Session discussion. An announcement will be made of the basis for the Executive Session discussion.

APPROVED



City Manager

I certify that the above Notice of Meeting was posted at College Station City Hall, 1101 Texas Avenue, College Station, Texas, on May 14, 2015 at 5:00 p.m.



City Secretary

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Legislation Details (With Text)

File #:	15-0206	Version:	1	Name:	Internal Auditor's Delinquent Accounts Audit
Type:	Presentation	Status:		Status:	Agenda Ready
File created:	4/21/2015	In control:		In control:	City Council Workshop
On agenda:	5/18/2015	Final action:		Final action:	
Title:	Presentation, possible action, and discussion concerning the City Internal Auditor's Delinquent Accounts Audit.				
Sponsors:	Ty Elliott				
Indexes:					
Code sections:					
Attachments:	Delinquent Accounts Report w Responses.pdf				

Date	Ver.	Action By	Action	Result
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Presentation, possible action, and discussion concerning the City Internal Auditor's Delinquent Accounts Audit.

Relationship to Strategic Goals:

- Good Governance

Recommendation(s): Staff recommends approval of report.

Summary:

Reason for the audit: This audit was conducted per direction of the City of College Station Audit Committee. The Audit Committee requested assurance and consultation services in regards to whether: (1) delinquent accounts are collected in accordance with proper procedures, (2) collections agencies are properly managed, and (3) uncollectible accounts are written off properly.

Summary of Findings: We found that Utility Customer Services is effective in collecting, managing, and writing-off delinquent accounts. For the most part, delinquent accounts are collected in accordance with appropriate procedures. However, we also found that the current procedures could be made more efficient and that policies and procedures are not always consistently applied.

The city's collections agency appears to be well managed. The majority of delinquent accounts are properly on file with the collections agency, and we appear to be paying appropriate fees. However, as a somewhat minor issue, we found that payment dates often do not reconcile between the city's records and the collection agency's records.

Finally, we found that the current write-off policies and procedures have control deficiencies. Current write-off procedures could use stronger controls, and some financial records are being completely deleted from the system.

Audit recommendations:

1. Policies and procedures should be updated to increase efficiency and eliminate procedural gaps.
2. Controls for the collections and write-off process could be strengthened.
3. The city should not delete the financial records of customers who still owe the city money.

Budget & Financial Summary: N/A

Attachments:

1. Delinquent Accounts Report with Responses

**Utility Customer Service
Delinquent Accounts Audit**

March 2015

**City Internal Auditor's Office
City of College Station**

File#: 14-03

Why We Did This Audit

This audit was conducted per direction of the City of College Station Audit Committee. The Audit Committee requested assurance and consultation services in regards to whether:

- (1) delinquent accounts are collected in accordance with proper procedures,
- (2) collections agencies are properly managed, and
- (3) uncollectible accounts are written off properly.

What We Recommended

Policies and Procedures should be updated to increase efficiency and eliminate procedural gaps.

Controls for the collections and write-off process could be strengthened.

The city should not delete the financial records of customers who still owe the city money.

Audit Executive Summary: Delinquent Accounts

What We Found

Overall, we found that Utility Customer Services is effective in collecting, managing, and writing-off delinquent accounts.

For the most part, delinquent accounts are collected in accordance with appropriate procedures. However, we also found that the current procedures could be made more efficient and that policies and procedures are not always consistently applied.

The city's collections agency appears to be well managed. The majority of delinquent accounts are properly on file with the collections agency, and we appear to be paying appropriate fees. However, as a somewhat minor issue, we found that payment dates often do not reconcile between the city's records and the collection agency's records.

Finally, we found that the current write-off policies and procedures have control deficiencies. Current write-off procedures could use stronger controls, and some financial records are being completely deleted from the system.

Change Order Audit

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Introduction

The Office of the City Internal Auditor conducted this performance audit of utility customer service delinquent accounts pursuant to Article III Section 30 of the College Station City Charter, which outlines the City Internal Auditor's primary duties.

A performance audit is an objective, systematic examination of evidence to assess independently the performance of an organization, program, activity, or function. The purpose of a performance audit is to provide information to improve public accountability and facilitate decision-making. Performance audits encompass a wide variety of objectives, including those related to assessing program effectiveness and results; economy and efficiency; internal control; compliance with legal or other requirements; and objectives related to providing prospective analyses, guidance, or summary information. A performance audit of delinquent accounts was included in the fiscal year 2015 audit plan based on direction given by the Audit Committee.

Audit Objectives

This report answers the following questions:

- Are delinquent accounts collected in accordance with procedures?
- Were collection agencies properly managed?
- Were uncollectible accounts written off properly?

Scope and Methodology

This audit was conducted in accordance with government auditing standards, which are promulgated by the Comptroller General of the United States, with the exception of an external peer review.¹ Audit fieldwork was conducted from November 2014 through February 2015.

The scope of review included only utility customer service accounts. Because the City outsources the billings of most of its revenue generating sources, we found the delinquent accounts of all other city functions besides Utility Customer Service and the Municipal Court were immaterial. We decided not to include municipal court accounts in

¹ Government auditing standards require audit organizations to undergo an external peer review every three years.

the scope because procedures used by the Municipal Court differ substantially from the collection procedures employed throughout the rest of the City. Unique collection enforcement procedures are available to the Municipal Court due to the legal nature of these accounts.

To arrive at our findings we reviewed the work of auditors in other jurisdictions and researched professional literature to identify: (1) applicable laws and regulations, (2) delinquent account management best practices, and (3) common forms of fraud or abuse related to delinquent accounts. We also interviewed city staff involved with the management of delinquent accounts. Finally, we analyzed relevant documentation and data regarding delinquent accounts.

Background

Utility Customer Service (UCS) is a division of the Fiscal Services Department responsible for setting up customer accounts, connecting and disconnecting utility services, reading meters, billing and collecting utility customer accounts and addressing customer concerns. Table 1 below describes the budgeted expenditures and full-time equivalent positions in UCS from fiscal year 2013 to 2015.

Table 1: Utility Customer Service Budget (fiscal years 2013 -2015)

FTE Positions	FY13	FY14	FY15
Billing/Collections	17.00	17.00	17.00
Meter Services	<u>10.50</u>	<u>11.00</u>	<u>12.00</u>
Total:	27.50	28.00	29.00
Expenditures			
Salaries & Benefits	1,281,240	1,353,395	1,387,013
Supplies	47,251	55,182	70,874
Maintenance	20,153	42,043	26,352
Purchased Services	<u>803,833</u>	<u>780,913</u>	<u>844,795</u>
Total:	2,152,477	2,231,533	2,329,034

Utility Customer Service processes more customer payments than any other division in the City. In 2014, UCS processed over 500,000 customer payments for approximately \$141 million. Roughly 92% of the \$141 million are electric, water, or wastewater payments. Sanitation payments make up 6%, and most of the remainder are charges incurred by other city departments. Table 2, on the next page, provides a summary of the different types of payments processed by UCS over the past three years.

Table 2: Utility Customer Service Customer Payment Methods (in thousands)

Payment Type	2012	2013	2014	Average
Mail Payments	\$ 51,547	\$ 47,128	\$ 43,483	\$ 47,386
Internet Payments	44,244	44,606	44,405	44,419
Bank Draft	18,772	23,873	27,064	23,236
Over-the-counter	17,091	17,082	19,166	17,780
Department Payments	2,747	2,817	2,821	2,795
Wire/Electronic Payments	2,959	2,604	2,116	2,560
Deposit Refunds	890	1,202	1,238	1,110
Other Payment Types	67	107	1,178	451
Total:	\$ 138,317	\$ 139,419	\$ 141,471	\$ 139,737

Utility Customer Service utilizes several enforcement methods in order to maximize collections. Approximately one week after meters are read for a particular one month billing cycle, utility customers are billed. These bills are due close to three weeks later. Customers are assessed a late fee a day after the bill's due date if full payment is not made. The first notice of this late fee appears on the customer's next bill. After 30 days, UCS will cut off power from customers who still have not paid their utility bills. Automated notices are sent out the day before cut off. During this process they don't normally cut off water. Sometimes a customer will attempt to turn back on their power. If a customer tampers with their electric meter by cutting the meter seal, there is an additional \$50 fee.

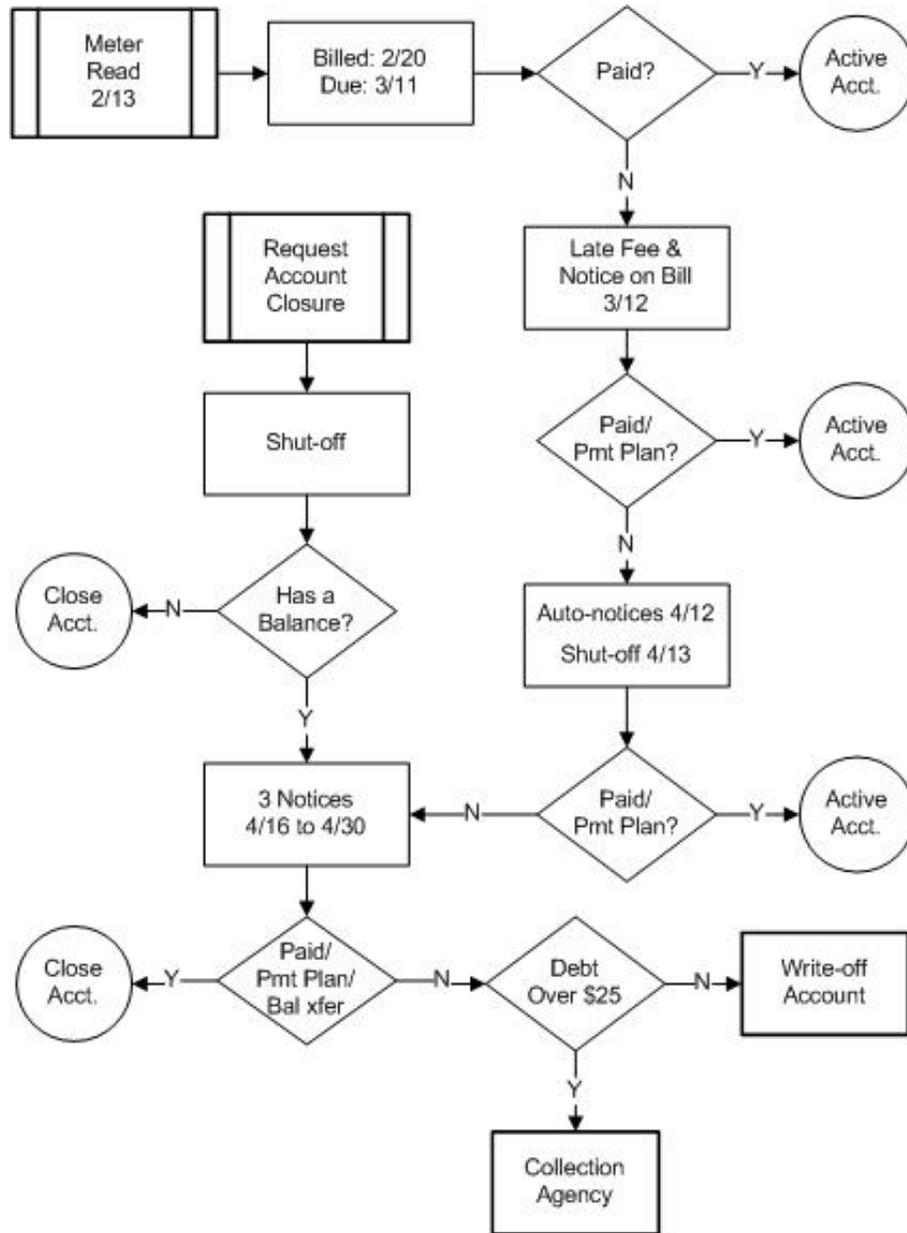
On the 15th of every month, a system generated report is created that pulls all the customers that were terminated (disconnected service) in the last 30 days that still have an outstanding bill. Utility Customer Service uses this list to contact the terminated customers. They send a final bill, one bill notice, two emails, and one phone call to try and collect money owed before sending the list to the collections agency. The customer has 30 days from whence the delinquent list was created to pay their bill. If they don't pay within this 30 days window, their bill is sent to the collections agency, MVBA. Sometimes the City is able to get customers onto a payment plan within the 30 day window to avoid sending the account to the collections agency.

The remaining list of terminated customers that UCS is unable to collect is sent to collections on the 15th of the next month. For the first 30 days at MVBA, the customer's credit rating is not affected. MVBA collects a 12% fee of all payments made from customers who have been sent to them.

When the list is sent to collections, the bills are still active in the system for two years. After two years, the bills go into the write-off process. The City's CFO does not normally approve the write-offs but does receive an activity report each month. When the process is approved, the system takes all of the accounts in collections status and moves them

into the write-off account. Figure 1 provides visual description of the collections process in Utility Customer Service.

Figure 1: Billing Cycle 8 (Jan 15 to Feb 13) Delinquency Example



From 2008 through 2014 approximately \$5.63 million in delinquent account balances have been sent to collections. In this same period, the City received \$862 thousand in payments from this outstanding debt. Additionally, the amount sent to collections is a very small amount compared to the total amount of customer payments. For example, from 2008 through 2014 the average percentage of uncollectible accounts was under

0.6%. From 2011 to 2014 this percentage has continued to decrease. Table 3 below provides a comparison between the total payments collected by UCS to the delinquent accounts sent to collections.

Table 3: Payments That Are Sent to Collections

Year	Total Payments	Sent to Collections	Collections % of Pmts	Amount Collected	Amount Uncollected
2008	\$ 111,619,000	\$ 563,000	0.50%	\$ 128,000	\$ 435,000
2009	120,497,000	745,000	0.62%	137,000	608,000
2010	129,938,000	827,000	0.64%	157,000	670,000
2011	143,413,000	1,240,000	0.86%	195,000	1,046,000
2012	138,316,000	904,000	0.65%	145,000	759,000
2013	139,420,000	740,000	0.53%	80,000	661,000
2014	<u>141,469,000</u>	<u>611,000</u>	<u>0.43%</u>	<u>20,000</u>	<u>591,000</u>
	924,672,000	5,630,000	0.61%	862,000	4,770,000

Through Table 3, we can also observe that over the past few years UCS has been more effective at collecting on delinquent accounts prior to sending the account to the collection agency. On the other hand, the collection agency has been less effective at recovering outstanding debt owed to the City. The timing of this observation corresponds with a change instituted in UCS whereby delinquent customers are contacted multiple times after their electricity is shut-off (see Figure 1). Stricter deposit requirements were also instituted in 2012, which could have also contributed to the improved collection rate.

Analysis and Recommendations

Collections Policies & Procedures

Compliance with Collection Policies and Procedures

We found that the current policies and procedures adequately address the general rules for delinquent accounts, however at times they do not address the exceptions to the rules. As a result, there is some risk that customer accounts may be treated in an inconsistent manner.

Generally, we recommend that the policies and procedures for delinquent accounts be revised. The revised policies and procedures should attempt to minimize exceptions to rules. When there are exceptions, they should be written in to the policies so that staff

can uniformly perform their duties. Two specific areas we found had insufficiently written policies and procedures were: (1) the handling of bankruptcy and temporary sanitation accounts, and (2) the handling of delinquent pay plan accounts. Our findings which led us to this conclusion are discussed in greater detail in other sections of this report.

Some Collection Procedures Could Be Automated

We found that some procedures for delinquent accounts are largely manual when they could be automated. For example, we found that a significant amount of time is spent sending emails to customers to inform them of their delinquent accounts. UCS staff has made efforts to make this process efficient. In addition, since this procedure was implemented, the amount of delinquent accounts needed to be sent to the collections agency has significantly decreased (see Table 3 on page 6). However, this process could be improved through automation. UCS should work with IT to develop a process that allows UCS to automatically download into a spreadsheet the customer information that needs to be emailed out. They should then create a template e-mail in outlook that can use mail-merge to quickly send personalized emails to all individuals on the spreadsheet.

USC Procedures Are Mostly Effective

Overall, UCS procedures are quite effective. Considering the tens of thousands of active accounts, we found relatively few accounts with noteworthy errors. There are three findings worth mentioning here: (1) the City does not place liens on properties with delinquent payments, (2) a few accounts were not in collections status when they should have been, and (3) some account balances were not transferred when they should have been.

Liens. During the audit we found an instance of a customer who was the owner of a large apartment complex. This customer sold the complex while at the same time owing the city money for utilities used. This customer subsequently failed to pay the amount owed for utilities, and in the end the city had to write off nearly \$20,000.²

Under the Texas Local Government Code, the City can impose a lien on an owner's property to collect for delinquent utility bills but first must adopt an ordinance to do so. The City's utility ordinance does not include that language.

² Because this customer owned an apartment complex, the customer had 99 different accounts, the amounts written off on each account ranged from \$1,574.87 to \$0.94 (averaging \$198.16).

Therefore, the City may want to consider passing an ordinance that would allow for liens. This would enable the City to collect on delinquent accounts out of the proceeds of the property's sale.³

Accounts not in collections status. We found seven accounts that were not changed to collections status when they should have been. This of course constitutes a very small error rate and is a strong indicator of the effectiveness of UCS' procedures. Nevertheless these seven errors are symptomatic of a risk that should be addressed. It appears that these accounts did not get moved into collections status because they were "held" due to pending transactions. For example, an account terminated in May of 2012, still has a "Finalized" status (as of February 2015) even though \$441.24 has remained on the balance since June 2012. The apparent reason this account has been held by the system, and not moved to collections status, is a pending transaction created in May 2012. Even more curiously, this pending transaction is for the amount of \$0.00.

Transferred balances. Before sending an account to collections, UCS procedures dictate that staff check whether the account holder has any other active accounts with the City. Additionally, when a customer opens a new account, UCS staff check whether that customer has any past amounts owed. If so, UCS staff transfer the delinquent balance to the active or new account. This procedure increases the likelihood that a customer will pay their delinquent account while also eliminating the need to pay a fee to the collections firm.

We found 8 delinquent accounts worth more than \$25 that were not transferred when they should have been. (The total value of these 8 accounts is \$1,837). This constitutes only about 0.05% of accounts that were in collections or write-off status. However, these 8 accounts were found using only one type of analysis; therefore, more might be found using other forms.

Customer Deposits Policies and Procedures

Requiring customers to pay a deposit on their account is a useful way to help prevent delinquencies. This is because if a customer fails to pay their bill the deposit can be applied to the amount owed.

³ It should be noted that there are some limitations to using a lien as a remedy for delinquent accounts. For example, the City cannot impose a lien on homestead property. If the property is rental property, the City cannot impose a lien if the service is connected in a tenant's name after the owner has given notice to the City that the property is rental property. If the service is connected in a tenant's name prior to the date an ordinance goes into effect, the City is prohibited from placing a lien on the property. And, if the lien is placed on the property following its sale, we would not be able to collect from the proceeds since the money would have been paid out prior to the lien.

UCS Does Not Require Deposits from all Customers

Homeowners are not required to pay an initial deposit in order to receive utility service. After two late payments in 12 months; however, the homeowners are billed the deposit amount unless they enroll in auto pay. After the first auto pay return/non-payment, the deposit is billed in one installment. The deposit amount for all residential accounts is 1½ times the estimated average monthly bill.

Renters are billed a deposit on the first month's bill in one installment. The only exemption from deposit is for those who enroll in auto pay. After the first auto pay return/non-payment, the deposit is billed in one installment.

Commercial accounts pay a deposit of two times the annual estimated monthly bill amount. Exemptions are granted for customers who provide a letter of credit from a utility company showing 24 months of service with no late payments, or returned checks or disconnects for non-payment in the most recent 12 months.

If an account is disconnected for non-pay, the deposit amount is evaluated to ensure adequate deposit is on account. If not, additional deposit amounts will be collected. Deposit refunds apply to the final bills or they may be refunded for good payment record by request after 24 months of service with no more than two late payments.

Deposits Are Not Sufficient to Cover Delinquencies from Renters

Because one of the primary purposes of requiring deposits is to prevent accounts from having to enter collections, an important measure of the effectiveness of our deposit policies are how many accounts must be sent to collections. The following table shows the amount of accounts moved to collections status from August 1, 2012 to July 31, 2014.

Table 4: Payments That Are Moved to Collections Status

Customer Type	No. Sent to Collection	Total Number	% Sent to Collection	Total Sent to Collection	Avg. Sent to Collection
Owners	84	7,599	1.1%	\$ 12,953	\$ 153
Tenants	1,828	11,503	15.9%	\$ 610,893	\$ 334
Contractor	10	1,041	1.0%	\$ 851	\$ 85
Unlabeled	264	3,765	7.0%	\$ 96,694	\$ 366

From Table 4 we can see that tenants are the primary source of accounts (and dollars) sent to collections. Therefore, if the City wants to reduce the amount of delinquent accounts, efforts should be focused on tenants.

However, we found that simply raising deposit amounts may not be a feasible method for reducing the number of delinquent accounts among tenants. According to our calculations, in order to decrease the number of delinquent accounts by 50% through raising deposit requirements, deposit amounts would have to increase by about \$280 per customer. If UCS wanted to get to the 1% rates found among owners and contractors, UCS would probably have to raise deposits by more than \$700 per customer.

We also found a strong correlation between a customer being on auto pay and not being sent to collections. While 16% of tenants are sent to collections at some point, we found that only 2% of tenants who are signed up for auto pay were sent to collections. Because approximately 31% of tenant accounts are on auto pay, the City may be able to reduce the number of delinquent accounts among tenants by increasing the number of tenants who use auto pay.

However, the city already offers one incentive for signing up for auto pay (not requiring a deposit) and it is possible that the low numbers of tenants signing up for auto pay is not from a lack of desire, but a lack of feasibility. For example, tenants with roommates may not want to sign up for auto pay if it means being on the hook for their roommates' portion of the utility bill.

Management of Collection Agencies

The City is currently contracted to McCreary, Veselka, Bragg and Allen, Attorneys at Law (MVBA) for collections. MVBA's compensation for providing professional services for representation in the collection of delinquent utility bills is twelve percent (12%) of the amount collected by the City on those accounts in which the data files are transmitted to MVBA by electronic media. MVBA charges a fee for all payments made by customers that have been sent to them for collections—this is true even if MVBA had nothing to do with the collection.

Risk of Double Billing Exists Due to Inaccurate Payment Dates

New invoices contained old payments. We conducted a review of all MVBA invoices in fiscal year 2014. We found that the City paid fees to MVBA for some accounts that had been paid off by the customer in previous years. Specifically, we found that about 10% of the fees invoiced in fiscal year 2014 were for accounts that had been paid off by the customer more than a year earlier.

Having large gaps between the date the payment was made and the date MVBA invoices the City makes it difficult for UCS to ensure that it is not being double-billed. Table 5

below shows the amount of time between the payment date and the invoice date for accounts invoiced by MVBA in fiscal year 2014.

Table 5:
Invoice & Delinquent Payment Dates Gaps

Gap	No. Accounts	%
Less 1 month	183	26%
1-2 months	214	30%
2-3 months	71	10%
3-6 months	124	17%
6-12 months	53	7%
1-2 years	37	5%
2-3 years	20	3%
3+ years	12	2%
Total	714	100%

We were informed that the likely cause of the large gap between payment and invoice date is that the duties of taking payments from customers and recording the receipt of the payment in MVBA’s system are segregated amongst UCS staff (which is a proper internal control). However, because payment receipt notification is not fully automated, errors can occur when a payment is received by the City but not recorded in MVBA’s system. When this happens, the customer still has a mark on their credit report despite having paid the balance on their account. Typically, the customer will later learn that the mark is still on his or her record and notify UCS of the error; but this may be at a much later date. This at least partially explains why we found several instances of delinquent customer bills that have been paid in years previous to when they were invoiced.

City’s payment dates did not match MVBA’s payment dates. We also found that the date of payment listed on MVBA’s invoices often differed from the date listed in the City’s information system. The two dates did not reconcile approximately 44% of the time in fiscal year 2014. There were twenty-five instances where the dates differed by over a year. When payment dates do not reconcile, it makes reconciliation of the overall payment much more difficult.

There is a Low Risk that MVBA Is Intentionally over Billing

When reviewing invoices for accuracy, UCS does not check every single line item on an MVBA invoice, but rather the total invoice amount is reviewed for reasonableness, and they verify that MVBA billed 12% of the total payment and not some other percentage. Therefore, we conducted a review of fiscal year 2014 MVBA invoices to determine if there were any instances where the City was over charged.

Based on this review, we found at least seven instances where the amount MVBA invoiced did not match with internal records maintained by the City. In total, it appears that the City was overcharged \$121. This constitutes less than 1% of the total amount we paid to MVBA that year. Given this perspective, the \$121 in potential over charges does not meet the threshold of materiality.

Through the course of this review; however, we discovered two areas of note. First, according to UCS, MVBA should not be invoicing the City when a customer’s delinquent balance is paid through the deposit amount the customer paid when the account was created. However, we found at least one instance of this occurring.

Second, we found two instances where the City paid a fee to MVBA before the city had actually received the delinquent payment. In doing so, the City risked paying a fee on a payment that subsequently may never be received. However, both of the cases found appear to be the result of human error rather than a flaw in the city’s processes. Furthermore, given the small number found, it is not a material error.

Whether these are isolated instances or systemic, neither case appears to be caused by a willful intent to over bill the City.

Some MVBA Accounts Do Not Reconcile to City Records

We found a number of accounts that are in collections status that could not be reconciled to MVBA’s accounts, but probably should be. As of February 2015, we found 28 accounts that should have been sent to the collections firm from 2012 to 2014, but were not in MVBA’s records. This makes up less than 1% of the accounts that were actually sent to the collections firm during the same time period.

Table 6: Accounts Missing from MVBA’s Records

Yr-Mnth to Collections	Non-reconciled	Total Amount	Average Amount
2012	10	\$5,908	\$591
2013	4	\$1,796	\$449
2014	14	\$3,769	\$269
Total:	28	\$11,472	\$410

It appears that some of these accounts were not sent to the collections agency because they had been on a failed pay plan. When the accounts were then moved from the pay plan to collections status, the step of sending the accounts to the collections firm was skipped. It is unclear why the remaining accounts were not sent to collections. UCS may want to re-evaluate its processes to ensure all accounts that should be sent to a collections agency are sent to the collections agency.

Uncollected Accounts Write-off Procedures

According to city policy, write-offs should be performed two years after accounts are sent to the collections agency. When an account is written off in the Utility Customer Service (UCS) system, the delinquent amount is removed from the system and placed in another account in the City's accounting system. Delinquent accounts that have a balance under \$25 are written off without being sent to a collections firm. The \$25 threshold has been in place for over 25 years.

Most Write-offs Occur 2 Years after Accounts Enter Collections

We reviewed all accounts sent to write-off from July 2004 to November 2014.⁴ As can be seen in Table 7 below, about 98% of write-offs occur at or near 24 months.

Table 7: Non-small Accounts Time in Collections before Write-off (Jul 04 to Nov 14)

Months	Count	%Count	Sum	%Sum	Average
0-6	1	0.01%	\$ 74	0.00%	\$ 74
7-13	5	0.04%	1,377	0.03%	275
14-20	136	1.05%	42,759	0.90%	314
21-27	12,768	98.11%	4,563,651	95.58%	357
28-34	87	0.67%	130,999	2.74%	1,505
35-41	6	0.05%	17,216	0.36%	2,869
42-48	5	0.04%	5,567	0.12%	1,113
49-55	6	0.05%	12,924	0.27%	2,154
	13,014		\$ 4,774,567		\$ 366

We observed that accounts that are written off after more than 24 months have larger than average amounts due. This is primarily due to the fact that many of the accounts written off after 27 months are in bankruptcy. However, we also found 7 accounts that were written off late for unknown reasons.

For accounts written off in less than 24 months, we were primarily concerned with accounts that were never forwarded to the collections firm (since the collections firm continues to search for accounts even if they are written off). There were four accounts that were written off in less than 21 months and never sent to the collections firm.

We also found inconsistencies in the timing of the write-off of small accounts (less than \$25). It appears that some staff write off the account at the time the account would be

⁴ This date was chosen because it is when the two year write-off period began. Effective 7/14/04, no write-offs were to be performed for one year to allow them to get a two year write-off period.

sent to collections, while other staff write off the account after the 2 year waiting period. The question of when these small accounts should be written off is, ultimately, not very important. But it is important that UCS be consistent in its policies and procedures.

Write-off Procedures in UCS Lack Adequate Controls

There is no formal approval process for writing off a delinquent account. In addition, customer service representatives who work the front desk (and therefore receive payments/have custody of money) also have access to the records, and are authorized to write-off bad debts.

Write-offs are processed on the 15th of each month. The accounts are automatically placed on hold until a customer status is changed from held to non-held; otherwise, the system will not allow the account to be written off. Although UCS's procedure only includes performing write-offs of many accounts at once, there is no system limitation that requires this. In other words, the system allows write-offs of individual accounts.

We also conducted a review to determine if there are any instances of accounts being written off without first having a collections status in SunGard. Although we did not find any instances of this occurring, we found that because some accounts in collections status were never actually forwarded to the collections firm, customer service representatives have the ability to write-off accounts that are not being collected on.

This creates a significant control deficiency in that a theft could occur by a single employee performing the following actions: (1) receive money from the customer who is closing their account, (2) steal the money, (3) final the account, (4) move account to collections status, (5) before accounts are sent to the collections firm, move the account to write-off status, (6) take the account off hold, (7) write-off the account.

In the above situation, the primary risk of being caught is that if the former customer tries to reopen an account, the system will flag that the customer had some amount written off. However, many customers will leave College Station and never come back. Additionally, those who do come back, if gone for long enough, are unlikely to remember/have records to show whether they had paid off their last bill when they left the City.

Deleting Accounts with Balances Increases the Risk of Fraud

As of February 9, 2015, there were 65,642 customer accounts that have been deleted from the utility billing information system.⁵ The last deletion of a customer record occurred in December 2014. When an account is deleted, all record of the account is

⁵ There have been a total number of 184,410 accounts created.

removed from the system. Some data is stored on laserfiche, but this information is largely unusable for purposes of fraud detection.

When accounts are deleted, it occurs for two different reasons: First, there are deletions of individual accounts. This procedure can be performed by UCS staff, and generally occurs when a customer account is created, but then the customer cancels the account before anything actually happens. For example, this may occur if a tenant's lease falls through and they never end up moving in. So long as there was never any activity (such as work orders, etc.) UCS staff can delete the account. We confirmed that UCS staff cannot delete accounts that have account activity.

The second form of deletion involves the mass deletion of accounts (sometimes referred to as a "purge"). The deletion of these accounts can include accounts with activity—and even include accounts that still owe the city money. However, according to UCS policy, only accounts that have not had any activity for many years and do not have a balance owed to the City should be deleted. The mass deletion of accounts can only be performed by members of the IT department.

Deleting financial records carries significant risk of fraud. This is because if a fraud does occur, deleting the financial records related to the fraud can make the fraud nearly impossible to detect. Therefore, if an organization must delete financial records, it is crucial that proper controls are in place.

In examining the City's practice of deleting the financial records of utility customer accounts, we found two control deficiencies: (1) segregation of duties were inadequate, and (2) accounts with delinquent balances were deleted.

Insufficient segregation of duties. UCS staff do not have the ability to delete customer accounts with past activities. Instead, this ability resides with the IT department. This is a good control; however, we found that in practice, IT deletes the accounts that UCS directs them to delete—which is substantively the equivalent of giving UCS the ability to delete customer accounts.

Accounts with delinquent balances were deleted. Using records obtained from MVBA (the City's collection agency), we were able to determine that the City deleted at least 10 customer accounts with delinquent balances. A total of \$2,194 is still owed on these accounts. The date received for these accounts ranged between June 2007 and April 2009.

MVBA was only contracted in 2007. Prior to this, the City contracted with Financial Control Services (FCS). According to paper records, as of March 2014, there are 5,460 accounts still on file with FCS. We took a random sample of 30 of the 5,460 FCS accounts previously mentioned to derive an indication of the percentage of accounts

that are missing from the City’s information system (i.e. SunGard). Table 8 below summarizes these results.

Table 8: FCS Accounts Missing From SunGard

In SunGard?	Count	Percentage	95% Confidence Interval
Yes	1	3%	.02% to 10%
Probably not ⁶	4	14%	1% to 26%
No	25	83%	69% to 96%
No & Probably Not	29	97%	91% to 99.98%

Even though Table 8 has fairly large confidence intervals, it is still obvious that there are thousands of accounts that are in FCS’ records that are not in SunGard.

Even after an account is deleted from the system, the collection agency may continue to attempt to collect on the account. We are aware of at least one instance where a customer has attempted to pay on an account that has been deleted from the system. Because there was no account available for the customer to apply a payment, the customer service representative did not take the payment (since he could not confirm whether the customer truly still owed the money). However, the City employee could have just as easily taken the payment and pocketed the money, and there would be no means to identify the theft.

The process of deleting accounts from the system was originally implemented due to capacity issues of legacy hardware. However, these capacity concerns are no longer an issue due to a hardware upgrade.

Front Counter Employees Rotate Writing-off Accounts

According to UCS management, write-offs are performed by utility customer service representatives primarily charged with serving customers at the front counter. We found that there have been seven different employees that have performed write-offs since 2007. Six of these employees are customer service representatives; with their supervisor also performing write-off duties. Table 9 on the next page provides a summary of the dollar amount of write-offs performed by these employees each year between 2007 and 2014.

⁶ This means we found a name match, but the account number did not match.

Table 9: Amount of Write-offs Processed by Utility Customer Service Employees

Year	Cust. Serv. Supervisor	Customer Service Representatives					
		A	B	C	D	E	F
2007	\$ 0	\$ 0	\$ 0	\$ 34,431	\$ 92,233	\$ 24,736	\$ 114,988
2008	61,242	0	0	90,736	30,954	121,443	53,357
2009	0	0	0	61,788	136,636	52,472	129,256
2010	1,163	0	0	56,409	23,360	338,403	194,764
2011	0	0	0	89,723	220,344	74,624	240,259
2012	194,639	0	0	0	148,579	467	438,602
2013	0	0	501,764	0	0	265,887	239,648
2014	101,064	200,454	0	0	0	69,533	322,837
	358,109	200,454	501,764	333,087	652,106	947,565	1,733,711
Hire Date	2.12.90	2.8.10	12.10.12	1.18.96	6.8.81	9.16.84	10.2.00
Term Date				8.3.12	12.7.12		

We found that write-off duties (for the most part) rotate every two to four months amongst the employees described in Table 9. Although there were employees who had significantly higher levels of write-offs (in both frequency and amount); we found that those anomalies corresponded to times when turnover was experienced in UCS.

Summary of Audit Recommendations

(1) The policies and procedures should be revised. The revisions should focus on the following aspects:

- Procedures should be automated as much as possible. This will increase efficiency, and decrease human errors.
- In areas where the policies and procedures cannot be automated, UCS should carefully design the procedures in order to minimize errors, while also balancing the need for efficiency.
- Policies and procedures should avoid allowing for exceptions.
- All exceptions to the general policies and procedures should be documented.

Specific topics within the policies and procedures that ought to be addressed are:

- Bankrupt accounts, temporary sanitation accounts, and any other similar types of accounts.
- Pay plan policies and procedures.
- The handling of accounts with overly long “pending transactions.”
- Ensuring all accounts that should be sent to the collections firm actually are sent.
- Ensuring that payment dates recorded in UCS’s system match the collection firm’s records.

- Consistently transferring delinquent balances.

(2) Controls for the collection and write-off process should be strengthened. In order to successfully hide a fraud, fraudsters need to ensure the collection agency never receives the fraudulent account's information, then the fraudsters must successfully write-off the account. To prevent the fraudster from accomplishing this, staff duties should be segregated. Ideally, there should be a segregation between those staff who receive payments, those staff who process collections, and those staff who write-off accounts. Alternatively, these duties could be rotated among staff, so long as the rotation schedule does not allow the same individual to perform all duties on the same customer account. Currently, collections processing has been segregated by being assigned to one member of staff, and the write-off process is being rotated among other staff members.

UCS can further strengthen its controls by adding an approval level to the write-off process. Ideally, every write-off should be individually reviewed and approved. However, because there is a fairly large number of accounts that must be written off, this may not prove feasible. Therefore, UCS may alternatively decide to only give individual scrutiny to accounts written-off in less than two years, as these are the accounts at highest risk of fraud.

(3) Customer financial records should not be deleted. The City should adopt a policy of never deleting records from the utility billing system. This includes never deleting inactive accounts as well as never-used accounts. There should be no gaps between the numeric account numbers.

However, in the future, this recommendation may not always prove feasible due to data storage capacity limitations. Therefore, if the city must delete records the following criteria for deleting should be met:

1. Specific criteria should be established for deleting:
 - No account with activity within the last four years should be deleted. (The city may select a period of time greater than four years, but should not select less than four years).
 - Preferably, no account that has ever had a delinquent balance should be deleted. At the very least, no account with a remaining balance, written-off balance, or otherwise unpaid balance should be deleted. Accounts that are on file with a collections firm should also not be deleted.
2. Before each delete, at least two approvers should fill out a checklist confirming that the above criteria had been met on *every* account deleted. This procedure should be performed even though it may be time consuming because deleting records carries significant fraud risk. Ideally, these approvers would be the Utility Customer Service Supervisor and someone separate from her staff (e.g. Finance Director, Division Director, or Assistant Director of IT).

To: Ty Elliott, Internal Auditor
Through: Kelly Templin, City Manager
From: Jeff Kersten, Assistant City Manager
Date: March 18, 2015
Subject: Management Responses to Recommendations - Performance Audit: Utility Customer Service Delinquent Accounts

1. **The policies and procedures should be revised.** The revisions should focus on the following aspects:
 - Procedures should be automated as much as possible. This will increase efficiency, and decrease human errors.
 - In areas where the policies and procedures cannot be automated, UCS should carefully design procedures in order to minimize errors, while balancing the need for efficiency.
 - Policies and procedures should avoid allowing for exceptions.
 - All exceptions to the general policies and procedures should be documented.

Specific topics within the policies and procedures that ought to be addressed are:

- Bankrupt accounts, temporary sanitation accounts, and any other similar type of accounts.
- Pay plan policies and procedures.
- The handling of accounts with overly long "pending transactions."
- Ensuring all accounts that should be sent to the collections firm actually are sent.
- Ensuring that payment dates recorded UCS's system match the collection firm's records.

Management Response: *Management concurs that the policies and procedures related to delinquent accounts should be reviewed and revised. The Utility Billing portion of the ERP Implementation will begin in late April. As part of that implementation most of the policies and procedures as well as processes will be evaluated and updated. The results of this audit will be used as these policies and procedures are being revised.*

2. **Controls for the collection and write-off process should be strengthened.** In order to successfully hide a fraud, fraudsters need to ensure the collection agency never receives the fraudulent account's information, then the fraudsters must successfully write-off the account. To prevent the fraudster from accomplishing this, staff duties should be segregated. Ideally, there should be a segregation between those staff who receive payments, those staff who process collections, and those staff who write-off accounts. Alternatively, these duties could be rotated among staff, so long as the rotation schedule does not allow the same individual to perform all duties on the same customer account. Currently, collections processing has been segregated by being assigned to one member of staff, and write-off process is being rotated among other staff members.

UCS can further strengthen its controls by adding an approval level to the write-off process. Ideally, every write-off should be individually reviewed and approved. However, because there is a fairly large number of accounts that must be written off, this may not prove feasible. Therefore, UCS may alternatively decide to only give individual scrutiny to accounts written-off in less than 2 years, as these are the accounts at highest risk of fraud.

Management Response: *Management concurs that the collection and write off processes should be reviewed to see where they can be strengthened. These processes will be reviewed to determine what changes should be made. Duties for the collection process will be rotated. The write-off process is already being rotated. Management will review the write-off process and the timing of the write-offs to determine what changes should be made to reduce the risk of fraud.*

3. **Customer financial records should not be deleted.** The city should adopt a policy of never deleting records from the utility billing system. This includes never deleting inactive accounts as well as never-used accounts. There should be no gaps between the numeric account numbers.

However, in the future, this recommendation may be not always prove feasible due to data storage capacity limitations. Therefore, if the city must delete records the following criteria for deleting should be met:

1. Specific criteria should be established for deleting:
 - No account with activity within the last four years should be deleted. (The city may select a period of greater than four years, but should not select less than four years).
 - Preferably, no account that has ever had a delinquent balance should be deleted. As the very least, no account with a remaining balance, written-off balance, or otherwise unpaid balance should be deleted. Accounts that are on file with a collections firm should also not be deleted.
2. Before each deleted, at least two approvers should fill out a checklist confirming that the above criteria had been met on *every* account deleted. This procedure should be performed even though it may be time consuming because deleting records carries significant fraud risk. Ideally, these approvers would be the Utility Customer Service Supervisor and someone separate from her staff (e.g. Finance Director, Division Director, or Assistant Director of IT).

Management Response: *There may be situations where it is determined to be valid and appropriate to delete an account. Management concurs that a formal policy and procedure for deleting account records should be established. If it is determined that account records need to be deleted for a valid reason, this policy and procedure will be utilized for that process. As part of the new ERP implementation, records storage and management will also be reviewed to determine the best option to retain historical data. Management will weigh the costs and benefits of implementing the recommendation.*



Legislation Details (With Text)

File #: 15-0230 **Version:** 1 **Name:** Distributed Antenna System (DAS)
Type: Presentation **Status:** Agenda Ready
File created: 5/5/2015 **In control:** City Council Workshop
On agenda: 5/18/2015 **Final action:**
Title: Presentation, possible action and discussion on a license agreement with ExteNet for the installation and operation of a Distributed Antenna System (DAS).
Sponsors: Aubrey Nettles
Indexes:
Code sections:
Attachments: [20150501-NoRedline_Draft College Station DAS System License Agreement-ExteNet.pdf](#)
[20150501-NoRedline_Draft College Station Pole Attachment License Agreement-ExteNet.pdf](#)

Date	Ver.	Action By	Action	Result
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Presentation, possible action and discussion on a license agreement with ExteNet for the installation and operation of a Distributed Antenna System (DAS).

Relationship to Strategic Goals:

1. Core Services and Infrastructure

Recommendation(s): Staff requests that the Council receive the presentation and provide feedback on the proposed agreements. No formal action is needed at this time.

Summary: A Distributed Antenna System, or DAS, is a network of spatially separated antenna nodes connected to a common source to provide wireless service within a geographic area. In many instances, these antennas are connected to existing utility poles, and require additional ground-mounted infrastructure to support the operation of the antenna.

A draft license agreement and pole attachment agreement was developed to allow this service provider, ExteNet, to utilize city right-of-way and open space existing utility poles or street light poles to accommodate their infrastructure.

Budget & Financial Summary: N/A

Reviewed and Approved by Legal: Yes

Attachments:

1. Draft License Agreement
2. Pole Attachment Agreement
3. ExteNet Presentation

DISTRIBUTED ANTENNA SYSTEM (“DAS”) LICENSE AGREEMENT

THIS AGREEMENT (“License Agreement”) is made by and between the **City of College Station**, a municipal corporation and home-rule municipality of the State of Texas located at 1101 Texas Avenue South, College Station, Texas 77840 (“CITY” or “Licensor”) and **ExteNet Systems, Inc.**, a Delaware corporation with its principal place of business located at 3030 Warrenville Road, Suite 340, Lisle, Illinois, 60532 (“LICENSEE” or “Company” or “ExteNet”), each referred to as a “Party” or jointly as the “Parties”.

RECITALS

WHEREAS, ExteNet, is a certificated telecommunications provider licensed by the Texas Public Utility Commission to offer facilities-based and resale telecommunications services in the state, but does not currently offer retail telecommunications service in City of College Station, Texas; and

WHEREAS, the CITY owns and/or controls and regulates public street rights-of-way and public utility easements within the boundaries of the City of College Station, Texas; and

WHEREAS, ExteNet desires to install and operate a DAS Network within the boundaries of the CITY, subject to the requirements of this License Agreement and pursuant to CITY ordinances and state and federal laws; and

WHEREAS, the installation, maintenance, and operation of ExteNet’s DAS Network on public rights-of-way will be performed in a manner consistent with all applicable CITY ordinances and any other applicable regulations; and

WHEREAS, ExteNet has entered into one or more Pole Attachment Agreements with the CITY for existing poles that serve the CITY’s utility and street light network for the purpose of installing its DAS Network on CITY poles erected on or about public rights-of-way; and

WHEREAS, installation of ExteNet's DAS Network is in the public interest and will further the convenience of the business community and citizens of the City of College Station, Texas; and

WHEREAS, the CITY has excess capacity on certain existing CITY-owned electrical utility and street light poles and is willing to grant ExteNet a non-exclusive license to install, maintain, operate, repair and replace its DAS Network or micro or small cell installations on certain existing CITY-owned utility and street light poles within discrete segments of the rights-of-way subject to the requirements of this License Agreement and the rights granted to LICENSEE herein, and pursuant to permits issued by the CITY’s City Engineer (“City Engineer”);

WHEREAS, LICENSEE’s DAS Network is subject to the Communications Act of 1934, as amended, including but not limited to Section 253 thereof, 47 U.S.C. § 253 (hereinafter referred to as the “Federal Telecommunications Laws”), which authorize the CITY to regulate its Rights-of-Way.

WHEREAS, the License Agreement is consistent with Section 54.205 of the Public Utility Regulatory Act (Texas Utilities Code) which reserves “a municipality’s historical right to control and receive reasonable compensation for access to the municipality's public streets, alleys, or rights-of-way or to other public property”; and

WHEREAS, the CITY hereby sets forth rights, duties and obligations of ExteNet in this License Agreement.

NOW, THEREFORE, FOR AND IN CONSIDERATION OF THE MUTUAL PROMISES HEREIN SET FORTH, IT IS AGREED BY THE PARTIES AS FOLLOWS:

ARTICLE 1 DEFINITIONS

As used herein, the following terms shall have the following meanings. 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.

1.1 “Aerial Project” means the construction or installation of Network Facilities above ground in the public Rights-of-Way by attaching Network Facilities to existing utility poles.

1.2 “Cable Service” shall have the meaning set forth in Section 602 of the Communications Act of 1934, as amended, 47 U.S.C. § 522(6).

1.3 “City Engineer” means the CITY’s City Engineer.

1.4 “DAS Network” or “Distributed Antenna System Network” or “small cell network” means the LICENSEE’s network of spatially separated antenna nodes which, as to size, will not exceed three feet in height, two feet in width and one foot in depth, located in the CITY’s Public Rights-of-Way, on currently existing CITY distribution and street light poles or poles installed by CITY due to electric delivery system needs or other CITY poles installed for existing system needs and not installed for purposes of a DAS or small cell network, and as identified in Exhibit "A" and connected to a common source via fiber optic cable providing DAS wireless service within a geographic area, and shall not include any additional poles not owned by CITY and further shall not include any equipment in excess of or not described in Exhibit “A.” DAS Network does not mean a cellular tower as defined by CITY ordinance or federal or state law.

1.5 “Facility” or “Facilities” shall mean each antenna site, space or equipment used by LICENSEE for the purpose of providing services.

1.6 “Gross Revenues” means all revenues received by LICENSEE from the operation of the Network utilizing existing CITY poles in the Rights-of-Way, including, but not limited to all rents, payments, fees and other amounts actually collected from any Third Party whose connections do not qualify as access lines under Texas PUC Substantive Rule 26.461 and

received by LICENSEE and allocable to the period within the Term or any Renewal Term pursuant to any sublease agreement, together with any option fees collected from any actual or prospective Third Party for telecommunications services provided with respect to the DAS Network, but exclusive of:

(a) any reimbursements or pass-through from or contributions by Third Party to LICENSEE:

- i. for utility charges, taxes and other pass-through expenses, or
- ii. in connection with work performed or equipment installed by LICENSEE;

(b) construction management or supervision fees related to the installation of the Third Party's equipment;

(c) initial contributions of capital by Third Party to reimburse LICENSEE in whole or in part for the installation of the Network Facilities in the DAS Network; and

(d) "upfront bonuses" or other incentive fees or remuneration paid by Third Parties to LICENSEE as an incentive or reward for securing multiple sites for Third Parties or which are not totally and directly related to the location of the Third Parties on the DAS Network.

For the purpose of this definition, all revenues from telecommunications services that actually qualify as access lines under Texas PUC Substantive Rule 26.461 shall be excluded from Gross Revenues. The obligation to include revenues from wholesale or retail customers ends when their contracts expire or terminate.

1.7 "Licensed Areas" means the portions of the Rights-of-Way in which LICENSEE is authorized to construct and install Network Facilities, as depicted and described on Exhibit "A" attached hereto and incorporated herein by reference for all purposes allowed by law and for which work a permit has been obtained by the LICENSEE from the CITY.

1.8 "Network Facilities" means LICENSEE's communications equipment and Facilities necessary to serve the DAS Network, including fiber optic cables and copper wiring, currently existing CITY poles, or other physical devices used to provide DAS service and similar furnishing and improvements located within, or above the Public Rights-of-Way, but not including any separate poles or antennas.

1.9 "Node" means a remote communications point of a distributed antenna system (DAS) or small cell system consisting of at least one antenna for the transmission and reception of a wireless service provider's RF signals and one or more of the following ground mounted or attached to a utility pole or other support structure: equipment cabinets, amplifiers, receivers, battery back-up units, meters, power supply cabinets, disconnect switches, and/or related couplers, cables, wires, conduit, brackets, through bolts, and other equipment and hardware necessary for the operation of the DAS or small cell network and/or provision of wireless or wireline telecommunications service.

1.10 “Projects” means Aerial Projects and Underground Projects, collectively, as those terms are defined in this License Agreement.

1.11 “Rights-of-Way” or “Public Rights-of-Way” means the surface of, air space above, and space below, any public highways, roads, streets, alleys, sidewalks and public utility easements, as the same may now or hereafter exist within the boundaries of the CITY and within the CITY’s jurisdiction now or hereafter-held by the CITY or over which the CITY exercises any rights of management control, but only as necessary to build the DAS Network as identified in Exhibit “A,” and for purposes of this License are discrete areas allowed with permission of the CITY’s City Engineer or designee. The term includes permitted Texas Department of Transportation (TxDOT) right-of-way. Facilities placed in TxDOT right-of-way also require a permit from TxDOT.

1.12 “Supply Space” means the area on any given utility pole, above the Communications Space, that is reserved for the placement of electric supply lines, electrical equipment, and other CITY facilities. The term Supply Space has the equivalent meaning as that used in the Electrical Code. Licensee may not place any attachments, including, but not limited to, antennas or other Facilities, in the Supply Space.

1.13 “Texas PUC” means the Public Utility Commission of Texas.

1.14 “Third Party” means any person or entity that is not a Party to this License Agreement.

1.15 “Underground Project” means the construction or installation of Network Facilities in, through, or below the surface of the Rights-of-Way.

ARTICLE 2 GRANT OF LICENSE AND OTHER PERMISSION

2.1 The CITY hereby grants LICENSEE a non-exclusive license to use and occupy that portion of the Rights-of-Way as shown in Exhibit “A,” limited to locations only with permission of the CITY’s City Engineer or designee, to locate, erect, install, construct, replace, reconstruct, repair, relocate, maintain and operate its DAS or small cell Network in, across or under the Rights-of-Way in Exhibit “A” including all necessary Network Facilities in connection with the DAS Network only, subject to the laws of the State of Texas and the CITY’s charter and laws as they exist now or may be amended from time to time and subject to the conditions outlined in this License Agreement. LICENSEE shall install its Network Facilities consistent with the CITY’s Rights-of-Way Ordinance, the CITY’s applicable engineering design standards and criteria, and as such ordinances and standards may hereafter be amended. TxDOT Right-of-Way is not controlled by the CITY, and therefore any facilities proposed in TxDOT Right-of-Way will require appropriate TxDOT approvals and permits, whether underground or overhead.

2.2 The LICENSEE’s license to use and occupy the Public Rights-of-Way shall not be exclusive and the CITY reserves the right to grant a similar use of same to itself or any person or entity at any time during the period of this License Agreement.

2.3 The LICENSEE shall not have the ability to expand its DAS Network or small cell network and Network Facilities beyond Rights-of-Way as depicted in Exhibit "A." Any additions or expansions of the LICENSEE's DAS Network beyond that shown in Exhibit "A" shall require the approval of an amendment or supplement to this License Agreement by the City Council. This License Agreement authorizes LICENSEE or its agents to construct, install, own and operate the DAS Network and Network Facilities in public Rights-of-Way, together with the right to enter the Licensed Areas to maintain, locate, upgrade, repair, move, reconstruct, relocate, remove and replace Network Facilities in accordance with the CITY's Rights-of-Way Ordinance, the CITY's applicable engineering design standards and criteria, and as such ordinances and standards may hereafter be amended.

2.4 Consistent with the CITY's Rights-of-Way Ordinance and the CITY's applicable engineering design standards and criteria, as amended, the CITY's City Engineer shall assign priorities among competing private uses of the Public Right-of-Way according to the order completed permit applications are received.

2.5 IN CONSIDERATION FOR THE LICENSE GRANTED UNDER THIS LICENSE AGREEMENT, LICENSEE WAIVES ALL CLAIMS, DEMANDS, CAUSES OF ACTION, AND RIGHTS IT MAY ASSERT AGAINST THE CITY INCLUDING BUT NOT LIMITED TO ANY LOSS, DAMAGE, OR INJURY TO ANY EQUIPMENT OR ANY LOSS OR DEGRADATION OF SERVICES.

2.6 LICENSEE shall use Network Facilities in the Licensed Areas solely for the purpose of operating the DAS Network including all services associated with and ancillary to a distributed antenna system, including RF Transport services, facilities-based backhaul services, lease of broadband communications services and Network Facilities to other communications providers and to enterprises, as well as transport for in-building wireless networks.

2.7 This License Agreement only concerns the right to use the public rights-of-way. LICENSEE understands that some utility or street light Poles are located on dedicated easements over private property that, by their terms, restrict the use of the easement to CITY for the sole purpose of electric distribution or transmission. Nothing in this License Agreement shall compel CITY to extend any property rights it does not have. Nothing in this License Agreement and no action by CITY shall be construed to offer, grant or approve any right or license to use such easement or to affix an attachment, Facility, Network Facility, or Node to a Pole within such easement without the consent of the owner of the property to which the easement is appurtenant, unless otherwise allowed by law. CITY has no obligation to expand or obtain rights in such easement on LICENSEE'S behalf. It is the sole obligation of LICENSEE to obtain the necessary consent or additional easement rights, if any, at LICENSEE'S own expense.

2.8 LICENSEE shall provide sufficient documentation, including diagrams, maps, drawings or surveys for each proposed Licensed Area. The provided documentation shall depict the boundaries of the public rights-of-way, any existing equipment or improvements in the immediate vicinity, and all of LICENSEE'S proposed attachments, equipment, and improvements in the proposed Licensed Area.

2.9 All uses of the Licensed Areas not described herein are prohibited, including Cable Service. Nothing in this License Agreement shall be deemed to prohibit LICENSEE from using Network Facilities to offer Cable Service if LICENSEE first obtains a separate State-Issued Certificate of Franchise Authority from the Texas PUC and a cable system franchise from CITY, nor shall LICENSEE be prohibited from offering wholesale communications connections and services to Third Party operators of Cable Service licensed by and through the Texas PUC and the CITY.

2.10 In case of conflict between this LICENSEE and the CITY's Right-of-Way ordinance, as amended, the Right-of-Way ordinance shall prevail.

2.11 LICENSEE's DAS Network or Distributed Antenna System Network or small cell network will not exceed, per facility or node, the dimensions established in the Construction Guidelines (Pole Attachment Specifications) contained in Exhibit B, located in the CITY's Public Rights-of-Way, on currently existing CITY distribution and street light poles or poles installed by CITY due to electric delivery needs or other CITY pole installed for existing system needs and not installed for purposes of a DAS or small cell network, and as identified in Exhibit "A" and connected to a common source via fiber optic cable providing DAS wireless service within a geographic area, and shall not include any additional poles not owned by CITY and further shall not include any equipment in excess of or not described in Exhibit "A." DAS Network does not mean a cellular tower as defined by CITY ordinance or federal or state law. If a Node is located at a street light pole, only the antenna and necessary vertical fiber, coax, and conduit shall be attached to the street light pole.

2.12 LICENSEE shall use commercially reasonable means in selecting and upgrading Facility components and give selection preferences to smaller Facility components that reduce the footprint size of the Facilities and Nodes. The Parties agree on the importance of maintaining the aesthetics, appearance, orderly development, and functionality of public Rights-of-Way.

2.13 The color of the Facilities and Nodes shall be a neutral color consistent with support structures and existing equipment, subject to review and approval by the CITY's City Engineer.

2.14 Each Facility or Node shall display the name of the company owning the node and an identification number.

2.15 LICENSEE's Facilities, DAS or small cell Network or equipment shall be installed in a safe manner, meeting all Codes and in a manner that will not interfere with the use of the streets or sidewalk by the travelling public. Sight distance and sight lines for pedestrian and vehicular traffic shall be maintained at all times.

2.16 Each pole mounted Node or Facility, excluding electrical meters, electrical panel or disconnect, vertical conduit containing fiber or coax running up a pole to an antenna or Node, shall be at least thirteen feet (13') above street or alley grade. If that height is not possible, LICENSEE shall either: (a) not install the Node or Facility, (b) relocate the Node or Facility to a suitable pole or location (as approved by the CITY's City Engineer), or (c) ask the CITY's City Engineer for an exception and place the Node at a height or pole location approved by the

CITY's City Engineer. Installation of antennas, Nodes or other Facilities is prohibited in or above the Supply Space.

2.17 If new conduit is installed by LICENSEE, LICENSEE agrees to reserve and make available space or innerduct of at least two inches (2") for City use.

ARTICLE 3 TERM

3.1 Initial Term. The initial term of this License Agreement shall commence upon the date of final execution by both parties and, unless earlier terminated pursuant to any provision hereof, shall expire five (5) years after the Effective Date.

3.2 Renewal Term(s). Upon application by the LICENSEE, this License Agreement may be renewed for up to four (4) additional successive three (3) year terms by the CITY pursuant to the procedures established in this Section, and in accordance with the applicable laws, regulations, and the rules of the State of Texas.

a. At least six (6) months prior to the expiration of the License Agreement, the LICENSEE shall inform the City Manager in writing of its intent to seek renewal of the License Agreement. During this time period, the parties may re-negotiate terms of the License Agreement.

b. Upon determination by the City Manager that the LICENSEE's performance is satisfactory, including payment of all fees, each renewal, subject to the agreed re-negotiation of compensation and other terms, may be granted for one period of three (3) years.

c. CITY shall not unreasonably withhold any Renewal Term of the License Agreement upon such terms and conditions as the Parties may agree provided that at the time LICENSEE requests renewal LICENSEE is in substantial compliance with all terms set forth in this License Agreement, including the payment of all fees.

ARTICLE 4 HOLDING OVER

4.1 In any circumstance not described in Article 3 whereby LICENSEE remains in occupancy of the Rights-of-Way after expiration of this License Agreement, as extended, such holding over shall not be deemed to operate as a renewal or extension of this License Agreement, but shall only create a right of use from month to month (the sum of which months shall be "Hold Over Period") provided that LICENSEE continues to make all required payments and conforms to all other requirements of this License Agreement and the Right-of-Way Ordinance and all other applicable law, and provided further that this License Agreement may be terminated at any time during the Hold Over Period by CITY or LICENSEE upon sixty (60) days written notice to the other.

**ARTICLE 5
EARLY TERMINATION**

5.1 LICENSEE or CITY shall have the right to terminate this License Agreement early, without any further right or obligation to the other party by giving the other party ninety (90) days advance written notice and by removing the DAS Network and all Network Facilities from public Rights-of-Way within ninety (90) days of the effective date of the notice.

**ARTICLE 6
ABANDONMENT OF NETWORK FACILITIES**

6.1 Whenever LICENSEE intends to abandon any of its Network Facilities within a Right-of-Way, it shall submit to the CITY's City Engineer an application describing the Network Facilities it proposes to be abandoned and the date of the proposed abandonment. CITY may require LICENSEE, at LICENSEE's expense: (a) to remove the Network Facilities from the Public Right-of-Way; or (b) to modify the Network Facilities in order to protect the public health and safety or otherwise serve the public interest. If the LICENSEE fails to respond to the CITY's request to remove or modify the Network Facilities within sixty (60) days, the Network Facilities proposed to be abandoned shall upon the sole election and determination of the CITY be considered the property of the CITY and subject to the CITY's use, modification, demolition, removal or conveyance without any further compensation or benefit therefor being provided to LICENSEE. If CITY determines that any Network Facilities so abandoned must be demolished, modified and/or removed to protect the public health and safety or otherwise serve the public interest then LICENSEE shall be responsible for and liable to the CITY for any and all costs associated with such demolition, modification and/or removal.

6.2 Any fiber optic cable abandoned by LICENSEE shall be considered the property of the CITY.

6.3 Notwithstanding the foregoing, LICENSEE shall have no obligation to remove any pole or conduit that is owned by a Third Party provided that said pole or conduit is properly permitted, constructed and installed and that such Third Party owner is then currently licensed by and through the Texas PUC and the CITY.

6.4 In lieu of removing conduits installed by CITY pursuant to an Underground Project, LICENSEE may elect to transfer ownership of the conduits to a Third Party having an appropriate license from the Texas PUC and the CITY to own such Facilities in public Rights-of-Way, or may abandon such conduits in place and transfer ownership to CITY.

6.5 If LICENSEE abandons any Network Facilities in place pursuant to this section, LICENSEE shall remain responsible for any such pole or conduit, save and except to the extent only that LICENSEE transfers such pole or conduit to a Third Party. Notwithstanding the provisions in section 6.4, at no time and under no circumstances shall CITY be deemed the owner or

responsible party for any property abandoned in place by LICENSEE save and except only properly installed fiber optic cable belonging to the CITY.

ARTICLE 7 FEES AND PAYMENTS

7.1 To compensate the CITY for the use and occupancy of the Public Rights-of-Way on CITY poles, LICENSEE shall be required to pay the CITY the following fees:

(a) Fees.

- (1) LICENSEE shall pay a minimum base annual fee of one thousand, two hundred dollars (\$1,200.00) per each Facility or Node. The minimum base annual fee includes one (1) tenant, provider, or telecommunications carrier using the Facility or Node. The minimum base annual fee shall be increased by nine hundred dollars (\$900.00) per each Facility or Node for each additional tenant, provider, or telecommunications carrier using the Facility or Node. The minimum annual amount may be renegotiated at the end of the Initial Term or at the end of each subsequent Renewal Term. LICENSEE shall submit to the CITY a list of the Facilities and the locations of the Facilities when the system is built out and by December 31, 2015 and each subsequent year until the system is completely built out. LICENSEE shall update the build out list within sixty (60) days of any changes.
- (2) The LICENSEE shall pay the CITY for the use of Public Rights-of-Way fees totaling five percent (5%) of Gross Revenues from the DAS Network. The percentage of Gross Revenues fees will be paid during the Initial Term, any subsequent Renewal Term(s) of this License Agreement, and any Hold Over Period on an annual basis as prescribed under subsection (c). If the five percent (5%) of Gross Revenues fee exceeds the minimum annual payment, the minimum annual payment shall not be due for that year. LICENSEE shall pay either the five percent (5%) or the minimum annual payment, whichever is greater.

(b) Fiber Strands. In addition to the payments, LICENSEE shall make an in-kind contribution to the CITY of two (2) strands of the fiber installed in the Telecommunications Network ("Licensed Fiber"). In the event that such consideration is declared illegal by any court, legislature or governmental agency of competent jurisdiction, LICENSEE and the CITY shall negotiate for mutually acceptable alternate consideration. The connection of electronic equipment to the Licensed Fiber shall be the responsibility of the CITY and will be made at the sole cost and expense of the CITY. The costs of construction, maintenance, repair and operation of the CITY's network, facilities and equipment not comprising a part of the Telecommunication Network shall be the sole responsibility of the CITY. The CITY will enjoy the use of the Licensed Fiber under the terms and conditions of an indefeasible right of use (IRU) agreement to be negotiated by the parties within thirty (30) business days of City Council approval of this License Agreement, which will be included as Exhibit "C" to this License Agreement.

(c) Remittance of Fees. Each annual fee payment shall be paid in advance and will be due on or before December 31 to cover the next calendar year. The first annual fee payment amount for

each Facility or Node will be prorated for the current calendar year and paid at the time each Node or Facility is approved by the CITY. Each annual payment shall be accompanied by a statement, substantially in the form provided in Exhibit “D,” which mathematically verifies the accuracy of the payment, and a financial report which will include Gross Revenues received during the applicable reporting period, a calculation of five percent (5%) of Gross Revenues, with property taxes excluded from such Gross Revenues, and an explanation that the annual payment is made pursuant to this License Agreement. The financial report will be certified by an officer of the LICENSEE and will be accompanied by supporting documents to verify the accuracy of the reported information. The last payment under this License Agreement shall be paid within thirty (30) calendar days following termination or expiration of the License Agreement including any renewal term(s) and any Hold Over Period.

(d) **True-Up.** At the end of each calendar year, LICENSEE shall perform true-up calculations to determine whether five percent (5%) of Gross Revenues exceeds the amount of the minimum annual payment made for that calendar year. No later than forty five (45) days after the end of each calendar year, LICENSEE shall provide CITY notice of the true-up calculation results and indicate if a true-up payment by LICENSEE is required pursuant to this License Agreement. LICENSEE shall tender such true-up amount to CITY within thirty (30) days after providing CITY notice that a true-up payment is required. The necessary underlying financial information supporting the true-up amount and calculations shall be provided to the CITY, upon request.

7.2 **Annexation.** Subsequent to the Effective Date of this License Agreement, should the CITY exercise the right to annex any area in which the LICENSEE has installed a portion of its DAS Network, the LICENSEE shall be responsible for paying additional fees under this License Agreement associated with DAS Network that previously was found outside the CITY’s geographic boundaries, but following annexation will lie within the new CITY boundaries. The effective date of the additional payment will be consistent with the annual payment process as defined in Section 7, above. The additional payment will be prorated by the number of months during the previous year following annexation.

7.3 **Permit Fees.** LICENSEE must obtain all required construction permits from the CITY’s City Engineer in order to install, construct, and maintain the DAS Network and Network Facilities in the Public Rights-of-Way, including paying the appropriate permitting fees, if applicable.

7.4 **Late Fees.** Fees are deemed paid only when CITY actually receives payment. Any Fee payment not timely paid shall accrue simple interest at the rate of one-and-one-half percent (1½ %) per month or the legal rate from the date the amount first came due until paid.

ARTICLE 8 RIGHT TO AUDIT

8.1 The CITY, or its designees, shall have the right to audit, examine or inspect, at the CITY’s election and at CITY’s expense, all of the LICENSEE’s records at any and all LICENSEE’s locations relating to the DAS Network (“LICENSEE’s Records”) during the term of the License Agreement and any renewal term or Hold Over Period and retention period herein. The audit, examination or inspection may be performed by a CITY designee, which may include its internal

auditors or an outside representative engaged by the CITY. The LICENSEE agrees to retain the LICENSEE's Records for a minimum of four (4) years following termination of the License Agreement, unless there is an ongoing dispute under the License Agreement, then, such retention period shall extend until final resolution of the dispute.

8.2 The LICENSEE's Records shall be made available to CITY electronically or via certified paper copy within thirty (30) calendar days of CITY's request and shall include any and all information, materials and digital data of every kind and character generated in connection with or related to the telecommunications network which is the subject of this License Agreement or other information generated as a result of this License Agreement. Examples of LICENSEE's Records include but are not limited to billings, billing reports, remittance records, books, true-up calculations, trial balances, subsidiary ledgers, general ledgers, audited financial statements, invoices, receipts, customer contracts and other documents that are necessary to substantiate Gross Revenues. The LICENSEE bears the cost of producing and transmitting any and all requested business records.

8.3 The CITY agrees that it will exercise the right to audit, examine or inspect only during regular business hours. The LICENSEE agrees to allow the CITY's designee access to all of the LICENSEE's Records deemed necessary by CITY or its designee(s), to perform such audit, inspection or examination. The LICENSEE also agrees to provide adequate and appropriate work space necessary to CITY or its designees to conduct such audits, inspections or examinations if required.

8.4 If an audit inspection or examination discloses that LICENSEE's remittances to the CITY as previously reported for the period audited were underpaid, LICENSEE shall pay within thirty (30) days to the CITY the underpaid amount for the audited period together with interest at the Interest Rate of five percent (5%) from the date(s) such amount was originally due. Further, if such understatement was in excess of five percent (5%) of LICENSEE's actual remittances to the CITY, the reasonable actual cost of the CITY's audit shall be reimbursed to the CITY by the LICENSEE.

8.5 Failure by the LICENSEE to comply with the provisions of this audit clause may result in termination by the CITY of all rights provided under this License Agreement to the LICENSEE. In the event of termination, the LICENSEE is responsible for the cost of termination and agrees to hold the CITY harmless for any and all claims resulting from termination due to the LICENSEE's failure to comply with the audit clause.

ARTICLE 9 LIMITED RIGHTS/SUBORDINATE USE

9.1 This License Agreement is intended to convey limited rights and interests as set forth herein only as to those locations specifically identified in the attached Exhibit "A" in which the CITY has an actual interest. It is not a warranty of title or interest in any Rights-of-Way; and it does not confer rights other than as expressly provided herein, or as provided in the CITY's charter, ordinances, enabling legislation or permits. This License Agreement does not deprive the CITY

of any powers, rights or privileges it now has, or may later acquire in the future, to use, perform work on or to regulate the use of and to control public Rights-of-Way.

9.2 LICENSEE's use of the public Rights-of-Way is subject to the existing and future uses and prior and continuing right of the CITY to use the specified Rights-of-Way for municipal purposes.

ARTICLE 10 BREACH AND DEFAULT

10.1 Defaults Specific to LICENSEE. LICENSEE shall comply with the terms and provisions of this License Agreement and shall cause all persons using the Licensed Areas under the authority granted LICENSEE by this License Agreement to do the same. LICENSEE's failure to do so shall be a material breach by LICENSEE of this License Agreement. The LICENSEE shall not be excused from complying with any of the terms and conditions of this License Agreement by the previous failure of the CITY to insist upon or seek compliance with such terms and conditions. This entire License Agreement is made upon the condition that each and every one of the following events shall be deemed an "Event of Default" by LICENSEE of LICENSEE's material obligations under this License Agreement:

a. LICENSEE is in arrears in the payment of any Fee and does not cure such arrearage within thirty (30) days after receiving written notice from CITY.

b. LICENSEE fails to maintain any insurance required by this License Agreement. Notwithstanding the preceding sentence, such failure shall not be a material breach if within ten (10) days after notice from CITY, LICENSEE provides to CITY the required insurance and the required evidence thereof. Such insurance must apply retroactively so that there is no gap in the insurance coverage required by this License Agreement.

c. LICENSEE is the subject of a voluntary or involuntary bankruptcy, receivership, insolvency or similar proceeding or an assignment is made of any of LICENSEE's property for the benefit of creditors.

d. LICENSEE fails to obtain or maintain any licenses, permits, or other governmental approvals pertaining to the use of the Rights-of-Way, or any bond required under this License Agreement or timely pay any taxes pertaining to the Rights-of-Way and does not cure such failure within thirty (30) days.

10.2 Default by CITY or LICENSEE. This entire License Agreement is made upon the condition that either Party shall be deemed to have committed an Event of Default if either of them shall fail to or neglect to timely and completely do or perform or observe any provisions contained herein and such failure or neglect shall continue for a period of thirty (30) days after the Party in default has been notified in writing of such failure or neglect. The defaulting Party will take immediate corrective action to eliminate any such conditions(s) and will confirm in writing to the non-defaulting Party within thirty (30) days following receipt of written notice that the cited condition(s) has ceased or been corrected. Any condition which cannot be corrected within such

thirty (30) day period will not be considered an Event of Default so long as the defaulting Party diligently proceeds to correct such condition upon receipt of notice from the non-defaulting Party.

10.3 Remedies. Upon the occurrence of any Event of Default or at any time thereafter, CITY or LICENSEE may, at its option and from time to time, exercise any or all or any combination of the following cumulative remedies in any order and repetitively:

- a. Terminate this License Agreement;
- b. Assert, exercise or otherwise pursue any and all rights or remedies, legal or equitable, against the Party in default; or
- c. In the case of CITY, unilaterally and without LICENSEE's or any other person's consent or approval, draw upon or obtain the value of any bond, in an amount sufficient to cure LICENSEE's Event of Default.

10.4 Force Majeure. Notwithstanding any other provision of this License Agreement, neither Party shall not be liable for delay in the performance of, or failure to perform, any of its obligations hereunder if such delay or failure is due in whole or substantial part to any fire, flood, accident, explosion, strike, labor disturbance, war, insurrection, sabotage, terrorist act, condemnation, prohibition or expropriation by any government or governmental agency, delays attributable to encountering hazardous materials or historical relics, unavailability or shortage of materials, or Acts of God, provided, however, that *force majeure* shall not excuse any failure, delay or refusal in making any payment when due.

ARTICLE 11 NO ADVERSE IMPACT UPON OTHER AUTHORIZED USERS.

11.1 LICENSEE recognizes that its use of the Public Right-of-Way is non-exclusive with respect to utilities and other entities occupying such Right-of-Way, and that the CITY specifically reserves the right to install, and permit others to install utility facilities in the Rights- of-Way. In permitting such work to be done by others, the CITY shall not be liable to LICENSEE for any damage caused by those persons or entities. LICENSEE shall adhere to the rules regarding the respective rights of such utilities and other entities as established by state and federal law, the CITY's Code of Ordinances and Charter, including all International Codes, as adopted, and by commonly accepted industry codes regarding engineering, safety, and construction of right-of-way facilities.

11.2 Within ninety (90) calendar days of written request by CITY, or within such other mutually agreed upon timeframe, LICENSEE shall be required to relocate Facilities at its own cost if required to do so by CITY due to a public works or other governmental use of the right-of-way. If Licensee fails or refuses to comply with the directions of CITY to relocate Facilities in accordance with this Agreement, CITY may then opt to relocate LICENSEE'S Facilities without incurring any liability to Licensee and at Licensee's sole cost, or CITY may proceed under Article 10 (Breach and Default) of this Agreement.

11.3 Except as permitted by applicable law or this License Agreement, LICENSEE shall not damage, remove or impair the use of any public Rights-of-Way or any other authorized facilities therein, including without limitation, streets, sidewalks, sanitary sewers, storm drains, water mains, gas mains, poles, overhead or underground wires or conduits without the prior written approval of the CITY and of any other owner(s) of the affected property.

11.4 LICENSEE may not impede, obstruct or otherwise interfere with the installation, existence and operation of any other facility in the public Rights-of-Way, sanitary sewers, water mains, storm drains, gas mains, poles, aerial and underground electrical infrastructure, cable television and telecommunication wires, public safety and CITY networks, and other telecommunications, utility, or municipal property unless the owner(s) of the affected property expressly authorize LICENSEE's actions in writing or LICENSEE can show CITY that such facilities have been abandoned.

11.5 If the CITY requires LICENSEE to adapt or conform its Network Facilities, or in any way or manner to alter, relocate or change its property to enable any other corporation or person, except the CITY, to use, or to use with greater convenience, any Right-of-Way, LICENSEE shall not be required to make any such changes until such other corporation or person shall have undertaken, with solvent bond, to reimburse LICENSEE for any loss and expense which will be caused by, or arise out of such removal, change, adaptation, alteration, conformance or relocation of LICENSEE's Facilities; provided, however, that the CITY shall never be liable for such reimbursement.

11.6 Upon request, the LICENSEE will remove or raise or lower its Network Facilities to permit the moving of houses or other bulky structures. The reasonable and necessary expense of such temporary rearrangements shall be paid by the party or parties requesting them and the LICENSEE may require payment in advance. The LICENSEE shall be given not less than forty-eight (48) hours advance notice to arrange for such temporary rearrangements.

ARTICLE 12 SUPERVISION BY CITY OF LOCATION OF POLES AND CONDUITS

12.1 In the event LICENSEE finds it necessary to route its Facilities where there are no existing CITY poles, LICENSEE shall install its Facilities underground. The CITY shall have the option, but not the obligation, to exercise any and all lawful, reasonable and proper control related to the location and route of all stubs, guys, anchors, conduits, fiber and cables placed and constructed by the LICENSEE in the installation, construction and maintenance of its DAS Network in the CITY.

ARTICLE 13
CONSTRUCTION AND RESTORATION STANDARDS

13.1 Prior to the performance of the initial construction and installation of the DAS Network, LICENSEE shall submit engineering plans to the CITY's City Engineer for review and approval. The construction, installation, maintenance, repair and removal of Network Facilities shall be accomplished without cost or expense to the CITY and shall be in accordance with the CITY's Rights-of-Way Ordinance and the CITY's applicable engineering design standards and criteria, as amended, and shall be accomplished in such manner as not to endanger persons or property or unreasonably obstruct access to, travel upon or other use of the specified public Rights-of-Way.

13.2 Prior to beginning any excavation or boring project on Public Rights-of-Way, LICENSEE shall comply with the provisions of the Texas One Call utility locator service at least forty-eight (48) hours in advance. LICENSEE has the responsibility to protect and support the various utility facilities of other providers during construction.

13.3 LICENSEE shall, at its own cost, after the installation, removal or relocation of its Network Facilities, repair and return the public Right-of-Way and any nearby or adjacent private property, if any, in which the Network Facilities are or have been located to a safe and satisfactory condition in accordance with the CITY's Rights-of-Way Ordinance and the CITY's applicable engineering design standards and criteria, as amended.

13.4 If LICENSEE installs an Underground Project, LICENSEE shall maintain membership, for the life of the Network Facilities, in the Texas One Call utility locator service for subsurface installations. LICENSEE shall field mark, at its sole expense, the locations of its underground Network Facilities in accordance with the recommendation of the Texas One Call utility locator service and the requirements of all applicable laws.

13.5 LICENSEE shall be responsible for any damage to CITY streets, existing utilities, poles, curbs and sidewalks due to its installation, maintenance, repair or removal of its Network Facilities in the Public Right-of-Way, and shall repair, replace and restore in kind any such damage at its sole cost and expense in accordance with all applicable CITY requirements.

13.6 In case LICENSEE, after receipt of written notice and a reasonable opportunity to cure, fails or refuses to comply, the CITY shall have the authority to remove the same at the expense of LICENSEE, all without compensation or liability for damages to LICENSEE.

ARTICLE 14
AS-BUILT MAPS AND RECORDS

14.1 LICENSEE shall maintain accurate maps and other appropriate records of its Network Facilities as they are actually constructed in the Rights-of-Way, including, for Underground Projects, the use of Auto CAD/GIS digital format files. LICENSEE will provide the maps and records to the CITY upon request.

14.2 LICENSEE shall also provide detailed as-built design drawings, certified by the engineer and contractor, showing the size, depth and location of all Facilities and other service appurtenances within the Licensed Area. It is understood that the location of the Facilities shall be verified by excavating if exact alignment is required. City agrees that it will comply with all state and federal laws prohibiting disclosure of Grantees drawings, maps, etc. to any third party. The following certifications shall affixed and signed with the as-built drawings:

“I hereby attest that I am familiar with the associated construction and attest that the Facilities and other service appurtenances have been constructed as reflected with the as-built drawings within reasonable dimension tolerances based on the approved construction plans or amendments thereto approved by the City of College Station.”

(Licensed Professional Engineer)

“I hereby attest that the Facilities and other service appurtenances shown on this as-built sheet were actually built, and that said Facilities and other service appurtenances are substantially as shown hereon. I further certify, to the best of my knowledge, that the materials of construction and the sizes of manufactured items, if any, are stated correctly hereon.”

(General Contractor)

ARTICLE 15 REMOVAL AND RELOCATION OF NETWORK FACILITIES

15.1 If LICENSEE desires to remove or relocate its Network Facilities in the Rights-of-Way, it shall give the CITY not less than ten (10) business days prior written notice of its intent to do so. Before proceeding with removal or relocation work, LICENSEE shall obtain such additional permits as may be required by the CITY and conform with all requirements of this License Agreement and the CITY's Rights-of-Way Ordinance and the CITY's applicable engineering design standards and criteria, as amended.

15.2 LICENSEE shall remove or relocate, without cost or expense to the CITY, the Network Facilities it installs under this License Agreement if and when made necessary by (i) the construction, repair, relocation, or maintenance of a public improvement project in, on, under or about the Public Rights-of-Way or public utility easement; (ii) to protect or preserve the public health or safety; or (iii) where the CITY affords LICENSEE a technically and financially reasonable alternative location for installation of LICENSEE's Network Facilities. The CITY will notify LICENSEE as soon as reasonably possible after the requirement to remove or relocate Network Facilities becomes known, and will to the extent reasonably possible assist LICENSEE in finding substitute Rights-of-Way. Said removal or relocation shall be completed within ninety

(90) days following written notification or such shorter period as the CITY may reasonably direct in the case of an emergency. If LICENSEE fails to remove or relocate its Network Facilities within such period, the CITY may cause the same to be done at the sole expense of LICENSEE, and without liability to the CITY. The CITY will to the extent reasonably possible cooperate with LICENSEE to relocate its Network Facilities at minimal disruption to its services. Nothing in this section shall be construed as preventing the LICENSEE from recovering the cost of removal or relocation from a Third Party that makes the request for removal or relocation of utilities.

ARTICLE 16 INDEMNIFICATION

16.1 LICENSEE shall exercise due care to avoid any action that may cause damage to property of the CITY, property of any other person or entity whose facilities occupy, abut or adjoin the Public Rights-of-Way, and any other third-party.

16.2 LICENSEE SHALL, AT ITS SOLE COST AND EXPENSE, FULLY INDEMNIFY, DEFEND AND HOLD HARMLESS CITY, ITS OFFICERS, BOARDS, COMMISSIONS, COUNCILS, EMPLOYEES, VOLUNTEERS, AGENTS, ATTORNEYS, CONTRACTORS, AND SUBCONTRACTORS, (CITY AND SUCH OTHER PERSONS AND ENTITIES BEING COLLECTIVELY REFERRED TO HEREIN AS "INDEMNITEES"), FROM AND AGAINST:

16.2.1 ANY AND ALL LIABILITIES, OBLIGATIONS, DAMAGES, PENALTIES, CLAIMS, LIENS, COSTS, CHARGES, LOSSES AND EXPENSES (INCLUDING, WITHOUT LIMITATION, REASONABLE FEES AND EXPENSES OF ATTORNEYS, EXPERT WITNESSES AND CONSULTANTS), WHICH MAY BE IMPOSED UPON, INCURRED BY OR BE ASSERTED AGAINST THE INDEMNITEES BY REASON OF ANY ACT OR OMISSION OF LICENSEE, ITS PERSONNEL, EMPLOYEES, AGENTS, CONTRACTORS, SUBCONTRACTORS OR AFFILIATES, INCLUDING THE FAILURE TO COMPLY WITH ANY FEDERAL, STATE OR LOCAL STATUTE, LAW, CODE, ORDINANCE OR REGULATION, AND RESULTING IN PERSONAL INJURY, BODILY INJURY, SICKNESS, DISEASE OR DEATH TO ANY PERSON OR DAMAGE TO, LOSS OF OR DESTRUCTION OF TANGIBLE PROPERTY, OR ANY OTHER RIGHT OF ANY PERSON, FIRM OR CORPORATION, WHICH MAY ARISE OUT OF OR BE IN ANY WAY CONNECTED WITH THE CONSTRUCTION, RECONSTRUCTION, INSTALLATION, OPERATION, MAINTENANCE OR CONDITION OF LICENSEE'S FACILITIES OR OTHER PROPERTY OF LICENSEE OR ITS AFFILIATES AND ANY OTHER FACILITIES AUTHORIZED BY OR PERMITTED UNDER THIS AGREEMENT (INCLUDING THOSE ARISING FROM ANY MATTER CONTAINED IN OR RESULTING FROM THE TRANSMISSION OF PROGRAMMING OVER THE COMMUNICATIONS FACILITIES, BUT EXCLUDING ANY PROGRAMMING PROVIDED BY THE INDEMNITEES' COMMUNICATIONS SERVICES OR OTHER SERVICES AUTHORIZED BY

OR PERMITTED UNDER THIS AGREEMENT); THE RELEASE OF HAZARDOUS SUBSTANCES, OR; THE FAILURE TO COMPLY WITH ANY FEDERAL, STATE OR LOCAL STATUTE, LAW, CODE, ORDINANCE OR REGULATION, EXCEPT TO THE EXTENT ANY SUCH LOSS OR INJURY RESULTS FROM THE CITY'S GROSS NEGLIGENCE.

- 16.2.2 ANY AND ALL LIABILITIES, OBLIGATIONS, DAMAGES, PENALTIES, CLAIMS, LIENS, COSTS, CHARGES, LOSSES AND EXPENSES (INCLUDING, WITHOUT LIMITATION, REASONABLE FEES AND EXPENSES OF ATTORNEYS, EXPERT WITNESSES AND OTHER CONSULTANTS), WHICH ARE IMPOSED UPON, INCURRED BY OR ASSERTED AGAINST THE INDEMNITEES BY REASON OF ANY CLAIM OR LIEN ARISING OUT OF WORK, LABOR, MATERIALS OR SUPPLIES PROVIDED OR SUPPLIED TO LICENSEE, ITS CONTRACTORS OR SUBCONTRACTORS, FOR THE INSTALLATION, CONSTRUCTION, RECONSTRUCTION, OPERATION OR MAINTENANCE OF LICENSEE'S FACILITIES (AND ANY OTHER FACILITIES AUTHORIZED BY OR PERMITTED UNDER THIS AGREEMENT OR PROVISION OF COMMUNICATIONS SERVICES OR OTHER SERVICES AUTHORIZED BY OR PERMITTED UNDER THIS AGREEMENT), AND, UPON THE WRITTEN REQUEST OF CITY, LICENSEE SHALL CAUSE SUCH CLAIM OR LIEN COVERING CITY'S PROPERTY TO BE DISCHARGED OR BONDED WITHIN THIRTY (30) DAYS FOLLOWING SUCH REQUEST.
- 16.2.3 ANY AND ALL LIABILITIES, OBLIGATIONS, DAMAGES, PENALTIES, CLAIMS, LIENS, COSTS, CHARGES, LOSSES AND EXPENSES (INCLUDING, WITHOUT LIMITATION, REASONABLE FEES AND EXPENSES OF ATTORNEYS, EXPERT WITNESSES AND CONSULTANTS), WHICH MAY BE IMPOSED UPON, INCURRED BY OR BE ASSERTED AGAINST THE INDEMNITEES BY REASON OF ANY FINANCING OR SECURITIES OFFERING BY LICENSEE OR ITS AFFILIATES FOR VIOLATIONS OF THE COMMON LAW OR ANY LAWS, STATUTES, OR REGULATIONS OF THE STATE OF TEXAS OR THE UNITED STATES, INCLUDING THOSE OF THE FEDERAL SECURITIES AND EXCHANGE COMMISSION, WHETHER BY LICENSEE OR OTHERWISE.
- 16.2.4 LICENSEE'S OBLIGATIONS TO INDEMNIFY INDEMNITEES UNDER THIS AGREEMENT SHALL NOT EXTEND TO CLAIMS, LOSSES, AND OTHER MATTERS COVERED HEREUNDER THAT ARE CAUSED OR CONTRIBUTED TO BY THE NEGLIGENCE OF ONE OR MORE INDEMNITEES. IN SUCH CASE THE OBLIGATION TO INDEMNIFY SHALL BE REDUCED IN PROPORTION TO THE NEGLIGENCE OF THE INDEMNITEES. BY ENTERING INTO THIS AGREEMENT, CITY DOES NOT CONSENT TO SUIT, WAIVE ITS GOVERNMENTAL IMMUNITY OR

THE LIMITATIONS AS TO DAMAGES CONTAINED IN THE TEXAS TORT CLAIMS ACT.

16.2.5 THIS SECTION 16.2 SURVIVES THE TERMINATION OF THIS LICENSE AGREEMENT.

16.3 LICENSEE SHALL BE LIABLE TO THE CITY FOR DAMAGES SUSTAINED BY THE CITY AND RESULTING FROM THE ACTS AND OMISSIONS OF ANY CONTRACTOR, SUBCONTRACTOR, OR ANY PARTY INVOLVED DIRECTLY OR INDIRECTLY IN THE CONSTRUCTION AND INSTALLATION OF LICENSEE'S DAS NETWORK AND UNDER LICENSEE'S DIRECT CONTROL. ANY ACT OR OMISSION OF SUCH PARTY SHALL BE CONSIDERED AN ACT OR OMISSION OF THE LICENSEE.

THIS SECTION 16.3 SURVIVES THE TERMINATION OF THIS LICENSE.

16.4 Promptly upon learning of any claim for which it seeks indemnification under this License Agreement, CITY shall give written notice to LICENSEE of the claim. LICENSEE, as the indemnifying Party, shall bear the cost of and shall have the right to control the defense, the right to select counsel of its own choice, and the right to settle the claim. CITY shall cooperate and assist LICENSEE in investigating and defending against the claim. If LICENSEE does not provide the indemnity and defense, or if LICENSEE does not make diligent effort to settle the claim or provide for a defense, CITY may assume control of the matter with counsel of its own choosing and either make a reasonable settlement of the claim or undertake a defense, all at LICENSEE's sole cost and expense.

16.5 Neither party will be liable to the other for any special, consequential or other indirect damages arising under this License Agreement.

**ARTICLE 17
INSURANCE**

17.1 **Insurance Required.** During the term of this Agreement, and at all times thereafter when LICENSEE is occupying or using the licensed areas in any way, LICENSEE shall at all times carry insurance issued by companies duly licensed and authorized to provide insurance in the State of Texas rated at least A VIII under the A. M. Best rating system, and approved by CITY (which approval shall not be unreasonably withheld) to protect LICENSEE and the CITY from and against any and all claims, demands, actions, judgments, costs, expenses, or liabilities of every kind that may arise, directly or indirectly, from or by reason of losses, injuries, or damages described in this Agreement. The CITY reserves the right to review the insurance requirements and to reasonably adjust insurance and limits when the CITY determines that changes in statutory law, court decisions, or the claims history of the industry or the LICENSEE require adjustment of the coverage.

17.2 Minimum Coverages. At a minimum, Licensee shall carry and maintain the following policies and shall furnish the CITY Risk Manager Certificates of Insurance on the most current State of Texas Department of Insurance-approved certificate form as evidence thereof.

A. Commercial General Liability coverage with minimum limits of liability of \$2,000,000 per occurrence and \$2,000,000 aggregate. The policy shall contain no exclusions without specific reference to same, and shall include coverage for products and completed operations liability; independent contractor's liability; personal & advertising injury liability; and coverage for property damage from perils of explosion, collapse or damage to underground utilities, commonly known as XCU coverage.

B. Workers' Compensation coverage with statutory limits of liability as set forth in the Texas Workers' Compensation Act and Employer's Liability coverage of not less than \$1,000,000 per accident, \$1,000,000 per disease and \$1,000,000 per disease per employee.

C. Business Automobile Liability Insurance for any vehicles, owned vehicles, non-owned vehicles, scheduled vehicles and hired vehicles with a minimum combined single limit of liability of \$2,000,000.

D. Pollution liability insurance which provides coverage for sudden and accidental environmental contamination with minimum limits of liability of \$5,000,000.

E. Umbrella or Excess Liability insurance with minimum limits of \$5,000,000 combined single limit per occurrence, and \$5,000,000 aggregate.

17.3 CITY as Additional Insured. All policies, except for Workers' Compensation policies, shall list the CITY and all associated, affiliated, allied and subsidiary entities of CITY, now existing or hereafter created, and their respective officers, boards, commissions, councils, employees, agents, and volunteers as their respective interests may appear, as Additional Insureds (CITY and such other persons and entities being collectively referred to herein as "Additional Insureds") and shall include cross-liability coverage. Should any of the policies be canceled before the expiration date thereof, written notice shall be given to the City's Risk Manager in accordance with the policy provisions. The "other insurance" clause shall not apply to the CITY; it being the intention of the parties that the above policies covering Licensee and the Additional Insureds shall be considered primary coverage. Each policy shall contain a waiver of all rights of recovery or subrogation against CITY, its officers, agents, employees, volunteers and elected officials.

17.4 Occurrence Basis Policies. All insurance policies shall be occurrence-based, other than those for workers' compensation. Claims-made policies will not be accepted.

17.5 Combining Policy Amounts. The coverage amounts set forth in this section may be met by a combination of underlying (primary) and umbrella policies so long as in combination the limits equal or exceed those stated and the umbrella policy follows the form, or its terms and conditions are at least as broad as those of the primary policies.

17.6 **Insurance Primary.** All policies of the Licensee shall be primary, and any policy of insurance or self-insurance purchased or held by the CITY now or in the future shall be non-contributory. The term “policy of insurance” as applied to the Additional Insureds shall include any self-insurance program, self-insured retention or deductible, or risk pool program or an indemnification, defense, or similar program purchased or maintained by CITY and Additional Insureds.

17.7 **Contractors.** Any Contractor or Subcontractor retained by Licensee to perform work or services for Licensee under this Agreement shall be required to insure against liability to the same extent as provided above, including Additional Insured endorsements, as a condition of being granted access to Poles.

17.8 LICENSEE shall immediately advise the CITY’s City Attorney’s Office of actual or potential litigation that may develop and affect an existing carrier's obligation to defend and indemnify.

17.9 This Article creates no right of recovery of an insurer against the CITY. The required insurance policies shall protect the LICENSEE and the CITY. The insurance shall be primary coverage for losses covered by the policies.

ARTICLE 18 PERFORMANCE BOND

18.1 LICENSEE shall obtain and maintain at its sole cost a corporate surety bond securing performance of its obligations and guaranteeing faithful adherence to the requirements of the License Agreement for the protection of the CITY. The surety bond must be:

- a. in an amount not less than One hundred Thousand Dollars (\$100,000);
- b. issued by a surety company licensed to do business in the State of Texas and reasonably acceptable to the CITY; and
- c. reasonably acceptable to the CITY’s City Attorney.

18.2 The LICENSEE shall obtain this bond no later than the effective date of this License Agreement and prior to construction or installation of any Network Facilities in the Rights-of-Way.

18.3 The rights reserved to the CITY under the bond are in addition to all other rights. No action, proceeding or exercise of a right regarding the bond shall affect the CITY’s rights to demand full and faithful performance under this License Agreement or limit the LICENSEE’s liability for damages.

**ARTICLE 19
TREE TRIMMING**

19.1 The right, license, privilege and permission is hereby granted to the LICENSEE, its contractors and agents, to trim trees upon and overhanging the streets, avenues, highways, alleys, sidewalks and public places of the CITY so as to prevent the branches of such trees from coming in contact with the aerial wires, fiber or cables of the LICENSEE.

**ARTICLE 20
EMERGENCY NOTIFICATION TO LICENSEE**

20.1 The LICENSEE Call Center shall be available to CITY staff 24 hours-per-day, 7 days-per-week, regarding problems or complaints resulting from the Network Facilities. The CITY's City Engineer may contact LICENSEE by telephone at a number which shall be provided by LICENSEE in conjunction with all permit applications.

**ARTICLE 21
NOTICES**

21.1 All notices permitted or required hereunder shall be in writing and shall be transmitted via certified United States mail, return receipt requested, or by private delivery service and shall be addressed as follows or to such different addresses as the Parties may from time to time designate by giving written notice to the other party of such change:

If to the CITY, to:

City of College Station
Attn: City Manager
P.O. Box 9960
College Station, TX 77842
Phone (979) 764-3500

Copy to:

City of College Station
Attn: City Engineer
P.O. Box 9960
College Station, TX 77842
Phone (979) 764-5007

If to LICENSEE, to:

ExteNet Systems, Inc.
ATTN: CFO
3030 Warrenville Road, Suite 340
Lisle, Illinois 60532
Phone (630) 505-3800

Copy to:

ExteNet Systems, Inc.
ATTN: General Counsel
3030 Warrenville Road, Suite 340
Lisle, IL 60532
Phone (630) 505-3800

Notices shall be deemed effective upon receipt.

ARTICLE 22 ASSIGNMENT

22.1 The rights granted by this License Agreement inure to the benefit of LICENSEE and shall not be assigned, transferred, sold or disposed of, in whole or in part, by voluntary sale, merger, consolidation or otherwise by force or involuntary sale, without the expressed prior written consent of the CITY, which consent shall not be unreasonable withheld, delayed or conditioned.

22.2 Notwithstanding the provisions of Section 22.1, a transfer of this License Agreement may occur without CITY approval in the following circumstance: (i) an assignment or transfer to entities that control, are controlled by, or are under common control with LICENSEE, or (ii) the acquisition of all or substantially all of LICENSEE's assets in the College Station, Texas market by reason of a merger, acquisition or other business reorganization. In order to effect an assignment of this License Agreement as listed in (i) and (ii) above without CITY approval, the LICENSEE must provide the CITY Administrator a Notice of Assumption at least thirty (30) days prior to the assignment which contractually binds the purchasing or acquiring party to meet all the obligations of this License Agreement.

22.3 CITY acknowledges that LICENSEE's business plan includes leasing the capacity of its Network Facilities to Third Parties, often by long-term conveyances that extend for the entire useful life of the Network Facilities. Such long-term leases are agreed to be within the scope of LICENSEE's intended use and shall not be deemed assignments requiring CITY's consent, provided that LICENSEE has delegated none of its obligations under this License Agreement to the lessee of the Network Facilities, and CITY may continue to look solely to LICENSEE for performance hereunder.

22.4 LICENSEE may also assign this License Agreement, without CITY's consent and without prior notice to CITY, to an institutional mortgagee or lender providing financing to LICENSEE with respect to LICENSEE's DAS Network or Network Facilities in the event such institutional mortgagee or lender exercises its foreclosure right against LICENSEE and operates the DAS Network or Network Facilities; provided such institutional mortgagee or lender is capable of assuming all of the obligations of the LICENSEE under this License Agreement and further provided that any assignment will not be effective against CITY unless and until written notice of such assignment and exercise of rights is provided to CITY.

ARTICLE 23 FUTURE CONTINGENCY

23.1 Notwithstanding anything contained in this License Agreement to the contrary, in the event that this License Agreement, in whole or in part, is declared or determined by a judicial, administrative or legislative authority exercising its jurisdiction to be excessive, unrecoverable, unenforceable, void, unlawful, or otherwise inapplicable, the LICENSEE and the CITY shall meet and negotiate an amended License Agreement that is in compliance with the authority's decision or enactment and, unless explicitly prohibited, the amended License Agreement shall provide the CITY with a level of compensation comparable to that set forth in this License Agreement.

ARTICLE 24 MISCELLANEOUS

24.1 **Choice of Laws.** This License Agreement shall be construed and enforced in accordance with the laws of the State of Texas without regard to the conflict of law provisions thereof. Exclusive venue shall be had in Brazos County, Texas.

24.2 **Entire Agreement.** This License Agreement, together with its attached exhibits, contains the entire understanding between the Parties with respect to the subject matter hereof. There are no representations, agreements or understanding (whether oral or written) between or among the Parties relating to the subject matter of this License Agreement which are not fully expressed herein. This License Agreement can be amended, supplemented, modified or changed only by a written document executed by both Parties.

24.3 **Reservation of Rights by Parties.** Except as specifically set forth herein to the contrary, the CITY and LICENSEE each reserve all rights under applicable state and federal law.

24.4 **Authority.** The signer of this License Agreement for the LICENSEE and the CITY hereby represents and warrants that he or she has full authority to execute this License Agreement on behalf of the LICENSEE or the CITY respectively.

24.5 **Waiver.** None of the material provisions of this License Agreement may be waived or modified except expressly in writing signed by the LICENSEE and CITY, as authorized by City Council. Failure of either party to require the performance of any term in this License 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.

24.6 **Severability.** If any clause or provision of the License Agreement is illegal, invalid, or unenforceable under present or future laws effective during the term of this License Agreement, then and in that event it is the intention of the parties hereto that the remainder of this License Agreement shall not be affected thereby, and it is also the intention of the parties that in lieu of each clause or provision of this License Agreement that is illegal, invalid, or unenforceable, there be added as part of this License 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.

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

24.8 **Singular and Plural.** All references to the plural herein shall also mean the singular and to the singular shall also mean the plural unless the context otherwise requires.

24.9 **Ambiguity.** Any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not be applied in the construction or interpretation of this License Agreement.

24.10 **No Third Party Beneficiaries.** No person or entity shall be a third party beneficiary to this License Agreement or shall have any right or cause of action hereunder.

24.11 **No Partnership.** This License Agreement and the transactions and performances contemplated hereby shall not create any manner of partnership, joint venture or similar relationship between the Parties.

IN WITNESS WHEREOF the Parties have caused this License Agreement to be executed by their duly authorized representatives.

EXTENET SYSTEMS, INC.

CITY OF COLLEGE STATION

By: _____
Printed Name: _____
Title: _____
Date: _____

By: _____
Mayor
Date: _____

ATTEST:

City Secretary
Date: _____

APPROVED:

City Manager
Date: _____

City Attorney
Date: _____

Assistant City Manager / CFO
Date: _____

LIST OF EXHIBITS

- Exhibit A – Diagrams, Maps, and Locations of Facilities and Nodes
- Exhibit B – Construction Guidelines (Pole Attachment Specifications)
- Exhibit C – Fiber Indefeasible Right of Use Agreement
- Exhibit D – Form of Statement to be Submitted with Annual Fee

Exhibit “A”
Diagrams, Maps, and Locations of Facilities and Nodes

Exhibit “B”
Construction Guidelines (Pole Attachment Specifications)

Exhibit “C”
Fiber Infeasible Right of Use Agreement

Exhibit “D”
Form of Statement to be Submitted with Annual Fee

CERTIFIED PAYMENT FORM

Please find attached the following supporting documentation for each category:

Gross Revenue Collected by _____:

Fee: _____

Fee is to be the greater of:

(a) five percent (5%) of Gross Revenues; or

(b) a minimum base payment of \$1,200.00 per year per facility or node and an additional \$900.00 per year per facility or node for each additional tenant, provider, or telecommunications carrier using the facility or node.

Indicate if fee is based upon percentage or minimum (circle applicable choice).

Property Taxes _____

I, _____ (name), in my capacity as _____ (title) for _____, am hereby authorized by _____ to make this filing on behalf of _____, and do hereby certify that to the best of my knowledge and belief, the foregoing information is true and correct.

Signature

Date

Printed Name

STATE OF _____
COUNTY OF _____

§
§

BEFORE ME, the undersigned on this day personally appeared _____ (Name), _____ (Title) and attested that she/he is authorized to sign on behalf of _____, and proved to me through the presentation of a valid Driver's License to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that she/he executed the same for the purposes and consideration therein expressed. M_____. _____ furthermore attested that he/she is signing this document in his/her capacity as _____ for and on behalf of _____, and that such capacity makes his/her signature valid and binding to _____.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, this _____ day of _____, 20____.

NOTARY OF PUBLIC,
State of _____

My Commission Expires: _____

**POLE ATTACHMENT LICENSE AGREEMENT BETWEEN
THE CITY OF COLLEGE STATION AND LICENSEE**

THIS AGREEMENT (“License Agreement”) is made by and between the **City of College Station**, a municipal corporation and home-rule municipality of the State of Texas located at 1101 Texas Avenue South, College Station, Texas 77840 (“CITY” or “Licensor”) and **ExteNet Systems, Inc.**, a Delaware corporation with its principal place of business located at 3030 Warrenville Road, Suite 340, Lisle, Illinois, 60532 (“LICENSEE” or “Company” or “ExteNet”), each referred to as a “Party” or jointly as the “Parties”.

WHEREAS, CITY, operates or controls certain utility poles in the public rights of way managed and controlled by CITY throughout College Station; and

WHEREAS, Licensee desires to provide voice, video, internet, or data transmission and other lawful communications services within CITY’s service area; and

WHEREAS, Licensee will need to place and maintain cables, equipment, facilities, including facilities for certain wireless services, within CITY’s service area and desires to place such cables, equipment, facilities, and wireless facilities on various Poles and easements owned by CITY; and

WHEREAS, CITY is willing to grant Licensee a revocable, non-exclusive license to use certain Poles on the strict terms and conditions set forth in this Agreement and subject to the City of College Station's Code of Ordinances, as it may be amended from time to time; and

WHEREAS, CITY is willing to allow Licensee to undertake the Make-Ready construction work necessary to prepare certain Poles to accommodate Licensee’s cables, equipment, facilities, and certain wireless facilities under the strict terms and conditions set forth in this Agreement.

NOW, THEREFORE, in consideration of the mutual covenants, terms and conditions herein contained, CITY and Licensee do hereby mutually covenant and agree as follows:

**ARTICLE 1
DEFINITIONS AND CONSTRUCTION**

1.1 **Definitions:** For purposes of this Agreement, capitalized terms are defined as follows:

A. **CITY Distribution Construction Standards** means those engineering and construction standards, specifications, and designs maintained and referenced internally by CITY, and complied with in all material respects by CITY, for its own Pole distribution construction and engineering efforts.

B. **Annual Usage Charge** means the recurring charge that Licensee is to pay CITY annually under this Agreement for the use of CITY's Poles. The Annual Usage Charge is in addition to any Costs and Filing Fees Licensee may incur during a Contract Year, and shall be determined by CITY as of December 1 of each Contract Year, other than the first Contract Year. The Annual Usage Charge for any Contract Year shall be the number of Attachments to which is shown on CITY's records to exist as of December 1 of the preceding Contract Year multiplied by the Usage Rate for the new Contract Year, except as otherwise provided herein. The calculation of the Annual Usage Charge will be for each pole with attachment of equipment where no horizontal Cable attachment is present, and for any horizontal Cable Attachment occupying up to one foot of space on the pole, and will not include Attachments that are overlashed to any of Licensee's Attachments for which a Usage Rate is chargeable, unless applicable state or federal law is amended to allow such a charge. Additional equipment (other than Wireless Facilities) that is attached to an existing Attachment and guy wires shall not constitute an additional Attachment for purposes of the Annual Usage Charge. Unless otherwise expressly provided in this Agreement, Annual Usage Charges are not refundable.

C. **Application** means the CITY prescribed application sheet, together with all required prints, maps, proposed routes, project descriptions, and proposed schedules that Licensee must submit, in full, to CITY in order to request and be granted an Attachment License for a particular Pole or group of Poles.

D. **Attachment** means (other than for Annual Usage Charge purposes):

1. each Cable owned, controlled, or used by Licensee, together with its associated messenger strand, guy wires, span guys, anchors, and other appurtenant and incidental facilities, affixed to a Pole regardless of the means by which affixed (a Cable lashed to another Cable and each Cable lashed to a common messenger is a separate Attachment);

2. each amplifier, repeater, controller, box, cabinet, appliance, device, or piece of equipment owned, controlled, or used by Licensee and affixed to a Pole, regardless of the means by which it is affixed;

3. each amplifier, repeater, controller, box, cabinet, appliance, device, or piece of equipment owned, controlled, or used by Licensee that is resting on the ground but is connected to a Pole, Attachment, or CITY line by a conductor;

4. each antenna, wireless transceiver, transmitter, or other similar device used for or associated with wireless communication or wireless data transmission, and cables or wires connecting such antenna, wireless transceiver, transmitter, or other similar device to other Attachments on the same Pole, provided that such antenna, wireless

transceiver, transmitter, or other similar device or equipment is not used to provide Commercial Mobile Radio Services (“CMRS”) as such term is defined in the Communications Act of 1934, as amended, and the rules and regulations of the Federal Communications Commission, unless such CMRS equipment is used pursuant to separate license agreements and permits issued by the CITY, expressly for CMRS and related purposes.

5. A new or existing service wire drop that (i) is located in the same one foot of space assigned to the Licensee’s Cable Attachment, and (ii) is attached to the same Pole as an existing Attachment of Licensee shall not constitute an additional Attachment.

E. **Attachment License** means the revocable (solely pursuant to the terms and conditions hereof and applicable law), non-exclusive right of Licensee to make an Attachment to a Pole under this Agreement, pursuant to CITY’s approval of an Application and subject to (1) any modifications, conditions, and specifications imposed by CITY pursuant to this Agreement or applicable law when approving the Application and (2) all Design Documents issued by CITY with respect to the Attachment and Pole in question. An Attachment License authorizes Attachments solely for lawful communications purposes, as described in this Agreement. The use of any Attachment for any purpose other than providing lawful communications as described in this Agreement is prohibited and shall constitute a material breach of this Agreement.

F. **Boxing** means the use of a cross arm or through bolt to facilitate a pole attachment on the opposite side of the pole from any existing attachment and the installation of cable or facilities on both sides of the same pole at approximately the same height. Licensee is prohibited from Boxing on CITY poles.

G. **Cable** means a conductor, wire, or fiber or a bound or sheathed assembly of conductors, wires, or fibers used as a wire communications or transmission medium (a bare messenger is also a Cable).

H. **Communications Space** means the area on any given Pole, below and sufficiently remote from the Supply Space as required by Electrical Code, within which Attachments and Pole Contacts may lie. The term Communications Space has the equivalent meaning as that used in the Electrical Code. The top surface of the Communications Space must remain at least 40 inches from the lowest surface of the Supply Space and from any other electrical lines, conductors, or equipment, or below the Supply Space a distance as defined by the National Electric Safety Code for a specified condition. The bottom surface of the Communications Space must maintain a clearance in accordance with National Electrical Safety Code standards.

I. **Conduit** means a structure owned by CITY containing one or more Ducts, usually placed in the ground, in which cables or wires may be installed.

CITY-owned electrical Conduit is expressly reserved for utility reliability and expansion purposes and is not available for use by Licensee.

J. **Conduit System** means any combination of Ducts, Conduits, Manholes, and Handholes joined to form an integrated whole. As used in this Agreement, the term refers to Conduit Systems owned or controlled by CITY. CITY-owned electrical Conduit System is expressly reserved for utility reliability and expansion purposes and is not available for use by Licensee.

K. **Contract Year** means any calendar year during which this Agreement is in effect, beginning January 1 and ending December 31, except that the first Contract Year shall run from the Effective Date until December 31 of that year and the final Contract Year shall run from January 1 of that year until the date of termination.

L. **Contractor** includes subcontractors.

M. **Cost** means the total cost reasonably incurred by CITY for any particular task under this Agreement, and includes without limitation reasonable labor, material, equipment usage, outside Contractor and vendor charges, reasonable overhead, and reasonable general and administrative expenses. Costs may be incurred for, without limitation, engineering and engineering review, Make-Ready construction, inspections and oversight, auditing, public relations and intervention, and other services. Certain Cost rates are specified in Exhibit A to this Agreement, which CITY may change no more than once per year upon 60-days' notice to Licensee; provided, however, that any such change to such Cost rates shall be based on CITY's reasonable cost of labor, materials, and equipment usage. Subject to the foregoing, Costs shall be determined by CITY in its reasonable judgment and reasonable discretion, and shall be paid by Licensee in accordance with either of the following, at CITY's sole option:

1. Any advance estimate provided by CITY, in which event CITY shall have the right to refuse to incur the Costs until the estimate is paid; and/or
2. Any final invoice submitted by CITY. In the event an advance estimate was paid by Licensee for Costs, the final invoice will reflect such payment.

N. **Design Documents** mean all specifications, drawings, schematics, blueprints, engineering documents, and written requirements for materials, equipment, design, construction, and workmanship issued by CITY to Licensee with respect to Make-Ready and installation work on a particular Attachment or Pole or group of Attachments or Poles.

O. **Duct** means a single enclosed tube, pipe, or channel for enclosing and carrying cables, wires, and other facilities owned by CITY. As used in this Agreement, the term Duct includes Inner-Ducts created by subdividing a Duct into smaller channels. CITY-owned electrical Duct is expressly reserved for utility reliability and expansion purposes and is not available for use by Licensee.

P. **Effective Date** means the date CITY signs this Agreement as shown on the signature page of this Agreement.

Q. **Electrical Code** means the National Electrical Safety Code (NESC), the National Electrical Code (NEC), and Chapter 752 of the Texas Health and Safety Code.

R. **Filing Fee** means the initial, non-refundable fee charged to Licensee for filing an Application for an Attachment License. Filing Fees are set by the CITY and shall not exceed the actual and reasonable cost to CITY of reviewing and processing an Application. The Filing Fee is solely to compensate CITY for reviewing and processing an Application and does not include or offset Costs or Annual Usage Charges.

S. **Handholes** means an enclosure, usually below ground level, used for the purpose of installing, operating, and maintaining Attachments in a Conduit. A Handhole is too small to permit personnel to physically enter. CITY-owned electrical Handholes are expressly reserved for utility reliability and expansion purposes and are not available for use by Licensee.

T. **Infrastructure Usage Regulations** means the College Station City Code of Ordinances and any other CITY ordinance that may be enacted to govern electric utility infrastructure usage or rental.

U. **Inner-Duct** means a pathway created by subdividing a Duct into smaller channels. City-owned electrical Inner-Duct is expressly reserved for utility reliability and expansion purposes and is not available for use by Licensee.

V. **Manhole** means an enclosure, usually below ground level and entered through a hole on the surface covered with a cast iron or concrete Manhole cover, which personnel may enter and use for the purpose of installing, operating, and maintaining Attachments in a Conduit. CITY-owned electrical Manholes are expressly reserved for utility reliability and expansion purposes and are not available for use by Licensee.

W. **Pole** means any electric distribution pole owned by CITY that supports electric lines having a nominal voltage of not more than 35kV; provided, however, that any electric distribution pole having a nominal voltage of more than 35kV will also be a "Pole" if the pole is also used for distribution of power from a local substation to customers. Unless otherwise agreed by CITY with respect to a

particular pole, the term Pole does not include (1) street lighting, traffic signal, or night watchman poles, (2) poles or towers supporting transmission lines carrying a nominal voltage greater than 35kV, unless such poles are also used to support transmission lines carrying a nominal voltage of not more than 35kV, (3) any structure or facility within a substation, (4) conduits (except as otherwise provided in Article 11), or (5) any structure not used for electric power distribution.

X. **Pole Contact** means the point or contiguous area on a Pole at which one or more of Licensee's Attachments make physical contact with (1) a Pole or (2) a Third Party User's Attachment, during a Contract Year, regardless of the duration for which the Pole Contact existed.

Y. **Make-Ready** means all work required to accommodate Licensee's Attachments on a Pole with respect to CITY and Third Party User needs and in compliance with Electrical Code, CITY Distribution Construction Standards, generally accepted engineering and construction practices, and applicable laws.

Z. **Maximum Lawful Usage Rate** means the maximum amount that CITY may lawfully charge for an Attachment under applicable state and federal law, rules and regulations in effect from time to time. If, for any Contract Year, applicable state or federal law does not limit the amount CITY may charge Licensee for a particular Attachment or service under this Agreement, the Maximum Lawful Rate for the Attachment or service shall be the amount that CITY determines, in its sole judgment and discretion, to constitute a reasonable and non-discriminatory annual Usage Rate.

AA. **Supply Space** means the area on any given Pole, above the Communications Space, that is reserved for the placement of electric supply lines, electrical equipment, and other CITY facilities. The term Supply Space has the equivalent meaning as that used in the Electrical Code. Licensee may not place any Attachments or Pole Contacts in the Supply Space.

BB. **Third Party User** means any third party that has, or may be granted, an Attachment License or other right to attach with respect to a Pole. Third-parties that are allowed by Licensee to overlash third-party conductors onto existing Licensee Attachment(s) shall also execute a Pole Attachment License Agreement with the CITY, regardless of the duration for which the Pole Contact existed. At least thirty (30) days before third-party overlash operations, Licensee shall provide advanced written Notice to CITY that identifies the proposed third-party overlash entity and all proposed third-party overlash locations.

CC. **Unauthorized Attachment** means an Attachment or any other affixing or placing of Licensee's facilities onto CITY property for which Licensee does not have a valid Attachment License.

DD. **Usage Rate** means, for each given Contract Year, the amount Licensee must pay CITY for each Attachment.

EE. **Wireless Facilities** means an antenna, wireless transceiver, transmitter, or other similar device used for or associated with wireless communication or wireless data transmission, provided that such Wireless Facilities are not used to provide Commercial Mobile Radio Services (“CMRS”) as such term is defined in the Communications Act of 1934, as amended, and the rules and regulations of the Federal Communications Commission, unless such CMRS equipment is used pursuant to separate license agreements and permits issued by the CITY, expressly for CMRS and related purposes.

FF. **Wireless Facilities Rental Rate** means, for each given Contract Year, the amount Licensee must pay CITY for attaching Wireless Facilities to a Pole. Rental and license rates for CMRS and related services and equipment shall be set by separately negotiated license agreements with CITY.

1.2 **Syntax** Except as otherwise expressly provided herein, all nouns, pronouns and variations thereof shall be deemed to refer to the singular and plural.

1.3 **Amendments** Any reference to a law, code, or document shall mean such law, code, or document as it may be amended from time to time.

1.4 **Third Party User Agreements** CITY has in the past entered into other Pole usage agreements with Third Party Users. In construing this Agreement, no variations between this Agreement and other agreements with Third Party Users shall have any evidentiary value or be construed against CITY.

1.5 **No Construction against CITY** The rule of construction that ambiguities in a contract are to be construed against the drafting party shall not apply to this Agreement.

1.6 **Headings** The descriptive headings in this Agreement are only for the convenience of the parties and shall not be deemed to affect the meaning or construction of any provision.

ARTICLE 2 SCOPE AND TERM OF AGREEMENT

2.1 **General Purpose** In accordance with the provisions of this Agreement, CITY may issue Attachment Licenses to Licensee on the terms and conditions set forth herein. Before Licensee makes any Attachment to or begins any work on a Pole, excluding service drops, it shall file an Application and await CITY’s issuance of an Attachment License and Design Documents with respect to that particular Attachment or Pole, as set forth in Article 4. Nothing in this Agreement shall be construed to obligate CITY to grant an Attachment License with respect to any particular Pole where Licensee has failed to fulfill the requirements herein for the grant of such Attachment License.

2.2 **Term** The initial term of this Agreement is five (5) years, beginning on the Effective Date and renewing thereafter for four (4) successive three (3) year terms, unless terminated by either Party. At the end of each then-current term, Licensee shall, if it intends to renew, give CITY written notice of its request to renew before the end of the then-current term. If Licensee has not materially defaulted during the course of the then-current term (other than any material default that Licensee cured), the request to renew shall be granted. If Licensee has materially defaulted and not cured such default, the request to renew will be granted in CITY's reasonable discretion. If the request to renew is denied, CITY will give written notice of the reasons for denial within 30 days of receiving Licensee's request and this Agreement will expire at the term's end.

2.3 **Existing Facilities Only** Except as otherwise set forth in paragraph 6.4, (i) CITY is under no obligation to add, build, keep, maintain, or replace Poles or any other facilities for the use or convenience of Licensee; and (ii) the maintenance, replacement, removal, relocation, or addition of CITY Poles and facilities shall remain within the sole province and discretion of CITY. Notwithstanding the foregoing, any actions of CITY under this Agreement shall be taken on a nondiscriminatory basis.

2.4 **Poles Only** This Agreement addresses only Attachments to CITY Poles. This Agreement does not authorize Licensee to install or maintain Attachments on other CITY property and facilities, including without limitation conduits, buildings, and towers.

2.5 **City Rights-of-Ways** Nothing in this Agreement shall be construed to grant Licensee any right or authorization to use or occupy the public streets or rights-of-way of the CITY. Except for the placement of Attachments on Poles or other facilities covered by this Agreement and notwithstanding that a Pole to which Licensee may attach its facilities is in the CITY's public streets or rights-of-way, Licensee and CITY agree that the authority to attach to CITY Poles does not grant Licensee authority to use or occupy CITY's public streets or rights-of-way.

2.6 **Private Easements** Licensee understands that some Poles are located on dedicated easements over private property that, by their terms, restrict the use of the easement to CITY for the sole purpose of electric distribution or transmission. Nothing in this Agreement shall compel CITY to extend any property rights it does not have. Nothing in this Agreement and no action by CITY shall be construed to offer, grant or approve any right or license to use such easement or to affix an Attachment to a Pole within such easement without the consent of the owner of the property to which the easement is appurtenant, unless otherwise allowed by law. CITY has no obligation to expand or obtain rights in such easement on Licensee's behalf. It is the sole obligation of Licensee to obtain the necessary consent or additional easement rights, if any, at Licensee's own expense.

2.7 **Eminent Domain** CITY is under no obligation to exercise any power of eminent domain on Licensee's behalf.

2.8 **No Property Rights In Poles** All Poles shall remain the property of CITY and no payment made by Licensee shall create or vest in Licensee any ownership right, title, or interest in any Pole, but Licensee's interest shall remain a bare license. The existence of such a license shall not in any way alter or affect CITY's right to use, change, reclaim, operate, maintain, or remove its Poles, subject to the terms and conditions hereof. Nothing herein shall prohibit Licensee from repairing, operating, or maintaining a Pole at Licensee's sole cost and expense if: (i) CITY expressly abandons the Pole or constructively abandons the Pole by electing not to repair, operate, or maintain the Pole to such an extent that a reasonable person would conclude that CITY has abandoned the Pole, and (ii) Licensee is permitted to do so under the City Code, the terms of Licensee's franchise, if applicable, and any applicable easements; provided, however, that CITY may remove an abandoned Pole if such removal manifestly serves the public interest. If CITY's use of its Poles materially and adversely affects Licensee's use and operation of an Attachment, Licensee may, by written notice to CITY, remove its Attachments from any adversely affected Pole. Such termination shall be implemented by written notice to CITY.

2.9 **License not Exclusive** Licensee acknowledges that CITY has entered into before, and may enter into in the future, similar or other agreements concerning the use of Poles by third parties, including Licensee's competitors. Nothing in this Agreement shall be construed to limit or in any way affect CITY's right or ability to enter into or honor other agreements, or to grant any rights, licenses, or access concerning any Pole, irrespective of the character or degree of economic competition or loss caused to Licensee, so long as CITY's actions are nondiscriminatory.

2.10 **CITY Priority** The primary purpose of a Pole is electric distribution and public health and safety, and CITY reserves to itself first priority in the use of a Pole. In the event of any conflict between the use of a Pole by CITY and Licensee, the use of a Pole for the distribution of electric power to CITY customers shall prevail and have priority over Licensee's use of the Pole. CITY retains and shall have exclusive use of the Supply Space. All of Licensee's Aerial Attachments shall remain within the Communications Space.

2.11 **Discretion of CITY Final** CITY reserves the right to deny any Application pursuant to the terms and conditions hereof, reserve any Pole to its own use pursuant to a *bona fide* development plan, or modify any Pole for legal, safety, mechanical, structural, engineering, environmental, reliability, or service reasons. Determination of these issues shall at all times remain within the reasonable discretion of CITY, subject in all respects to the terms and conditions hereof. Licensee will not be required to pay for any modifications to any Pole or its Attachments in order to accommodate a Third Party User.

2.12 **No Cost or Expense to CITY** The engineering, construction, installation, use, operation, and maintenance of Licensee's Attachments shall be at Licensee's sole expense. Unless otherwise expressly provided herein, nothing in this Agreement shall be construed to require CITY to expend any funds or to incur or bear any cost or expense.

ARTICLE 3
USAGE RATES AND CHARGES

3.1 **Payment Due upon License Approval** CITY's approval of an Attachment License shall be conditioned on Licensee's payment, within 45 days of approval, of the then current Usage Rate for each approved Attachment, prorated to reflect the number of months remaining in the Contract Year after CITY's invoice, with any partial month being considered to be a full month.

3.2 **Calculation of Usage Rates** For each Contract Year, the Usage Rate shall be no higher than the Maximum Lawful Usage Rate. Before each new Contract Year, CITY will notify Licensee in writing of the Maximum Lawful Usage Rate for such Contract Year at least 60 days in advance of any invoice. The CITY shall provide its Maximum Lawful Usage Rate calculations and relevant support data so Licensee may verify that the Rate is calculated in accordance with applicable law. The Maximum Lawful Rate may take into account changes in applicable laws that are to go into effect during the upcoming Contract Year. If Licensee disagrees in good faith with CITY's determination of the Maximum Lawful Usage Rate, Licensee may protest in writing within 30 days of receipt of the notice. The protest shall include copies of all records and other documentation that support Licensee's position. Failure to timely protest CITY's proposed Usage Rate shall constitute agreement to and acceptance of CITY's determination. If Licensee does timely protest a proposed Usage Rate, the parties shall endeavor in good faith to negotiate a resolution of the dispute. If the parties are unable to resolve the dispute within 60 days from the date of Licensee's protest, then either party may seek relief from the Texas Public Utilities Commission pursuant to Chapter 54.204 of the Texas Utilities Code, any successor regulation, or any other law conferring jurisdiction on the Texas Public Utilities Commission. The Texas Public Utilities Commission shall be the sole and exclusive forum for resolution of a dispute about a Usage Rate, unless the Texas Public Utilities Commission lacks jurisdiction, in which event the dispute resolution provisions set forth in paragraph 18.7 shall control. If the dispute is not resolved by the time the Annual Usage Charge invoice is issued, Licensee shall nonetheless pay the invoice based upon the disputed Usage Rate. Payment by Licensee of the invoice shall not prejudice Licensee's ability to continue to contest the Usage Rate, and CITY agrees not to interpose any claim, defense, or counterclaim that Licensee has waived its right to contest the Usage Rate by paying the disputed invoice.

3.3 **Subsequent Annual Usage Charges** In each January of each Contract Year and continuing thereafter until the expiration or termination of this Agreement, CITY will invoice for, and Licensee shall pay, within 45 days after receipt of invoice, the Annual Usage Charge for the new Contract Year. All overdue balances shall accrue interest at the rate of 1% per month from the due date until paid, or the maximum rate allowed by law, whichever is less.

3.4 **Invoice Disputes** If Licensee believes in good faith that an Attachment count contained in an Annual Usage Charge invoice is incorrect, it may pay the invoice

under protest. To protest an invoice, Licensee must give CITY written notice of the nature of its protest no later than the due date for payment of the invoice together with copies of records and other documentation supporting its position. The parties shall promptly meet to resolve the discrepancies in their records to determine the correct Attachment count. If the parties are unable to resolve a discrepancy as to the correct count, the parties may, upon mutual agreement, jointly conduct a physical inventory of geographical grids or other mutually agreeable census to determine the correct count. The cost to conduct such inventory or census shall be equally divided between the parties.

3.5 **Adjustments** If upon resolution of a dispute between the parties under paragraph 3.2 or paragraph 3.4, a refund is due to Licensee, CITY shall refund the amount of the overcharge together with interest at the rate specified in paragraph 18.5 from the date of CITY's receipt of the protested Annual Usage Charge payment. If Licensee owes additional money, a corrected invoice shall be issued by CITY for the additional Annual Usage Charge due, plus accrued interest at the rate specified in paragraph 18.5 from the due date of the original invoice.

3.6 **No Allowances** Unless otherwise expressly stated in this Agreement, there shall be no offsets against any sums due under this Agreement, or any other allowances, for system improvement, materials or labor supplied, upgrading, life extension, or other direct or incidental benefits conferred by Licensee upon CITY or its poles, system, or facilities. All such improvements and benefits belong solely to CITY, and the fact that such improvements or benefits may accrue shall in no way alter or affect Licensee's obligations under this Agreement.

3.7 **Wireless Facilities Rental Rate** CITY shall not impose a Wireless Facilities Rental Rate for any Attachment that is a Wireless Facility used exclusively to provide wireless services in a non-discriminatory manner to the public without charge. In the event Licensee offers commercial service using Wireless Facilities attached to a Pole that are not classified as Commercial Mobile Radio Services, CITY and Licensee shall negotiate in good faith on a just and reasonable rental rate for such Attachments. In no event shall the Wireless Facilities Rental Rate for Attachments that are Wireless Facilities exceed the Maximum Lawful Usage Rate.

3.8 **Commercial Mobile Radio Services** CITY is willing to grant a non-exclusive license to install, maintain, operate, repair, and replace a Distributed Antenna System ("DAS"), DAS Network, micro or small cell installations within the communications space on existing poles within discrete segments of the rights-of-way, subject to the requirements of a separate license agreement and pursuant to permits issued by the CITY. The separate license agreement is consistent with Section §54.205 of the Public Utilities Regulatory Act (Texas Utilities Code) which reserves "a municipality's historical right to control and receive reasonable compensation for access to the municipality's public streets, alleys, or rights-of-way or to other public property".

ARTICLE 4
ATTACHMENT LICENSES

4.1 **Attachment License Required** Licensee shall have an Attachment License with CITY before performing any work on a Pole or making any Contact with or Attachment to, a Pole or other facility on CITY property or easement. Maintenance of existing equipment shall be allowed if Licensee has a current Attachment License that covers the existing Attachments and equipment. Licensee must have an Attachment License for each Pole or group of Poles to which Licensee's Attachments are to be affixed, identifying each separate Attachment to the Pole(s) by type. An Attachment License is not needed to perform visual inspections necessary for preparing an Attachment Application.

4.2 **Overlapping** Licensee must obtain a separate and additional Attachment License for any Attachment it seeks to overlap to an existing Licensee or Third Party User Attachment or Pole Contact. Licensee may not allow another party to overlap to Licensee's facilities without such party first having an agreement with and Attachment License from CITY. Poles are the sole property of CITY, and Licensee shall not charge or accept any financial consideration for allowing a third party to overlap to an Attachment or Pole Contact without CITY's written consent.

4.3 **Application Process** The Application must be submitted in the then-approved CITY format. The Application form, and all required supporting documentation and other procedures, are within the reasonable discretion of CITY and may change from time to time upon prior written notice (provided such changes are not inconsistent with the terms and conditions of this Agreement and applied in a nondiscriminatory manner). . CITY may reject entirely an incomplete Application, or it may request additional information to support the Application, in which event the requested information shall be promptly furnished. In the event that CITY denies an Application, it shall provide written notice of its reason for denial to Licensee within 10 days of the date the Application was submitted.

4.4 **Filing Fee** The Filing Fee shall be paid at the time the Application is submitted. No Application will be considered before payment of the Filing Fee. Fee Schedule is attached as an exhibit.

4.5 **Approval**

(a) CITY retains sole and complete discretion to deny or modify any Attachment Application in order to be able to preserve the safety, reliability, integrity, and effectiveness of the electric distribution system that constitutes the core of its business and its governmental mandate. CITY will approve, modify, or deny an Attachment Application within 15 business days of submission. Licensee may request CITY to reconsider a denial or modification of an Attachment Application. CITY may approve an Application as submitted, approve it on a modified or conditional basis, or may deny the Application in accordance with the policies adopted by CITY pursuant thereto. An Application may be denied solely

for the reasons set forth. The CITY's Director of Utilities may deny an application if:

1. the applicant fails to submit a complete application;
2. the applicant fails to supplement its application with additional information or otherwise cooperate with the utility as requested in the evaluation of the application;
3. the applicant fails to pay the applicable filing fee;
4. the proposed attachments are of excessive size or weight or would otherwise subject utility infrastructure to unacceptable levels of additional stress;
5. approval would jeopardize the reliability or integrity of the electric system or of individual units of utility infrastructure;
6. approval would present a safety hazard to a City employee or the public;
7. approval would impair the City's ability to operate or maintain utility infrastructure; or
8. approval would require an unacceptable change, upgrade, or addition to utility infrastructure.

(b) In the event that CITY intends to deny an Attachment Application because the proposed Attachments are of excessive size or weight or would otherwise subject utility infrastructure to unacceptable levels of stress, because approval would jeopardize the reliability or integrity of the electric system or of individual units of utility infrastructure, because approval would present a safety hazard to a CITY employee or the public, because approval would impair the CITY's ability to operate or maintain utility infrastructure, or because of any other reason for which denial is permitted by law, and the Pole may be modified or replaced to resolve that issue, CITY shall approve the Attachment Application provided that (i) the Licensee agrees to pay CITY's Costs to so modify or replace the Pole, and (ii) the Attachment Application is otherwise acceptable and grantable pursuant to the terms and conditions of this Agreement and applicable law (provided, however, that nothing in this sentence abridges or modifies the requirements set forth in paragraph 6.4).

4.6 **Order of Approval** Applications concerning a particular Pole will be considered and acted upon by CITY in the order in which they are filed. For purposes of evaluating an Application with respect to Pole capacity and existing Third Party User Attachments, CITY will consider not only all existing attachments but also all valid Attachment Licenses and reserved CITY space.

4.7 **Engineering** Licensee shall submit documentation of its field evaluation using a CITY-approved Licensee employee. CITY shall not unreasonably withhold, condition, or delay grant of approval for a CITY-approved Licensee employee. CITY shall

accept and rely on such documentation, but shall reserve the right to perform, or have a firm retained by CITY perform, its own engineering and field evaluation including pole loading analysis. All Costs for such engineering and field evaluation shall be paid by Licensee. With respect to a particular Pole, CITY's engineering shall take into account and allow space for all Attachment Licenses, which are valid for that Pole. In granting an Attachment License, CITY shall issue to Licensee the related Design Documents that were paid for by the Licensee.

4.8 **Attachment License Expiration** All Attachment Licenses and Design Documents and any rights conferred thereunder shall expire on the later of (i) 120 days after issuance (or such longer period as the parties may agree to in writing) or (ii) 60 days after completion of all Make-Ready work, unless all Make-Ready and installation work has occurred in accordance with the Design Documents before the end of such period. If an Attachment License for a Pole expires, Licensee shall re-apply, *de novo*, for an Attachment License and must receive such License from the CITY before Licensee can begin working on or making an Attachment to that Pole.

ARTICLE 5 GENERAL REQUIREMENTS

5.1 **Work Site Safety** In performing any work on or near Poles supporting energized electric lines, Licensee, and its Contractors, agents and employees shall comply with Chapter 752 of the Texas Health and Safety Code and all federal, state and local laws, rules and regulations governing work in proximity to energized electric lines, including without limitation, those promulgated by the Occupational Safety and Health Administration. LICENSEE SHALL DEFEND, INDEMNIFY AND HOLD HARMLESS CITY, ITS OFFICERS, EMPLOYEES, VOLUNTEERS, AGENTS, CONTRACTORS, AND SUBCONTRACTORS FROM AND AGAINST ALL CLAIMS, DEMANDS, ACTIONS, SUITS AND JUDGMENTS ARISING FROM OR CONCERNING A BREACH BY LICENSEE OF ITS OBLIGATIONS UNDER THIS PARAGRAPH.

5.2 **Electrical Code** Licensee, and its Contractors, agents and employees, and all work, Contacts, and Attachments on a Pole shall at all times comply with the-then current Electrical Code, as applicable.

5.3 **Design Documents** All Make-Ready, installation, and other work performed by Licensee on a Pole or Attachment shall at all times comply with the Design Documents and CITY Distribution Construction Standards.

5.4 **Service Interruptions** Licensee shall not cause any interruption of CITY or Third Party User services without first obtaining CITY's express written consent as provided by Article 6. If it is necessary for CITY to de-energize any equipment or lines for Licensee's benefit, Licensee shall reimburse CITY in full for all Costs in doing so. In the event Licensee damages any of CITY's equipment or lines or causes any service interruption, Licensee, at its sole expense, shall immediately do all things reasonable to avoid injury and further damage, direct and incidental, resulting therefrom and shall notify

CITY immediately. Licensee shall be liable for all Costs resulting from such damage and any necessary repairs.

5.5 **CITY Oversight** CITY shall have the right to conduct on-site field oversight and inspections of Licensee's Attachments, work, and operations on Poles and in CITY easements. CITY may conduct pre-construction surveys, and in-progress and post-construction inspections at Licensee's expense and shall provide Licensee with the results. CITY shall at all times have unrestricted access to Poles and to all field work sites of Licensee and Licensee's Contractors. Both CITY and CITY's representative at any Pole site shall have complete and final authority to order the immediate suspension of Licensee's construction or installation activities if CITY or CITY's representative, in its sole discretion and judgment, deems such action necessary for reasons of safety, engineering, electrical service reliability, or failure to obtain proper licenses and permits. In the event of an oral suspension order, CITY shall send written notice to Licensee within three (3) days after such suspension, identifying the alleged bases for suspension. Such suspension shall be in effect until such time as the Licensee cures, at Licensee's sole Cost, the alleged bases for suspension. In no event shall CITY be responsible for any damages, losses, or costs incurred by Licensee as a result of such work stoppage. Licensee's failure to obey a suspension order issued in accordance with this Agreement shall constitute a material breach of this Agreement.

5.6 **Laws** To the extent that the Code of the City of College Station lawfully requires Licensee to possess a valid franchise or construction permit before engaging in a particular act, Licensee must comply with such requirement before beginning Make-Ready construction or installing Attachments. Nothing in this Agreement shall be construed as waiving other CITY requirements or permitting the construction of facilities other than Attachments. Attachments must conform to local, state, or federal law. Licensee's use of any Pole and Licensee's Attachments shall at all times conform to the requirements of the CITY's Code of Ordinances, Infrastructure Usage Regulations, and the published policies promulgated by the CITY pursuant thereto.

5.7 **Other Permits** Licensee shall apply for and obtain all licenses, permits or other authorizations required to provide its service or to use, operate or maintain its Attachments. If Licensee is denied any required license, permit or authorization, Licensee may, upon written notice to CITY, terminate any Attachment License granted hereunder that was predicated upon the grant of such license, permit or authorization.

5.8 **Taxes and Liens** Licensee shall pay all taxes and assessments lawfully levied on Licensee's Attachments and any tax, assessments, fee, or charge levied on Poles solely because of their use by Licensee. In no event shall Licensee permit any lien to be filed or to exist upon any Poles or CITY property as a result of any claim against Licensee. Licensee shall promptly pay upon receipt of written notice from CITY all such liens together with all fees and costs necessary to discharge same, or shall bond around such liens in the manner provided by law.

5.9 **Electrical Code Conflicts** In the event of a difference, conflict, or discrepancy between or among the requirements or practices of any Electrical Code or safety regulations, laws, or industry standards the following rules shall apply: (A) if one specification or practice is more stringent than the other, the more stringent shall apply; (B) if one is not more stringent than the other, the NESC shall govern to the extent permitted by law; (C) if the first two rules are insufficient to resolve the conflict in a clear and unambiguous manner, CITY shall determine which standard shall apply, giving highest priority to safety considerations.

5.10 **Design Document Conflicts** In the event of a difference, conflict, or discrepancy between or among the requirements or practices of the Design Documents and CITY Distribution Construction Standard, the Design Documents shall govern. In the event Licensee believes a Design Document or CITY Distribution Construction Standard is inconsistent with Electrical Code or applicable law, Licensee shall refer the matter to CITY for determination.

5.11 **No Interference** Licensee will use and operate any Wireless Facilities in a manner that will not cause radio frequency interference with the facilities or operations of CITY. Licensee will use and operate any Wireless Facilities in a manner that will not cause radio frequency interference with the Wireless Facilities of Third Party Users, provided that such other Third Party User's installation of Wireless Facilities predates the Licensee's installation of its Wireless Facilities. In the event any such interference occurs, Licensee will immediately upon receiving notice from CITY or the Third Party User, investigate the cause of such interference and if Licensee is determined to be the cause of such interference shall immediately cease operations until such interference is rectified, testing of said resolution excepted. In the event Licensee does not cease interfering operations then the Attachments constituting such Wireless Facilities shall become Unauthorized Attachments. CITY agrees that in the event CITY allows any Third Party User to use and operate Wireless Facilities on a Pole, CITY will require such Third Party User to agree (i) not to cause radio frequency interference to Licensee's Wireless Facilities on the Pole, provided that Licensee's installation of Wireless Facilities predates the Third Party User's installation of its Wireless Facilities; (ii) in the event such interference occurs, to cease operations immediately upon receiving notice from CITY or the Licensee and not resume operations until the Third Party User has eliminated such interference; and (iii) that failure to cease interfering operations will cause such Third Party User's Attachments to become unauthorized attachments.

5.12 **Electricity for Wireless Facilities** CITY shall supply electricity to Licensee's Wireless Facilities pursuant to and subject to the tariffed rates, terms, and conditions for such electrical service.

ARTICLE 6
MAKE-READY CONSTRUCTION

PART A - GENERAL PROVISIONS

6.1 **Performance of Make-Ready Work** The Parties shall negotiate the performance of the necessary Make-Ready work, except as set forth in paragraphs 6.3, 6.4, and 6.5. All Make-Ready Costs shall be borne solely by Licensee, including without limitation, costs of planning, engineering, construction, and pole replacement, except as set forth in paragraphs 6.3, 6.4, and 6.5.

6.2 **Third Party Facilities** Make-Ready Costs that are to be paid by Licensee include all costs and expenses to relocate or alter the attachments or facilities of any pre-existing Third Party User as may be necessary to accommodate Licensee's Attachment. CITY shall provide at least 30 days' notice to each Third Party User that needs to relocate or alter its facilities to accommodate Licensee and attempt to make all other necessary arrangements directly with the affected Third Party Users. CITY agrees to make best efforts to cause a Third Party User to relocate such Third Party User's facilities, including declaring such Third Party User's facilities to be unauthorized, in accordance with the terms of CITY's pole attachment agreement with such Third Party User, if the Third Party User fails to relocate its facilities within the time periods specified in the pole attachment agreement between CITY and such Third Party User.

6.3 **Non-Conforming Attachments** Notwithstanding paragraphs 6.1 or 6.2, Licensee shall not be liable for any cost or expense to modify, replace, relocate, or alter any attachments of CITY or a Third Party User that do not comply with the Electrical Code or applicable law. Licensee shall notify CITY if Licensee determines that any Third Party User attachments are out of compliance with the Electrical Code or applicable law, and CITY shall use its best efforts to cause any Third Party User to bring existing attachments into compliance within 30 days of such notice. If after 30 days the owner of the out-of-compliance attachment has not completed its work and brought its attachment in to compliance with the Electrical Code and applicable law, CITY shall declare such Third Party User's facilities to be unauthorized, and CITY or Licensee may relocate or alter the Third Party User's attachment at the Third Party User's expense. CITY shall use its best efforts to cause the Third Party User to pay Licensee its costs and expenses for bringing such Third Party User's attachments in to compliance with the Electrical Code and applicable law.

6.4 **Pole Replacement and Maintenance** CITY shall change, modify, or replace any Pole, at Licensee's request, unless such change, modification, or replacement will jeopardize the safety or reliability of CITY's electrical service. Except as otherwise provided in this paragraph, Pole replacement Costs shall be borne by Licensee if Pole replacement is requested by Licensee or if, because of insufficient capacity, approval of Licensee's Attachment Application first causes the need for the Pole replacement. CITY agrees that if a Pole is broken, rotten, or not otherwise in compliance with the Electrical Code or applicable law, standard Pole replacement costs shall be borne by CITY, except for additional pole height above the height of the existing pole; or pole strength required to accommodate Licensee's new attachments. If the non-compliance with the Electrical Code or applicable law or the broken pole is the result of Licensee's actions or the actions of Licensee's subcontractors, the Licensee shall be liable for the expense.

6.5 **Pole Upgrades** Notwithstanding anything set forth in paragraph 6.4 with respect to Licensee's responsibility to pay CITY's costs of changing, modifying, or replacing any Pole, CITY shall continue its existing Pole maintenance, modernization, and upgrade program.

PART B - CONSTRUCTION BY LICENSEE

6.6 **Construction by Licensee** All work performed by or on behalf of Licensee pursuant to an Attachment License shall be done in a good and workmanlike manner. Licensee shall also comply with the provisions of Exhibit B, which CITY may reasonably change upon 60 days written notice to Licensee (provided that such change is not inconsistent with the terms and conditions of the body of this Agreement). Licensee's acceptance of an Attachment License constitutes Licensee's agreement to be bound by its terms and conditions. All Attachments, Contacts, Make-Ready work, and other work performed or maintained by Licensee on a Pole shall strictly comply with Electrical Code, the Design Documents, and other laws and standards as provided by Article 5. Any material deviation shall constitute a material default under this Agreement if not cured within forty-five (45) calendar days or within such other mutually agreed upon timeframe, and shall afford CITY all lawful remedies it may have available to it, including without limitation the right to suspend Licensee's Make-Ready and installation operations and terminate Attachment Licenses for any non-compliant Attachments.

6.7 **Coordination of Make-Ready Efforts** In the event multiple entities have been granted Attachment Licenses for the same Pole and a disagreement arises between them as to construction and installation schedules, CITY shall have the right to require a representative of Licensee who has authority to agree on these issues to attend a meeting called by CITY to discuss and agree on these issues. Failure to reach an agreement shall result in mandatory submittal of these issues to mediation at the applicants' expense; provided, however, that if CITY in its reasonable discretion determines that Licensee is not bargaining in good faith, CITY may revoke or modify Licensee's Attachment License.

6.8 **Authority to Proceed** An Attachment License is not an authority to proceed with construction work on a Pole. Before beginning construction work on a Pole, Licensee shall give CITY not less than three (3) days written notice of the Pole location, the proposed date on which work will commence, and whether any electrical service interruptions or de-energizations will be required. If CITY does not approve of such date (such approval not to be unreasonably withheld, conditioned, or delayed), the parties shall mutually agree on a date for construction to take place and shall make all necessary arrangements and schedules for line and equipment de-energization. Licensee shall not begin construction work without authority to proceed from CITY, and shall comply with the agreed upon construction and de-energization schedule. Licensee shall be responsible for coordinating its efforts with CITY field inspection personnel and for any actions or notifications required by the CITY's Utilities Dispatch Center. LICENSEE SHALL INDEMNIFY CITY FROM ALL CLAIMS FOR LOSS, HARM, PROPERTY DAMAGE, AND BODILY INJURY OR DEATH IN CONNECTION WITH ANY WORK

PERFORMED WITHOUT THE NOTICE AND ARRANGEMENTS CONTEMPLATED BY THIS PARAGRAPH.

6.9 **Service Interruptions** In the event Licensee's construction efforts require a scheduled interruption in CITY or Third Party User services or otherwise require de-energization of CITY lines, time shall be of the essence. If Licensee fails to comply with the construction schedule as agreed upon pursuant to the preceding paragraph, CITY may opt to immediately revoke Licensee's Attachment License(s) for the Poles in question and restore the interrupted power and services at Licensee's sole Cost, unless Licensee's failure results from Force Majeure or through the fault of CITY or a Third Party User.

6.10 **Contractors** All contractor work for Make-Ready work in or around the Supply Space for the initial installation of all facilities, performed by or on behalf of Licensee pursuant to an Attachment License, shall be done by a Contractor approved by CITY. Licensee may propose new Contractors from time-to-time, and CITY shall approve such proposed Contractor unless there is a demonstrable reason for not approving such Contractor. Only orderly and competent workers shall be used. Neither Licensee's workers nor those of its Contractors may possess any weapon, or use, possess or be under the influence of any alcoholic or other intoxicating beverage, drug or controlled substance while performing any work on or around a Pole. If CITY finds any Licensee or contract worker to be incompetent, disorderly, in the possession of any weapon, or in the possession of or under the influence of alcohol or drugs, Licensee shall promptly remove such worker from all work on or around Poles, and may not again use such worker on work on or around Poles without the prior written consent of CITY.

6.11 **Materials** Should the Licensee be approved to undertake the electrical Make-Ready Construction, Licensee shall furnish all necessary materials and hardware including but not limited to: poles, crossarms, mounting hardware, guys, anchors, insulators, conductors, and any associated miscellaneous hardware. All materials used by Licensee for electrical Make-Ready work on Poles shall be obtained from CITY-approved vendors and shall be new and of good quality and free from known material defects. The use of attachment arms is prohibited without CITY's prior written consent.

6.12 **Licensee to Bear Costs** All Costs and expenses necessary to complete the Make-Ready construction, including the transfer of CITY facilities and Third Party User facilities, shall be borne entirely by Licensee except as set forth in paragraphs 6.3, 6.4, and 6.5, provided that such Make-Ready is required solely to accommodate Licensee. Licensee will not be required to pay any Make-Ready Costs required to repair pre-existing, non-grandfathered, safety violations of CITY or another attacher.

6.13 **CITY Property** Notwithstanding paragraphs 6.11 and 6.12, all Poles and materials installed in the Make-Ready process shall become and remain CITY's sole property, regardless of which entity procured or paid for it, with the exception of Licensee's facilities and equipment. Licensee shall execute any documents reasonably requested by CITY to evidence the transfer of title to such Poles and materials to CITY, and Licensee shall brand and tag all new poles to indicate CITY ownership. Licensee's performance of

Make-Ready Work or payment of any Costs (A) shall in no way create or vest in Licensee any ownership right, title, or interest in any Pole or electrical facilities, (B) shall not entitle Licensee to any offsets, credits, payments, or income from CITY's operation of the Pole or facilities, (C) shall not alter or affect CITY's rights under this Agreement, including those under Article 13, or (D) shall not restrict CITY's ability to allow access to a Pole by Third Party Users. Licensee's interest shall at all times remain a bare revocable license that is subject to the terms of this Agreement.

6.14 **Tree Trimming** Licensee shall be responsible for all tree trimming necessary for the safe and reliable installation, use, and maintenance of its Attachments, and to avoid stress on Poles caused by contact between tree limbs and Licensee's Attachments. All tree trimming shall be performed in accordance with the-then current CITY tree-trimming policies (to the extent not inconsistent with the terms and conditions of this Agreement), including without limitation those relating to owner notification and consent.

6.15 **Anchors and Guying** Licensee shall provide all anchors and guying necessary to accommodate the additional stress and load placed upon a Pole by its Attachments. Anchors and guys shall be in place and in effect prior to the installation of Attachments, cables, or any other facilities on a Pole. Licensee shall not attach to any CITY anchors or guying. Anchors shall not be placed outside of the easement in which a Pole stands.

ARTICLE 7

INSTALLATION AND MAINTENANCE OF ATTACHMENTS

7.1 **Installation** Upon (A) completion of Make-Ready work, and (B) CITY's receipt of full payment of all sums owing to CITY, if any, for engineering, Make-Ready, and other Costs in connection with the applicable Pole, Licensee may affix its Attachments to the Pole as set forth in the Attachment License and Design Documents.

7.2 **Communication Space** Except as otherwise provided herein, all Attachments and Contacts on a Pole must remain in the Communications Space. Licensee operations in the Supply Space or in the space separating the Communication and Supply Spaces are prohibited. The Communications Space includes the space reserved for each attachment on a given pole. Each Cable Attachment or space reserved in the Communications Space shall have a maximum size of twelve (12) inches. Each thru-bolt type Cable Attachment where the Pole is drilled and bolted to support cable and messenger or band used to support cable or messenger shall maintain a minimum of 12" vertical separation from adjacent bolts or bands.

7.3 **Maintenance** Licensee shall, at its sole expense, make and maintain its Attachments in a safe condition and in good repair including maintain tree trimming and clearances, and in such a manner as to not interfere with or interrupt CITY's lines, facilities, and services or with Third Party User attachments, facilities, and services.

7.4 **No Damage** Licensee shall not cause damage to CITY or Third Party User facilities or operations. If Licensee, its Contractors, agents, employees, or Attachments cause damage to CITY or Third Party User facilities or operations, Licensee assumes all responsibility for, and shall, as determined by CITY, either repair or promptly reimburse CITY or the Third Party User for all direct loss and expense caused by such damage. Licensee shall immediately inform CITY and all damaged Third Party Users of any damage to their facilities.

7.5 **Sag and Mid-Span Clearances** Licensee shall leave proper sag in its lines and cables and shall observe the established sag of power line conductors and other cables so that during the life of the Attachment minimum clearances are (A) achieved at Poles located on both sides of the span and (B) maintained throughout the span. A minimum clearance between surfaces must be maintained between Licensee's and others' Cables at mid-span and between Licensee's and others' Attachments and Pole Contacts on the Poles. Licensee will correct any clearance violations caused by its facilities or attachments. In no event will Licensee be responsible for clearance violations caused by any other party, including CITY.

7.6 **Climbing Space** An unobstructed climbing space must be maintained at all times on the face of all Poles as required by Electrical Code, as well as adequate ground access to Poles. All Attachments must be placed as to allow and maintain a clear and proper climbing space. Licensee shall place its Attachments on the same side of the Pole as the majority of existing Attachments, if any. Licensee is prohibited from Boxing on CITY poles. Notwithstanding the foregoing, in no event will Licensee be responsible for climbing space violations caused by any other party, including CITY.

7.7 **Tagging** Each Attachment shall be identified at all times by an identifying marker at each pole approved by CITY that, at minimum, (A) is permanent in duration and not degradable by rain or sunlight (B) has coloring and numbering or lettering unique to Licensee, and (C) is capable of being read unaided from the ground by a person with normal vision.

ARTICLE 8 MODIFICATION OF ATTACHMENTS

8.1 **No Unauthorized Modifications** Except for routine modifications as provided in Section 8.2, Licensee shall not change the type, nature, or location of any Attachment or alter its use of a Pole without prior written CITY consent. Any such unauthorized modifications shall be deemed an Unauthorized Attachment and the remedial provisions in Article 10 (Unauthorized Attachments) shall apply.

8.2 **Routine Modifications** Licensee does not need CITY consent for (A) changes incident to routine maintenance and repair; (B) installations of service drops; (C) removal of Licensee's Attachments; or (D) upgrades of existing equipment that do not materially alter pole loading or pole space utilization.

8.3 **CITY Mandated Modifications** Within 30 calendar days of written request by CITY or within such other mutually agreed upon timeframe, Licensee shall move or rearrange its Attachments in order to maximize the usable available Pole space and/or to accommodate CITY facilities. Licensee shall do so at its sole cost and risk, except that Licensee shall not be responsible for any costs or expenses incurred to relocate or alter its Attachments to accommodate the Make-Ready work of other Third Party Users. If Licensee fails or refuses to comply with the directions of CITY to change, alter, improve, move, remove or rearrange any of its Attachments in accordance with this Agreement, CITY may then opt to change, alter, improve, move, remove or rearrange such Attachments without incurring any liability, except as provided in Article 16, to Licensee and at Licensee's sole cost and risk, or CITY may proceed under Article 13 of this Agreement.

8.4 **Emergencies** In case of an Emergency, including electrical service restorations, CITY may move, rearrange or transfer Licensee's Attachments, without notice and without liability to Licensee or to any other person, except as provided in Article 16. Licensee shall be responsible for all Costs and shall reimburse CITY for the costs CITY incurs relating to such work within forty-five (45) calendar days of the date CITY sends Licensee an invoice for such work. An "Emergency" is a condition that: (i) poses an immediate threat to the safety of utility workers or the public; (ii) materially and adversely interferes with the performance of CITY or another Third Party User's service obligations; or (iii) poses an immediate threat to the integrity of CITY or another Third Party User's Poles or equipment. As soon as practical thereafter, CITY shall notify Licensee of such events and actions.

8.5 **Destroyed Poles** If any Pole on which Licensee has an Attachment is substantially destroyed or damaged by fire, storm, accident, or otherwise, CITY shall be under no obligation to rebuild or replace such Pole, but may elect to terminate Licensee's Attachment License for such Pole without any liability to Licensee. CITY shall notify Licensee in writing of a termination under this paragraph, and Licensee shall be entitled to a pro-rata refund of any prepaid but unearned Annual Usage Charge attributable to the Attachments on such damaged or destroyed Pole. Nothing herein shall prohibit Licensee from repairing or replacing such damaged or destroyed Poles at Licensee's sole cost and expense if: (A) CITY elects not to repair or replace same, and (B) Licensee is permitted to do so under the City Code, the terms of Licensee's franchise, if applicable, and any applicable easements.

8.6 **Pole Transfers**

A. Licensee and CITY expressly agree that for the orderly management of public rights-of-way and aesthetic considerations, double poles shall be prohibited if a new Pole contains sufficient carrying capacity to support existing Pole attachments. If CITY replaces an existing Pole supporting an Attachment with a new Pole, CITY will provide at least 30 days advance written notice to Licensee that Licensee must transfer its Attachment to the new Pole. If mutually agreed upon and if reasonably feasible, CITY will transfer the Attachment to the replacement Pole when CITY transfers its own lines and facilities. Licensee may also notify the

CITY in writing within 15 days of the notice that it does not desire to occupy the new Pole. Failure of Licensee to timely respond to CITY's notice shall be deemed an election to occupy the new Pole. If Licensee opts not to occupy the new Pole within 30 days, Licensee's Attachment License to the new replaced Pole shall terminate as of the date of replacement and as liquidated damages to CITY for maintaining a double Pole, Licensee's attachment fees for the existing pole shall be two times (2x) the Annual Usage Fee, starting 30 days after the date of replacement. Should the double Pole become damaged or rotten, the City shall not be responsible for its replacement and the Licensee will need to make other arrangements for their facilities. Licensee shall not be entitled to a refund of any Annual Usage Charge as a result. For each Attachment transferred by CITY, Licensee shall pay a transfer Fee as set forth in Exhibit A, unless the transfer is the result of a Third Party User attachment request, in which case the Third Party User will pay for Licensee's transfer.

B. All Poles, including any new Poles that may be required shall be installed in the same line of existing poles unless it is technically infeasible to do so safely.

8.7 **Relocation** Upon at least 60 days advance written notice, Licensee agrees that it will bear all actual and reasonable Costs associated with the relocation or re-routing of its Attachments in the event CITY facilities are removed from a Pole and re-routed. In such event, CITY shall be under no obligation to maintain any Poles that no longer support CITY lines and may remove Licensee's Attachments when removing the abandoned Pole at Licensee's sole Cost and risk, if Licensee fails to relocate its facilities in a timely manner. CITY will afford Licensee the opportunity to relocate underground, at Licensee's expense, where reasonably practicable. City is not responsible for any negotiations for reimbursement for developer related relocations.

ARTICLE 9 INVENTORY AND INSPECTIONS

9.1 **Right to Inspect** CITY may inspect Licensee's work and Attachments at any time. CITY may conduct these inspections for any purpose relating to this Agreement, including without limitation: (A) determining compliance with the Design Documents or other design and installation requirements; or (B) determining compliance with Electrical Code. The making of an inspection by CITY shall not operate in any way to relieve Licensee or Licensee's insurers of any responsibility, duty, obligation, or liability under this Agreement or otherwise, nor does CITY's ability to make inspections relieve Licensee from its obligations to exercise due care in the operation and inspection of its Attachments.

9.2 **Compliance** In the event any inspection of an existing Attachment reveals that corrections or other actions are required of Licensee under this Agreement, including without limitation those required for reasons of safety or structural integrity, Licensee shall make such corrections or take the requested actions within 30 days after the date CITY sends Licensee a written notice informing Licensee of the corrections to be made. If such

corrections cannot be made within 30 days, the parties will agree on a mutually acceptable timeframe. CITY may also perform such work without notice, at Licensee's sole Cost and risk, except as provided in Article 16, if CITY determines in its reasonable judgment and discretion that an Emergency does not permit full advance notice to Licensee. If Licensee fails or refuses to comply with the directions of CITY within the above described timeframe, the Attachment License(s) for the Attachments in question shall be terminated. In no event will Licensee be responsible for corrections of violations caused by another party, including CITY. CITY may opt to change, alter, improve, move, remove or rearrange such Attachments without incurring any liability to Licensee, except as provided in Article 16, and at Licensee's sole Cost and risk, or proceed under Article 13 of this Agreement.

9.3 **System-wide Inventory** Not more than once every 3 years, CITY may, but is under no obligation to, conduct a system-wide inventory of all Licensee Attachments and Third-Party User attachments on its Poles, for which Licensee shall bear its proportionate share of Costs with all other licensees and joint pole users. CITY will notify Licensee at least 90 days in advance of the times and places of such inventory, and Licensee may have representatives accompany CITY on the inventory. CITY may use the results of the inventory for purposes of calculating the Annual Usage Charge, but may also rely upon geographical grids or other mutually agreeable census to determine the correct count.

ARTICLE 10 UNAUTHORIZED ATTACHMENTS

10.1 **Unauthorized Attachments** Licensee shall not place any Attachments on a Pole or other CITY infrastructure except as authorized by an Attachment License. If one or more Unauthorized Attachments are discovered, Licensee shall comply with this Article 10 or, if Licensee fails to comply, CITY may, but shall not be required to, remove the Unauthorized Attachment without incurring any liability to Licensee and at Licensee's sole Cost, as described in this paragraph 10.1. With respect to any Unauthorized Attachment, CITY may opt to:

A. Require that Licensee remove such Unauthorized Attachment upon written notice or, if Licensee fails to do so as described in part B of this paragraph 10.1, remove such Attachment at Licensee's sole Cost and risk; or

B. Require that Licensee pay all costs to correct any Code or other violation, all inspection and engineering costs to field-check necessary Poles, Unauthorized Attachment Fees, with interest, for each unauthorized Attachment (as established in Exhibit "A" Pole Attachment Charges), and submit an Application for each such Unauthorized Attachment, together with the then-current Filing Fee and Annual Usage Charge for the current year. If such Penalty Fees, Application, and charges are not received by CITY within 30 days of notice of the Unauthorized Attachment, or such reasonable time under the circumstances, CITY may then opt to remove Licensee's Unauthorized Attachments pursuant to Part A. of paragraph

10.1. CITY reserves the right to immediately remove any Unauthorized Attachments that, in the CITY'S sole opinion, poses an imminent danger to electrical utility operations or the public.

10.2 **Remedies Cumulative** The remedies afforded CITY under this Article 10 are in addition to any civil or criminal penalties provided by City Ordinance, as amended.

10.3 **Ratification Must Be in Writing** No act or failure to act by CITY with respect to an Unauthorized Attachment or any other unauthorized use of CITY Poles or property shall be considered to be a ratification, licensing, or permitting of the unauthorized use, irrespective of any otherwise applicable doctrine of waiver or laches.

10.4 **Excessive Unauthorized Attachments** Following the first audit after the Effective Date, if CITY determines that Licensee has made more than 30 Unauthorized Attachments cumulatively during any Contract Year, Licensee shall be considered to be in material breach of this Agreement and CITY will have the right to terminate this Agreement and require removal of Licensee's Attachments in accordance with Article 13 of this Agreement. Licensee herein reserves the right to challenge any such termination and maintain its Attachments until such challenge is exhausted.

ARTICLE 11 ACCESS TO CONDUIT AND DUCTS

11.1 **Scope** CITY represents and warrants to Licensee that as of the Effective Date, CITY has not allowed any Third Party User to occupy CITY's electrical Ducts and Conduits. Nothing herein shall be construed as to require CITY to provide Licensee with access to CITY's electrical Ducts and Conduits.

ARTICLE 12 CUSTOMER INTERACTION

12.1 **Purpose** Licensee acknowledges that the scope of its proposed project and the amount of Make-Ready construction and Attachment installation it intends to undertake under this Agreement will require Licensee to make extensive and repeated intrusions onto the private property of CITY customers in order to access Poles. The purpose of this Article is to establish minimum standards of conduct with respect to property owners and CITY customers.

12.2 **Licensee Conduct** Before engaging in electrical Make-Ready or installation work on the property of a CITY customer (except for connections or disconnections of customer's service), Licensee shall, at minimum:

A. Provide CITY's Utility Dispatch Center (855) 528-4278 with notice of the times, locations, and nature of the work to be performed;

B. Require all field crews, and those of its Contractors, to carry and distribute upon request information packets explaining in detail the nature, extent,

and purpose of the work being done and listing the telephone number and web site where additional information can be found;

C. Establish and maintain a call-center telephone number during all hours during which field work is being done that is staffed by knowledgeable personnel who can answer and resolve customer questions and complaints concerning the work being done on their premises;

D. Require all field crews to wear I.D. badges that identify themselves as employees or Contractors of Licensee;

E. Have all vehicles used in field work bear logo of Licensee's Contractors or Licensee; and

F. Have readily available, during all hours in which field work is being done, one or more knowledgeable personnel who can communicate with and assist the City Manager's Office and City Council members regarding property owner complaints, and also have available qualified personnel to conduct on-site resolution of property owner complaints.

12.3 **No CITY Affiliation** Licensee, and its employees, Contractors, and agents shall not at any time represent themselves to the public, any CITY customer, or any resident as being associated with, having the permission of, or having been requested by the City of College Station to be on private property. Licensee shall inform any such persons that it is allowed to work on CITY Poles by virtue of state and federal law, not by voluntary association with the City of College Station.

12.4 **Service Interruptions** If applicable, Licensee shall provide written notice to affected CITY customers of any planned electrical service interruptions by Licensee's contractors that will affect them not less than 48 hours in advance of such interruption. Such notice shall contain the specific dates and times for such interruptions and the reasons therefor.

ARTICLE 13 TERMINATION

13.1 **Termination of Attachment Licenses** Attachment Licenses for specific Attachments shall terminate upon any of the following events or conditions:

A. Licensee has not completed all necessary Make-Ready work and Attachment installation within the later of (i) 120 days of issuance of the Attachment License (or such longer period as the parties may agree in writing) or (ii) 60 days after completion of all electrical Make-Ready work, unless Licensee and CITY agree in writing for a longer period;

B. Licensee removes the Attachment other than in the course of routine maintenance or replacement;

C. Licensee ceases to offer services, or provides services unlawfully, through the Attachment;

D. Licensee fails to comply with paragraphs 8.3, 8.7 or 9.2 of this Agreement, except as otherwise provided by those paragraphs.

13.2 **Right of Suspension** Except in the case of a bona fide, good faith dispute between the parties, if Licensee fails either to make any payment required under this Agreement, including timely payments to Licensee's Contractors for Make-Ready Work, or to perform timely any material obligation under this Agreement, and such default continues for 30 days after the date the payment or performance is due if such cure can reasonably be completed within thirty (30) days, and if not, such cure has commenced and is being diligently and consistently pursued then, in addition to any other available right or remedy, CITY may, upon written notice to Licensee, immediately suspend all Attachment Licenses of Licensee hereunder until such time as the default is cured. The payment under protest of a disputed amount in order to avoid, or lift, suspension of Attachment Licenses shall not prejudice the rights of Licensee to continue the payment dispute. A suspension of Attachment Licenses under this paragraph shall not prevent Licensee from operating, maintaining, repairing or removing its existing Attachments, but Licensee shall not install any new or additional Attachments or make any changes to existing Attachments (except for removal or routine repair or maintenance necessary to continue to provide services to then-existing Licensee customers) during the period of suspension.

13.3 **Termination of Agreement by CITY** If Licensee fails either to pay any undisputed payment required under this Agreement, including timely payments to Contractors for Make-Ready Work, or timely perform any material obligation under this Agreement, and if such default has not been cured within three months of Licensee's receipt of written notice of default, or if such cure cannot reasonably be completed in three (3) months, cure has commenced and has been continuously and diligently pursued, CITY may terminate this Agreement and all Attachment Licenses upon written notice to Licensee. Upon receipt of a notice of termination, Licensee shall promptly begin the process of removing all Attachments from specified Poles. All such Attachments shall be removed within 90 days after the date of the notice of termination, or within such time as CITY may agree. Until all of Licensee's Attachments are removed, Licensee shall continue to comply with all of the terms of this Agreement and perform all of its duties and obligations hereunder, including without limitation the obligation to pay Annual Usage Charges for its Attachments. Such payment by Licensee or acceptance by CITY of Annual Usage Charges shall not act to cure the default that triggered the termination nor shall it reinstate this Agreement or Licensee's Attachment Licenses hereunder.

13.4 **Failure to Remove Attachments** If Licensee has not removed all its Attachments within the period of time specified in the preceding paragraph, or such additional period of time granted by CITY in writing, then CITY may remove Licensee's

Attachments at Licensee's sole Cost and risk, in which event Licensee shall pay to CITY as liquidated damages, and not as a penalty, for the use and occupancy of CITY Poles a sum equal to five times (5x) the monthly Usage Rate for each Pole Contact for each month (or part thereof) until all such Attachments have been removed, in addition to the Annual Usage Fee. Alternatively, CITY may, in its reasonable discretion and upon written notice to Licensee, deem the Attachments to have been abandoned and assume ownership thereof.

13.5 **Termination of Agreement by Licensee** Licensee may terminate this Agreement upon 60 days written notice to CITY, in which event all Attachments shall be removed within 120 days after the date of the notice of termination or within such other time as CITY agrees. Until all of Licensee's Pole Attachments are removed, Licensee shall continue to comply with all of the terms of this Agreement and perform all of its duties and obligations hereunder, including without limitation the obligation to pay Annual Usage Charges for its Attachments. Termination by Licensee during a Contract Year shall not relieve Licensee from payment for the full Annual Usage Charge for that Contract Year or any other sums that it owes CITY.

13.6 **Survival** Licensee's obligations under this Article 13 shall survive termination of this Agreement.

ARTICLE 14 ASSIGNMENTS

14.1 **Written Consent Required** The rights granted by this License Agreement inure to the benefit of Licensee and shall not be assigned, transferred, sold or disposed of, in whole or in part, by voluntary sale, merger, consolidation or otherwise by force or involuntary sale, without the expressed prior written consent of the CITY, which consent shall not be unreasonable withheld, delayed or conditioned.

14.2 **Transfer of License Agreement** Notwithstanding the provisions of Section 14.1, a transfer of this License Agreement may occur without CITY approval in the following circumstance: (i) an assignment or transfer to entities that control, are controlled by, or are under common control with Licensee, or (ii) the acquisition of all or substantially all of Licensee's assets in the College Station, Texas market by reason of a merger, acquisition or other business reorganization. In order to effect an assignment of this License Agreement as listed in (i) and (ii) above without CITY approval, the Licensee must provide the CITY Administrator a Notice of Assumption at least thirty (30) days prior to the assignment which contractually binds the purchasing or acquiring party to meet all the obligations of this License Agreement.

14.3 **Leased Network Capacity** CITY acknowledges that Licensee's business plan may include leasing the capacity of its Network Facilities to Third Parties, often by long-term conveyances that extend for the entire useful life of the Network Facilities. Such long-term leases are agreed to be within the scope of Licensee's intended use and shall not be deemed assignments requiring CITY's consent, provided that Licensee has delegated

none of its obligations under this License Agreement to the lessee of the Network Facilities, and CITY may continue to look solely to Licensee for performance hereunder.

14.4 **Institutional Mortgagee or Lenders** Licensee may also assign this License Agreement, without CITY's consent and without prior notice to CITY, to an institutional mortgagee or lender providing financing to Licensee with respect to Licensee's Attachments, DAS Network or Network Facilities in the event such institutional mortgagee or lender exercises its foreclosure right against Licensee and operates the Attachments, DAS Network or Network Facilities; provided such institutional mortgagee or lender is capable of assuming all of the obligations of the Licensee under this License Agreement and further provided that any assignment will not be effective against CITY unless and until written notice of such assignment and exercise of rights is provided to CITY.

14.5 **Assignment by CITY** CITY may assign this Agreement in whole or in part without the consent of Licensee. CITY shall give Licensee written notice of the transaction within ten days after closing.

ARTICLE 15 SURETY

15.1 **Bond or Security** Within 45 days of the Effective Date of this Agreement, Licensee shall provide a Bond or other financial security satisfactory in form and content in the amount of \$4,000 for each 100 Poles for which Application is made to guarantee Licensee's obligations under this Agreement, including, but not limited to, the faithful payment of all of Licensee's obligations for rentals, fees, inspections, contracts, subcontracts, work, labor, equipment, supplies, materials, and the removal of Licensee's Attachments upon termination of this Agreement, or for any expense that may be incurred by CITY because of any default of Licensee. Licensee agrees to maintain the bond or other financial security in full force and effect during the entire term of this Agreement and until CITY is reimbursed for all Costs incurred as a result of removing Licensee's Attachments upon termination of this Agreement. The bond or other security shall be issued by a solvent company authorized to do business in the State of Texas, and shall meet any other requirements established by law or reasonably established by the CITY pursuant to applicable law. The amount of the bond or financial security does not operate as a limitation upon obligations of the Licensee under this Agreement.

ARTICLE 16 LIABILITY AND INDEMNITY

16.1 **CITY Liability** CITY reserves to itself the right to maintain and operate its Poles in such manner as will best enable it to fulfill its own service requirements. CITY shall not be liable for any damages incurred by Licensee for damage or interruption to its Attachments except for actual repair costs caused by the gross negligence or intentional misconduct of CITY; provided, however, that CITY shall not be liable to Licensee for material or financial loss resulting from any interruption of Licensee's service or for

interference with the operation of Licensee's Attachments. NEITHER PARTY SHALL BE LIABLE TO THE OTHER PARTY, ANY THIRD PARTY, OR ANY CUSTOMER OF THE OTHER PARTY FOR ANY SPECIAL, INDIRECT, PUNITIVE, OR CONSEQUENTIAL DAMAGES ARISING IN CONNECTION WITH THE USE OF OR DAMAGE TO, LICENSEE'S FACILITIES, OR THIS AGREEMENT.

16.2 **No Warranties by CITY** Licensee is expected to inspect the Poles on which its Attachments will be placed and shall rely solely on such inspection to determine the suitability of the Poles for its purposes. CITY DOES NOT MAKE, AND HEREBY EXPRESSLY DISCLAIMS, ANY EXPRESS OR IMPLIED WARRANTIES CONCERNING ANY POLE, INCLUDING WITHOUT LIMITATION THE WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. LICENSEE ACCEPTS THE USE OF ALL POLES AS IS-WHERE IS, AND WITH ALL FAULTS, EXCEPT AS OTHERWISE PROVIDED HEREIN.

16.3 **Unsafe Poles** Licensee acknowledges and agrees CITY does not warrant the condition or safety of CITY's Poles, or the premises surrounding the Poles, and LICENSEE HEREBY ASSUMES ALL RISKS OF, AND INDEMNIFIES CITY FROM, ANY DAMAGE, INJURY OR LOSS OF ANY NATURE WHATSOEVER CAUSED BY LICENSEE'S, OR LICENSEE'S CONTRACTORS' OR SUBCONTRACTORS' USE OF THE POLES AND ASSOCIATED FACILITIES AND EQUIPMENT ON, WITHIN, OR SURROUNDING THE POLES. Licensee expressly agrees it will undertake responsibility for inspecting and evaluating the condition of any Pole before allowing any employees, whether those of Licensee or Licensee's Contractors or Subcontractors, to climb or otherwise work on such Pole. If Licensee discovers any Poles that are rotten or otherwise unsafe for climbing or for Attachment installation, Licensee shall report any unsafe condition to CITY immediately. Licensee further acknowledges CITY does not warrant all poles are properly labeled, and agrees CITY is not liable for any injuries or damages caused by or in connection with missing labels or otherwise improperly labeled poles. Licensee further agrees to notify CITY immediately if labels or tags are missing or otherwise improper.

16.4 **Dangerous Nature of the Work** Licensee acknowledges in performing the work contemplated by this Agreement, Licensee and its agents, servants, employees, Contractors and Subcontractors will work near electrically energized lines, transformers, and other electrical equipment, and it is the intention the power flowing through such facilities will not be interrupted except by CITY. Licensee shall ensure its employees, servants, agents, Contractors and Subcontractors have the necessary qualifications, skill, knowledge, training, and experience to protect themselves, their fellow employees, employees of CITY, and the general public, from harm or injury while performing work permitted by this Agreement. In addition, Licensee shall furnish its employees, and shall require its agents, Contractors and Subcontractors to furnish their employees, with competent supervision and sufficient and adequate personal protective equipment, tools and other equipment for their work to be performed in a safe manner. Licensee further warrants it is apprised of, conscious of, and understands the imminent dangers (INCLUDING SERIOUS BODILY INJURY OR DEATH FROM ELECTROCUTION

OR FALLS) inherent in the work necessary to make installations on CITY's Poles by Licensee's employees, servants, agents, Contractors and Subcontractors, and accepts as its duty and sole responsibility to notify and inform Licensee's employees, and to require its agents, Contractors and Subcontractors to inform their employees of such dangers and to keep them informed regarding same.

16.5 **Disclaimer of Liability** CITY shall not at any time be required to pay from its own funds for injury or damage occurring to any person or property from any cause whatsoever arising out of Licensee's construction, reconstruction, maintenance, repair, use, operation, condition or dismantling of Licensee's system or Licensee's provision of service.

16.6 **Indemnification** Licensee shall, at its sole cost and expense, fully indemnify, defend and hold harmless CITY, its officers, employees, volunteers, agents, contractors, and subcontractors, (CITY and such other persons and entities being collectively referred to herein as "Indemnitees"), from and against:

16.6.1 Any and all liabilities, obligations, damages, penalties, claims, liens, costs, charges, losses and expenses (including, without limitation, reasonable fees and expenses of attorneys, expert witnesses and consultants), which may be imposed upon, incurred by or be asserted against the Indemnitees by reason of any act or omission of Licensee, its personnel, employees, agents, contractors, subcontractors or Affiliates, resulting in economic harm, personal injury, bodily injury, sickness, disease or death to any person or damage to, loss of or destruction of tangible or intangible property, or any other right of any person, firm or corporation, which may arise out of or be in any way connected with the construction, reconstruction, installation, operation, maintenance or condition of Licensee's Facilities or other property of Licensee or its Affiliates and any other facilities authorized by or Permitted under this Agreement (including those arising from any matter contained in or resulting from the transmission of programming over the Communications Facilities, but excluding any programming provided by the Indemnitees' Communications Services or other services authorized by or Permitted under this Agreement); the release of hazardous substances, or; the failure to comply with any Federal, State or local statute, law, code, ordinance or regulation.

16.6.2 Any and all liabilities, obligations, damages, penalties, claims, liens, costs, charges, losses and expenses (including, without limitation, reasonable fees and expenses of attorneys, expert witnesses and other consultants), which are imposed upon, incurred by or asserted against the Indemnitees by reason of any claim or lien arising out of work, labor, materials or supplies provided or supplied to Licensee, its contractors or subcontractors, for the installation, construction, reconstruction, operation or

maintenance of Licensee's Facilities (and any other facilities authorized by or Permitted under this Agreement or provision of Communications Services or other services authorized by or Permitted under this Agreement), and, upon the written request of CITY, Licensee shall cause such claim or lien covering CITY's property to be discharged or bonded within thirty (30) days following such request.

16.6.3 Any and all liabilities, obligations, damages, penalties, claims, liens, costs, charges, losses and expenses (including, without limitation, reasonable fees and expenses of attorneys, expert witnesses and consultants), which may be imposed upon, incurred by or be asserted against the Indemnitees by reason of any financing or securities offering by Licensee or its Affiliates for violations of the common law or any laws, statutes, or regulations of the State of Texas or the United States, including those of the Federal Securities and Exchange Commission, whether by Licensee or otherwise.

16.6.4 Licensee's obligations to indemnify Indemnitees under this Agreement shall not extend to claims, losses, and other matters covered hereunder that are caused or contributed to by the negligence of one or more indemnitees. In such case the obligation to indemnify shall be reduced in proportion to the negligence of the Indemnitees. By entering into this Agreement, CITY does not consent to suit, waive its governmental immunity or the limitations as to damages contained in the Texas Tort Claims Act.

16.6.5 This Section 16.6 Survives the termination of this License Agreement.

16.7 Assumption of Risk Licensee undertakes and assumes for its officers, agents, contractors and subcontractors and employees (collectively "Licensee" for the purpose of this Section), all risk of dangerous conditions, if any, on or about any CITY-owned or controlled property, the streets and public ways, and Licensee hereby agrees to indemnify and hold harmless the Indemnitees against and from any claim asserted or liability imposed upon the Indemnitees for personal injury or property damage to any person (other than from Indemnitees' gross negligence) arising out of Licensee's installation, operation, maintenance or condition of the Communication Facilities or other facilities or Licensee's failure to comply with any Federal, State or local statute, law, code, ordinance or regulation.

16.8 Defense of Indemnitees In the event any action or proceeding shall be brought against the Indemnitees by reason of any matter for which the Indemnitees are indemnified hereunder, Licensee shall, upon notice from any of the Indemnitees, at Licensee's sole cost and expense, resist and defend the same with legal counsel selected by Licensee and consented to by CITY, such consent not to be unreasonably withheld;

provided, however, that Licensee shall not admit liability in any such matter on behalf of the Indemnitees without their written consent and provided further that Indemnitees shall not admit liability for, nor enter into any compromise or settlement of, any claim for which they are indemnified hereunder, without the prior written consent of Licensee.

16.9 **Notice, Cooperation and Expenses** The Indemnitees shall give Licensee prompt notice of the making of any claim or the commencement of any action, suit or other proceeding covered by the provisions of this Article 16. Nothing herein shall be deemed to prevent the Indemnitees at their own expense from cooperating with Licensee and participating in the defense of any litigation by their own counsel.

16.10 **Other Indemnification Provisions** No indemnification provision contained in this Article shall be construed in any way to limit any other indemnification provision contained in this Agreement.

16.11 **Survival** This Article 16 shall survive the termination of this License Agreement.

ARTICLE 17 INSURANCE

17.1 **Insurance Required** During the term of this Agreement, and at all times thereafter when LICENSEE is occupying or using the licensed areas in any way, LICENSEE shall at all times carry insurance issued by companies duly licensed and authorized to provide insurance in the State of Texas rated at least A VIII under the A. M. Best rating system, and approved by CITY (which approval shall not be unreasonably withheld) to protect LICENSEE and the CITY from and against any and all claims, demands, actions, judgments, costs, expenses, or liabilities of every kind that may arise, directly or indirectly, from or by reason of losses, injuries, or damages described in this Agreement. The CITY reserves the right to review the insurance requirements and to reasonably adjust insurance and limits when the CITY determines that changes in statutory law, court decisions, or the claims history of the industry or the LICENSEE require adjustment of the coverage.

17.2 **Minimum Coverages** At a minimum, Licensee shall carry and maintain the following policies and shall furnish the CITY Risk Manager Certificates of Insurance on the most current State of Texas Department of Insurance-approved certificate form as evidence thereof.

A. Commercial General Liability coverage with minimum limits of liability of \$2,000,000 per occurrence and \$2,000,000 aggregate. The policy shall contain no exclusions without specific reference to same, and shall include coverage for products and completed operations liability; independent contractor's liability; personal & advertising injury liability; and coverage for property damage from perils of explosion, collapse or damage to underground utilities, commonly known as XCU coverage.

B. Workers' Compensation coverage with statutory limits of liability as set forth in the Texas Workers' Compensation Act and Employer's Liability coverage, or its equivalent, of not less than \$1,000,000 per accident, \$1,000,000 per disease and \$1,000,000 per disease per employee;

C. Business Automobile Liability Insurance for any vehicles, owned vehicles, non-owned vehicles, scheduled vehicles and hired vehicles with a minimum combined single limit of liability of \$2,000,000.

D. Pollution liability insurance which provides coverage for sudden and accidental environmental contamination with minimum limits of liability of \$5,000,000.

E. Umbrella or Excess Liability insurance with minimum limits of \$5,000,000 combined single limit per occurrence, and \$5,000,000 aggregate.

17.3 **CITY as Additional Insured** All policies, except for Workers' Compensation policies, or its equivalent, shall list the CITY and all associated, affiliated, allied and subsidiary entities of CITY, now existing or hereafter created, and their respective officers, employees, volunteers, agents, and contractors, as their respective interests may appear, as Additional Insureds (CITY and such other persons and entities being collectively referred to herein as "Additional Insureds") and shall include cross-liability coverage. Should any of the policies be canceled before the expiration date thereof, written notice shall be given to the City's Risk Manager in accordance with the policy provisions. The "other insurance" clause shall not apply to the CITY; it being the intention of the parties that the above policies covering Licensee and the Additional Insureds shall be considered primary coverage. Each policy shall contain a waiver of all rights of recovery or subrogation against CITY, its officers, agents, employees, volunteers and elected officials.

17.4 **Occurrence Basis Policies** All insurance policies other than those for workers' compensation must be occurrence-based. Claims-made policies will not be accepted.

17.5 **Combining Policy Amounts** The coverage amounts set forth in this section may be met by a combination of underlying (primary) and umbrella policies so long as in combination the limits equal or exceed those stated and the umbrella policy follows the form, or its terms and conditions are at least as broad as those of the primary policies.

17.6 **Insurance Primary** All policies of the Licensee shall be primary, and any policy of insurance or self-insurance purchased or held by the CITY now or in the future shall be non-contributory. The term "policy of insurance" as applied to the Additional Insureds shall include any self-insurance program, self-insured retention or deductible, or

risk pool program or an indemnification, defense, or similar program purchased or maintained by CITY and Additional Insureds.

17.7 **Contractors** Licensee shall be fully liable for any Contractor or Subcontractor retained by Licensee to perform work or services for Licensee under this Agreement, as a condition of being granted access to Poles and City property.

17.8 **No Right of Recovery Against City** This Article creates no right of recovery of an insurer against the CITY. The required insurance policies shall protect the LICENSEE and the CITY. The insurance shall be primary coverage for losses covered by the policies.

ARTICLE 18 MISCELLANEOUS PROVISIONS

18.1 **Integration** This Agreement constitutes the entire understanding of the parties relating to the use of Utility Poles hereunder; and there shall be no modification or waiver hereof except by writing, signed by the party asserted to be bound thereby. There are no oral representations or agreements between the parties. All previous agreements, correspondence, statements, and negotiations are superseded by this Agreement.

18.2 **No Waiver** The failure of either party to enforce or insist upon compliance with any of the terms or conditions of this Agreement shall not constitute a general waiver or relinquishment of any such terms or conditions, but the same shall be and remain at all times in duly force and effect.

18.3 **Applicable Law** The parties hereto agree and intend that all disputes that may arise from, out of, under or respecting the terms and conditions of this Agreement, or concerning the rights or obligations of the parties hereunder, or respecting any performance or failure of performance by either party hereunder, shall be governed by the laws of the State of Texas, without application of its Conflict of Laws provisions. The parties further agree and intend that venue shall be proper and shall lie exclusively in state or federal court with jurisdiction in Brazos County, Texas, except where otherwise provided herein and except where the Texas Public Utilities Commission lawfully has jurisdiction.

18.4 **Severability** If any term, covenant, or condition of this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remainder of the terms, covenants and provisions of this Agreement shall remain in full force and effect.

18.5 **Payments & Interest** All monetary payments under this Agreement shall be due and payable within 45 days after receipt of invoice. All overdue balances shall accrue interest at the rate of 1% per month from the due date until paid, or the maximum rate allowed by law, whichever is less.

18.6 **Amending Agreement** Notwithstanding other provisions of this Agreement, the terms and conditions of this Agreement shall not be amended, changed, or altered except in writing signed by authorized representatives of both Parties.

18.7 **Dispute Resolution** This procedure shall govern any dispute resolution process between CITY and Licensee arising from or related to the subject matter of this Agreement that is not resolved by agreement between their respective personnel responsible for day-to-day administration and performance of this Agreement. Upon mutual agreement of the Parties, prior to the filing of any suit with respect to such a dispute, other than a suit seeking injunctive relief with respect to intellectual property rights, the Party believing itself aggrieved (“the Invoking Party”) will call for progressive management involvement in the dispute negotiation by giving written notice to the other Party. Such a notice will be without prejudice to the Invoking Party's right to any other remedy permitted by this Agreement. CITY and Licensee will use their best efforts to arrange personal meetings and telephone conferences as needed, at mutually convenient times and places, between their negotiators. If a resolution is not achieved by negotiators at the final management level within allotted reasonable amount of time, then either Party may within ten (10) business days thereafter request non-binding mediation to resolve the dispute. The mediation shall take place in a location mutually agreed to by the Parties. The allotted period for completion of the mediation shall be thirty (30) calendar days. Notwithstanding the foregoing, either Party may file an action in a court of competent jurisdiction within the State of Texas to resolve the dispute at any time unless otherwise agreed.

18.8 **Receivership, Foreclosure, or Bankruptcy** Licensee shall notify CITY not later than thirty (30) days of the filing of a receivership, reorganization, bankruptcy or other such action or proceeding by or against Licensee. The rights granted to Licensee hereunder, at the option of CITY shall cease and terminate one hundred twenty (120) days after the appointment of a receiver or receivers, or trustee or trustees, to take over and conduct the business of Licensee whether in a receivership, reorganization, bankruptcy or other action or proceeding unless such receivership or trusteeship shall have been vacated prior to the expiration of said one hundred twenty (120) days, or unless:

18.8.1 to the extent permitted by law, within one hundred twenty (120) days after their election or appointment, such receivers or trustees shall have complied fully with all the terms and provisions of this Agreement granted pursuant hereto, and the receivers or trustees within said one hundred twenty (120) days shall have remedied all defaults under the Agreement, if any; and

18.8.2 to the extent permitted by law, within said one hundred twenty (120) days, such receivers or trustees shall execute an agreement duly approved by CITY having jurisdiction in the premises, whereby such receivers or trustees assume and agree to be bound by each and every term, provision and limitation of this Agreement.

18.8.3 In the case of foreclosure or other judicial sale of the plant, property and equipment of Licensee, or any part thereof, including or excluding this

Agreement, CITY may serve notice of termination upon Licensee and the successful bidder at such sale, in which event the Agreement herein granted and all rights and privileges of the Agreement hereunder shall cease and terminate thirty (30) days after service of such notice, unless:

18.8.4 CITY shall have approved the transfer of this Agreement, as and in the manner in this Agreement provided; and

18.8.5 Unless such successful bidder shall have agreed with CITY to assume and be bound by all the terms and conditions to this Agreement.

18.9 **Incorporation of Recitals and Appendices** The Recitals stated above and all appendices, attachments, and exhibits to this Agreement are incorporated into and constitute part of this Agreement.

18.10 **Contractors and Agents Bound** Licensee shall be fully liable for any contractor or subcontractor retained by Licensee to perform work or services for Licensee under this Agreement, as a condition of being granted access to Poles and City property.

18.11 **No Third Party Beneficiaries** The terms and provisions of this Agreement are intended to be for the benefit of CITY and Licensee except as otherwise provided in this Agreement, and nothing in this Agreement, express or implied, is intended to confer upon any person or entity, other than the parties to this Agreement, any benefits, rights or remedies under or by reason of this Agreement.

18.12 **Emergency Contact** Each Party shall maintain a staffed 24-hour emergency telephone number where a Party can contact the other Party to report damage to the other Party's Facilities or other situations requiring immediate communications between the Parties. Failure to maintain an emergency contact shall subject the Licensee to a charge equal to the actual costs incurred by CITY per incident and shall eliminate CITY's liability to Licensee for any actions that CITY deems reasonably necessary given the specific circumstances.

18.13 **Notices** When notice is required to be given under this Agreement by either party, it shall be in writing mailed or delivered to the other party at the following address or to such other address as either party may from time to time designate in writing for that purpose. All notices shall be effective upon receipt.

City

City of College Station
Attn: Director of Electric Utilities
P.O. Box 9960
1601 Graham Rd.
College Station, TX 77842
Phone (979) 764-3439

With a copy to:

City of College Station
Attn: City Attorney
P.O. Box 9960
College Station, TX 77842
Phone (979) 764-3507

Licensee

ExteNet Systems, Inc.
ATTN: CFO
3030 Warrenville Road, Suite 340
Lisle, Illinois 60532
Phone (630) 505-3800

With a copy to:

ExteNet Systems, Inc.
ATTN: General Counsel
3030 Warrenville Road, Suite 340
Lisle, IL 60532
Phone (630) 505-3800

[Remainder of page intentionally blank, signature page to follow]

DRAFT

IN WITNESS WHEREOF, the undersigned have executed this Agreement at College Station, Brazos County, Texas through their duly authorized representatives.

AGREED:

EXTENET SYSTEMS, INC.

By: _____
Printed Name: _____
Title: _____
Date: _____

CITY OF COLLEGE STATION

By: _____
Mayor
Date: _____

ATTEST:

City Secretary
Date: _____

APPROVED:

City Manager
Date: _____

City Attorney
Date: _____

Assistant City Manager / CFO
Date: _____

DRAFT

LIST OF EXHIBITS

Exhibit A – Pole Attachment Charges

Exhibit B – Construction Guidelines (Pole Attachment Specifications)

Exhibit C – Licensee’s Certificates of Insurance

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EXHIBIT A
POLE ATTACHMENT CHARGES

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EXHIBIT B
CONSTRUCTION GUIDELINES

[TO BE ADDED]

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EXHIBIT C
LICENSEE'S CERTIFICATES OF INSURANCE

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