

**DARK FIBER LEASE AGREEMENT**

**Between**

**Bryan, Texas (“PROVIDER”) and**

**\_\_\_\_\_ (“USER”)**

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“Confidential Information” shall have the definition set forth in Section 18.1.

“Connecting Point” means a point where the network or facilities of USER will connect to the System as further defined in Exhibit F and subject to the terms of said Exhibit F and Section 5.1 below.

“Costs” means costs incurred and computed in accordance with the established accounting procedures used by PROVIDER to bill third parties for reimbursable projects and generally accepted accounting principles. Such costs include the following:

- (a) labor costs, including wages, salaries, and benefits together with overhead allocable to such labor costs (the overhead allocation shall not exceed twenty five percent (25%) of the labor costs computed without such overhead); and
- (b) other direct costs and out-of-pocket expenses on a pass-through basis (such as equipment, materials, supplies, contract services, Required Rights, sales, use or similar taxes, etc.) plus ten percent (10%) of such costs and expenses.

“Dark Fibers” refers to those Fibers determined by PROVIDER to be excess capacity in its Fiber Optic Cable Facilities, provided without electronics or optronics, and which are not “lit” or activated.

“Effective Date” means the date on which this Agreement has been fully executed by both parties.

“Fiber Acceptance Testing” shall have the definition set forth in Exhibit B.

“Fiber Optic Cable Facilities” means the fiber optic cable and fibers contained therein, including the USER Fibers, and associated splicing connections, splice boxes and vaults, and conduit.

“Fibers” means any optical fibers contained in the System including the USER Fibers, the fibers of PROVIDER and the fibers of any third party in the System.

“Fiber Strand Mile” means one Route Mile of each individual strand of fiber optic cable. Used to calculate the License Payment amount. (Ex: A lease of two fiber strands over 10 miles equals 20 Fiber Strand Miles). Fiber Strand Miles are rounded to the nearest 0.1 mile for lease rate calculations.

“Force Majeure Event” shall have the definition set forth in Section 19.1.

“Innerduct” means any smaller conduit or tube used within a larger conduit/duct to subdivide the larger duct for placement of fiber or other communications cables. For the purposes of this agreement, the USER will request the innerduct/conduit to be leased and this will be approved on a case basis.

“Interconnect Facilities” shall have the definition set forth in Exhibit F.

“License Payment” shall have the definition set forth in Section 3.1.

“Linear Foot” means the distance traversed by conduit or innerduct underground. This number will be determined by either the data furnished by the City of Bryan maps/records or by the use of measured rodder to measure the length of the conduit. Any dispute on distance will be resolved with the use of the rodder to measure the distance for the calculation of lease rate.

“Non-Routine Maintenance” shall have the definition set forth in Section 8.1 below.

“POP” means Point of Presence, and is the point at which two or more different networks or communication devices build a connection with each other. POP generally refers to an access point, location or facility that connects to and helps other devices establish a connection with the Internet.

“Pro Rata Share” means a proportion equal to a fraction, the numerator of which is the number of USER Fibers and the denominator of which is all Fibers in the affected portion of the System. If this fraction varies over a particular Segment, then the Pro Rata Share shall be equal to the weighted average (weighted by length) of the relevant portions. For example, if the fraction for one hundred feet (100') of the affected Segment is 0.1 and the fraction for the remaining fifty feet (50') of the affected Segment is 0.07, the weighted average for the entire Segment would be 0.09.

“Route” means the route, including spurs, upon which the System is constructed and installed consisting of the Route Segments.

“Route Miles” means the actual miles traversed by the Fiber Optic Cable Facilities along the Route (measured in statute miles); provided that Route Miles in urban networks of one hundred (100) miles or less may be approximated and do not necessarily reflect the actual Route Miles of the System

“Route Segments” means the individual identified portions of the Route between each of the endpoints listed and described in Exhibit A-2 in which the USER Fibers or Conduit will be located or in the fiber optic network as described in Exhibit A-2.

“Routine Maintenance” shall have the definition set forth in Section 8.1.

“Scheduled Delivery Date” means the date defined in Section 4.5 below.

“Segment” means a discrete portion of the System and may refer to a Span of Fiber or Conduit, a portion between two POPs or a POP and a System end point, or a portion of the System affected by a relocation or other circumstance.

“Span” means, a portion of the System between one designated point on the System and a System end point along the Route from such site.

“System” means PROVIDER’s conduit or fiber optic communications system constructed along the Route which will contain the USER Fibers including, but not limited to, the Fiber Optic Cable Facilities, Fibers, conduits, handholes, manholes and all other appurtenances and components of said communications system.

“Term” shall have the definition set forth in Section 7.1.

“USER” means the entity named on the face page of this Agreement.

“USER Equipment” shall mean conduit, optronics, electronics, optical or electrical equipment, or materials, facilities, or other equipment utilized by USER in connection with its use of the USER Fibers.

“USER Fibers” means those certain strands of optical Dark Fibers that USER has licensed, of the type and quantity specified in Exhibit A-1 and A-2, for each Route Segment and meeting the specifications in Exhibit C within the Fiber Optic Cable Facilities installed or to be installed in the Route Segments of the System as identified by PROVIDER prior to commencement of Fiber Acceptance Testing under Exhibit B and in which USER shall be licensed under Article II.

“USER License” shall have the definition set forth in Article II.

“Voluntary Relocations” shall have the definition set forth in Section 8.2.

## **ARTICLE II - LICENSE**

- 2.1 On the Effective Date of this Agreement, and upon PROVIDER’s receipt of USER’s payment of the License Payment for each Route Segment, PROVIDER hereby grants to USER an exclusive license to use the USER Fibers or Conduit for the purposes described and subject to the terms and conditions set forth in this Agreement (the “USER License”). Such license does not convey, grant or vest to USER any interest or legal title to any real or personal property, including, without limitation, land, including but not limited to any fee, leasehold, easement or franchise, Fibers, Fiber Optic Cable Facilities, Conduit or the System. The USER License does not include any USER Equipment, including but not limited to any equipment used to transmit capacity over or “light” the USER Fibers.
- 2.2 Purposes of Use of the System. USER shall use the System only for the purpose of the transmission of data or placement of User Fiber. PROVIDER specifically reserves the right to allow the System, with the exception of the USER Fibers, to be used by other parties and to make additions, deletions or modifications to the System subject to the rights of USER herein. In the event USER uses the System to provide in whole or in part services

subject to Chapter 66, TEXAS UTILITIES CODE, or Chapter 283, TEXAS LOCAL GOVERNMENT CODE (as such statutes may be amended in the future), USER shall apply for the required certifications from the Texas Public Utility Commission and shall pay PROVIDER the fees provided in such statutory provisions.

### **ARTICLE III - CONSIDERATION**

- 3.1 **Consideration for USER License.** In addition to any other consideration provided for in this Agreement, USER agrees to pay to PROVIDER, a non-recurring payment as set forth on Exhibit A for the USER License to use the USER Fibers and Conduit (the “License Payment”).
- 3.2 **Annual Maintenance.** Following the Effective Date for each USER Fiber and Conduit on a Route Segment, USER will pay an annual maintenance fee per Fiber Strand Mile per year. The maintenance will be calculated annually and is based on the personnel cost (payroll and benefits) times the estimated percent of city staff time spent conducting fiber operations and maintenance activities. This amount provides the total staff cost devoted to fiber operations and maintenance activities. This amount is then divided by the total number of fiber strand miles to determine the annual maintenance cost per fiber strand mile
- 3.3 **Charges for Routine Maintenance.** USER shall pay PROVIDER a maintenance fee per Route Mile throughout the Term beginning on the Effective Date for each Route Segment for Routine Maintenance in the amounts set forth on Exhibit A-2. During the Term, PROVIDER shall send annual invoices by electronic transmission or U.S. Mail to USER for such amounts for each anniversary year following the Effective Date. USER shall pay all such invoices within thirty (30) days after receipt. Payments shall be prorated, as necessary, for partial months in which the Effective Date occurs or the Term expires. Routine Maintenance charges may be recalculated annually prior to the anniversary of the Effective Date. USER will be notified of the adjustment, if any, prior to the first invoice following the annual anniversary date.
- 3.4 **Charges for Non-Routine Maintenance and Relocations.** USER shall pay its Pro Rata Share of PROVIDER’s Costs of performing Non-Routine Maintenance and relocations (except Voluntary Relocations), if the gross Cost of such work relating to any single event or multiple, closely related events is greater than \$5,000.00. Notwithstanding the foregoing: (a) PROVIDER shall repair or contract for repair any damage PROVIDER reasonably determines to be caused by the negligence or willful misconduct of USER, its employees, agents or contractors, with all Costs of such repairs, including administrative charges to cover PROVIDER’s time to schedule and oversee work, to be reimbursed by USER within twenty (20) days after its receipt of PROVIDER’s invoice therefor, together with reasonable supporting documentation, (b) PROVIDER shall repair, at its sole expense, any damage PROVIDER reasonably determines to be caused by the negligence or willful misconduct of PROVIDER, its employees, contractors or agents but shall not be entitled to charge USER for any portion of the Costs of such repairs under this Section; and (c) PROVIDER shall not be entitled to reimbursement from USER for relocations caused by

a breach by PROVIDER of any of its obligations under this Agreement. To the extent a third party not having an interest in the Conduit, System or Fibers in the System reimburses some or all of PROVIDER's gross Costs, or to the extent a third party having an interest in the System or Fibers in the System pays in excess of its Pro Rata Share (based on the number of Fibers in the System) of such Costs, PROVIDER shall reduce the gross Costs by the amount of such reimbursement for purposes of computing USER's Pro Rata Share of such Costs. PROVIDER shall either reflect such reduction in its invoice or shall promptly refund such reduction when it receives such reimbursement.

- 3.5 **Method of Payment.** All payments to PROVIDER set forth in this Article III shall be made in United States Dollars by wire transfer of immediately available funds to the account or accounts designated by PROVIDER. In addition to any other remedies set forth in this Agreement, all late payments not disputed in accordance with Article XX shall bear interest accruing from the date due until paid at the lesser of 18% annual rate or highest amount permitted by law.

#### ARTICLE IV CONSTRUCTION

- 4.1 **Fiber Acceptance Testing.** Exhibit B sets forth Fiber Acceptance Testing procedures and test deliverables PROVIDER shall provide to USER.
- 4.2 **New Construction.** No new construction or installation by PROVIDER is planned or promised as part of this Agreement.
- 4.3 **Franchises, Easements, Authorizations or Permits** Notwithstanding any other provision herein to the contrary, USER shall be solely responsible for obtaining, at its sole cost and expense, any and all necessary franchises, easements, authorizations or permits specifically required as a result of USER's, as opposed to PROVIDER's, use or operation of or with the USER Fibers and its operation, maintenance, repair, and replacement of all USER Equipment associated therewith.
- 4.4 **Prior Construction.** USER acknowledges that some or all of said design, engineering, installation, construction, splicing and testing described above may have previously been completed.
- 4.5 **Scheduled Delivery Dates.** Subject to extension for delays resulting from Force Majeure Events and to extension or delay as otherwise permitted or provided in this Agreement, the "Scheduled Delivery Dates" for completion of, Fiber Acceptance Testing and hand-over of PROVIDER's test results and the USER Fibers to USER for the Route Segments are set forth in Exhibit A-2. USER shall have the right, upon reasonable prior written request, to observe testing of the USER Fibers, which occurs after the Effective Date.



## **ARTICLE V - CONNECTION AND ACCESS TO THE SYSTEM**

- 5.1 **Connections.** Subject to the provisions herein, USER shall pay for and arrange all connections of its facilities with the USER Fibers or Conduit which connections shall only be made at Connecting Points approved by PROVIDER and in accordance with the procedures set forth in Exhibit F. USER shall reimburse PROVIDER for any and all Costs incurred by PROVIDER as a result of making such connections and shall pay any other applicable charges or fees as specified in Exhibit F.
- 5.2 **Unauthorized Access to System.** USER shall not access any part of the System without the prior written consent of PROVIDER, and then only upon the reasonable terms and conditions specified by PROVIDER.

## **ARTICLE VI - COLLOCATION**

No collocation rights or obligations are provided with respect to this Agreement. In the event collocation space is provided in any PROVIDER facilities, the parties will enter into a collocation agreement in form acceptable to PROVIDER.

## **ARTICLE VII - TERM**

- 7.1 **Term.** The term of the USER License will commence upon the Effective Date and shall continue for a period of ten (10) years thereafter unless earlier terminated pursuant to the terms of this Agreement (the "Term").
- 7.2 **USER's Right to use the System.** USER's right to use the System commences on the Effective Date, unless there is a Route Segment(s) that has been identified and listed in Appendix A-2 that PROVIDER and USER agree has not been tested, or test results indicate a problem that PROVIDER agrees to attempt to correct. In this instance, USER's right to use all or any part of the System will not occur for any Route Segment(s), until the identified Route Segment is evaluated and approved for leasing by the PROVIDER and any problem has been corrected and payment in full of the License Payment has been made by USER to PROVIDER.
- 7.3 **Effect of Termination.** Upon expiration of the Term or other termination of this Agreement, USER's right to use the USER Fibers and Conduits shall automatically expire and the following shall apply;
- (a) PROVIDER shall;
    - (i) disconnect the USER Fibers from any POP or Connecting Point; or
    - (ii) remove, or require USER to remove, any USER Equipment from PROVIDER's premises, if any, upon commercially reasonable notice; and

- (b) this Agreement will Terminate, and PROVIDER shall take full right and possession of USER Fibers and Conduits.

74 **Survival.** The expiration or termination of this Agreement shall not affect the rights or obligations of any party hereto with respect to any payment hereunder for services rendered prior to the date of termination, or pursuant to the Articles of this Agreement entitled Indemnification, Limitation of Liability, Insurance, License Fees, Confidentiality and Proprietary Information, or pursuant to any other provisions of this Agreement that, by their sense and context, are intended to survive termination of this Agreement.

### **ARTICLE VIII - MAINTENANCE AND RELOCATION**

8.1 **Maintenance.** During the Term, PROVIDER shall perform all required Routine Maintenance and Non-Routine Maintenance. “Non-Routine Maintenance” means maintenance and repair work that PROVIDER is obligated to provide under this Agreement and described in Exhibit E other than:

- (a) the work specifically identified as Routine Maintenance in Exhibit E;
- (b) work in which the aggregate amount of Costs incurred as a result of any single event or multiple, closely related events is less than or equal to Five Thousand and No/100 Dollars (\$5,000); or
- (c) work for which USER is obligated to reimburse PROVIDER for all or a portion of the Costs incurred pursuant to other Articles of this Agreement.

“Routine Maintenance” means maintenance and repair work that is described in Subsections 8.1(a) or 8.1(b).

8.2 **Relocation and Modification Procedures.** Except as provided herein for emergencies, PROVIDER may relocate, modify or alter all or any portion of the System or any of the facilities used or required in providing USER with the USER License: (i) if a third party with legal authority to do so orders or threatens to order such relocation (e.g., through filing or threatening to file a condemnation suit), (ii) in order to comply with applicable laws, (iii) to prevent or abate interference with or interruption of the System, or an unreasonable risk thereof, due to the existence of physical conditions (e.g. rock slides, seismic conditions), (iv) to reduce governmental fees or taxes assessed against it or USER if mutually agreed by the parties, or (v) if it determines to do so in its reasonable business judgment. A relocation and/or modification made solely pursuant to Clause (v) shall be considered a “Voluntary Relocation.” PROVIDER shall provide USER as much advance notice as possible but shall use reasonable efforts to provide at least sixty (60) calendar days’ prior notice of any such relocation, if reasonably feasible. PROVIDER shall have the right to direct such relocation, modification or alteration, including the right to determine

the extent of, the timing of, and methods to be used for such relocation, provided that any such relocation:

- (a) shall be constructed and tested in accordance with the specifications and requirements set forth in this Agreement and applicable Exhibits;
- (b) to the extent reasonably practical and in conformance with industry standards then existing, shall not result in a materially adverse change to the operations, performance, Connecting Points with the network of USER, or end points of the Route Segment; and
- (c) shall not unreasonably interrupt service on the System.

8.3 **Relocation Expenses** USER shall have no responsibility for costs and expenses relating to the relocation, modification or alteration of the USER Fibers or the System for the purpose of meeting the needs of the PROVIDER or any other user. In all cases, USER shall bear the costs incurred in any rearrangement, relocation, modification or alteration of USER Equipment.

8.4 **Emergency Relocation** In the event of an emergency as determined by PROVIDER, PROVIDER may relocate, modify, or alter the USER Fibers and/or the System without prior notice to USER. In such event, as soon as reasonably practicable thereafter and not less than seventy-two (72) hours after having taken such action, PROVIDER will advise USER of the emergency work performed or the action taken with respect to any emergency modification or alteration of the USER Fibers and/or the System.

8.5 **Supply, Upgrade and Maintenance of USER Equipment Excluded.** USER acknowledges and agrees that PROVIDER is not supplying nor is PROVIDER obligated to supply to USER any USER Equipment, including but not limited to, conduit, optronics or electronics or optical or electrical equipment or other facilities, such as generators, batteries, air conditioners, fire protection and monitoring and testing equipment, all of which are the sole responsibility of USER. Nor is PROVIDER responsible for performing any work other than as specified in this Agreement. PROVIDER shall have no obligation under this Agreement to maintain, repair, or replace USER Equipment.

8.6 **User Equipment Maintenance** Notwithstanding any other provision of this Agreement, if USER's Equipment is not maintained in accordance with this Agreement, and USER has not corrected the violation within thirty (30) days from receipt of written notice thereof from PROVIDER, PROVIDER may at its own option correct such conditions at USER's expense. PROVIDER will notify USER prior to performing such work where practicable. When PROVIDER reasonably believes that such conditions pose an immediate threat to the safety of PROVIDER's employees or the public, interfere with the performance of service obligations of PROVIDER, or pose an immediate threat to the integrity of the System, PROVIDER may perform such work and or take such action at USER's expense that it deems necessary without first giving notice to USER, and shall be indemnified by

USER for such work in accordance with ARTICLE XIII herein. As soon as practicable thereafter and not less than seventy-two (72) hours after having taken such action, PROVIDER will advise USER in writing of the work performed or the action taken and make all reasonable efforts to arrange for recommendation of USER's Equipment so affected. USER shall be responsible for paying PROVIDER for all Costs incurred by PROVIDER in taking action under this section.

## **ARTICLE IX - USE OF THE SYSTEM**

- 9.1 **Compliance with Law.** USER warrants that its use of the USER Fibers and the System shall comply in all material respects with applicable government codes, ordinances, laws, rules, regulations and restrictions and shall not have an adverse effect on the System or its use.
- 9.2 **USER's Rights Exclusive for USER Fibers.** USER may use the USER Fibers for any lawful telecommunications purpose, except sublease, assignment or conveyance to any other entity or organization. PROVIDER shall have no right to use the USER Fibers during the Term of this Agreement. Nothing in this Agreement shall limit the Provider right to enter into a Lease Agreement with any other entity or user for Fiber Optic Cable Facilities not covered by this Agreement.
- 9.3 **Notice of Damage.** USER shall promptly notify PROVIDER of any matters pertaining to any damage or impending damage to or loss of the use of the System that are known to it and that could reasonably be expected to adversely affect the System. PROVIDER shall promptly notify USER of any matters pertaining to any damage or impending damage to or loss of the USER Fibers and/or the System that are known to it and that could reasonably be expected to adversely affect the USER Fibers and/or USER's use thereof.
- 9.4 **Preventing Interference with Other Fibers.** Neither USER nor PROVIDER shall use equipment, technologies, or methods of operation that knowingly interfere in any way with or adversely affect the System or the use of the System by the other party or third parties or their respective Fibers, equipment, or facilities associated therewith. Each party shall take all reasonable precautions to prevent damage to the System or to Fibers used or owned by the other party or third parties. Notwithstanding the above, the provisions of this Section shall not prevent a party from using commercially reasonable equipment, technologies, or methods of operation if the interference or adverse effect on the other party or a third party results primarily from such other party or third party's use of equipment, technologies, or methods of operation that are not commercially reasonable or that are not standard in the telecommunications industry.
- 9.5 **Liens.** USER shall not cause or permit any part of the System to become subject to any mechanic's, materialmen's, or vendor's lien, or any similar lien. If USER breaches its obligations under this Section, it shall immediately notify PROVIDER in writing, shall promptly cause such lien to be discharged and released of record without cost to PROVIDER and shall indemnify PROVIDER against all costs and expenses (including

reasonable attorneys' fees and court costs at trial and on appeal) incurred in discharging and releasing such lien.

- 9.6 **Security Interests in System Licensed by PROVIDER.** PROVIDER represents and warrants to USER that as of the Effective Date there are no liens or material encumbrances on, against or affecting the USER Fibers or USER License under Section 2.1.

## **ARTICLE X - AUDIT RIGHTS**

**Right to Audit.** Each party shall keep such books and records (which shall be maintained on a consistent basis and substantially in accordance with generally accepted accounting principles) as shall readily disclose the basis for any charges (except charges fixed in advance by this Agreement or by separate agreement of the parties) or credits, ordinary or extraordinary, billed or due to the other party under this Agreement and shall make them available for examination, audit, and reproduction by the other party and its agents for a period of two (2) years after such charge or credit is billed or due. A party shall be entitled to engage an independent, nationally recognized third party auditing firm (which firm is not regularly used by such Party for its corporate audit) to verify or determine the proper amount of such charges or credits billable and payable under the terms and conditions of this Agreement. The party requesting the audit shall pay all costs of the independent auditor.

## **ARTICLE XI – WARRANTIES**

- 11.1 **Warranties Relating to Agreement Validity.** In addition to any other representations and warranties contained in this Agreement, each party hereto represents and warrants to the other that:

- (a) it has the full right and authority to enter into, execute, deliver, and perform its obligations under this Agreement;
- (b) it has taken all requisite corporate action to approve the execution, delivery, and performance of this Agreement;
- (c) this Agreement constitutes a legal, valid and binding obligation enforceable against such party in accordance with its terms; and
- (d) it has no actual knowledge that its execution of and performance under this Agreement violates any applicable existing regulations, rules, statutes, or court orders of any local, state, or federal government agency, court, or body.

- 11.2 **Third Party Warranties.** The parties acknowledge and agree that, on and after the Effective Date, USER's sole rights and remedies with respect to any degradation of the USER Fibers or for any defect in or failure of the USER Fibers to perform in accordance with the applicable vendor's or manufacturer's specifications, which failure or defect does

not result from PROVIDER's breach of its construction, maintenance and/or repair obligations under this Agreement, shall be limited to the particular vendor's or manufacturer's warranty with respect thereto.

- 113 **EXCLUSION OF WARRANTIES.** EXCEPT AS SPECIFICALLY SET FORTH IN THIS AGREEMENT, PROVIDER MAKES NO WARRANTY TO USER OR ANY OTHER ENTITY, WHETHER EXPRESS, IMPLIED OR STATUTORY, AS TO THE INSTALLATION, DESCRIPTION, QUALITY, MERCHANTABILITY, USEFUL LIFE, FUTURE ECONOMIC VIABILITY, OR FITNESS FOR ANY PARTICULAR PURPOSE OF ANY FIBERS, THE SYSTEM, OR ANY SERVICE PROVIDED HEREUNDER OR DESCRIBED HEREIN, OR AS TO ANY OTHER MATTER, ALL OF WHICH WARRANTIES ARE HEREBY EXPRESSLY EXCLUDED AND DISCLAIMED. AS A MATERIAL PART OF THE CONSIDERATION FOR THIS AGREEMENT, PROVIDER AND USER AGREE THAT ACCESS TO PROVIDER FIBER OPTIC CABLE FACILITIES IS ON AN "AS-IS" BASIS.

## **ARTICLE XII - DEFAULT**

- 121 **Default and Cure.** Except as set forth in Section 12.2, a party shall not be in default under this Agreement unless and until the other party provides it written notice of a material default and the first party shall have failed to cure the same within fourteen (14) calendar days after receipt of such notice; provided, however, that where a material default cannot reasonably be cured within such fourteen (14) day period, if the first party shall proceed promptly to cure the same and prosecute such curing with due diligence, the time for curing such default shall be extended for such period of time as may be necessary to complete such curing. Any event of default may be waived at the non-defaulting party's option. Upon any failure of a party to timely cure any material default after notice thereof from the other party and expiration of the above cure periods, then the non-defaulting party may, subject to the terms of Articles XIV (Limitation of Liability); (i) take such action as the non-defaulting party deems necessary and appropriate to remedy and cure the default at the expense of the defaulting party; (ii) as to PROVIDER, suspend its performance under this Agreement in accordance with and subject to Section 12.2; (iii) as to any monetary obligation of the defaulting party, enforce payment thereof, including interest as provided herein together with reimbursement of reasonable attorney's fees expended in the collection of the amounts due; and/or (iv) take any other action expressly authorized for such default pursuant to the terms of this Agreement.
- 122 **Disconnection for Failure to Pay.** In addition to the remedies set forth in Section 12.1 and notwithstanding any provisions to the contrary, if USER fails to fully pay any amount invoiced under this Agreement within seven (7) days of the due date, PROVIDER may, in addition to any other remedies that it may have under this Agreement or by law, in its sole discretion and without liability for damages, take the following actions upon thirty (30) calendar days' notice if such payment (together with applicable interest) is not made within such 30-day period:

- (a) disconnect the USER Fibers from any POP or Connecting Point;
- (b) remove, or require USER to remove, any USER Equipment from PROVIDER's premises, if any, upon commercially reasonable notice; and/or
- (c) terminate this Agreement, and take full right and possession of USER Fibers.

123 **Termination by PROVIDER.** PROVIDER may terminate this Agreement for all or a portion of the USER Fibers upon giving no less than 360 days notice, if: (i) PROVIDER decides for any reason to terminate operation and maintenance of the System; or (ii) in the event PROVIDER determines that it needs the System and USER Fibers for its own uses. Any fees paid in advance by USER shall be refunded on the date the termination is effective. PROVIDER agrees that it will not terminate this Agreement under this provision if there are other Dark Fibers that are not in use or held in reserve by PROVIDER that are available for use and meet PROVIDER's needs. PROVIDER will, in its sole discretion and without liability for damages, take the following actions upon thirty (30) calendar days' notice:

- (a) disconnect the USER Fibers from any POP or Connecting Point;
- (b) remove, or require USER to remove, any USER Equipment from PROVIDER's premises, if any, upon commercially reasonable notice; and/or
- (c) terminate this Agreement, and take full right and possession of USER Fibers.

124 **Termination by USER.** USER may terminate this Agreement for all or a portion of the USER Fibers so long as USER has fully paid any and all Costs and accrued fees due to PROVIDER for the terminated Fiber. PROVIDER will, in its sole discretion and without liability for damages, take the following actions upon thirty (30) calendar days' notice:

- (a) disconnect the USER Fibers from any POP or Connecting Point;
- (b) remove, or require USER to remove, any USER Equipment from PROVIDER's premises, if any, upon commercially reasonable notice; and/or
- (c) terminate this Agreement, and take full right and possession of USER Fibers.

125 **Immediate Termination.** Immediate termination shall occur if this Agreement is ruled illegal, in whole or in part, by the ruling of a court of competent jurisdiction, or if the Agreement is prohibited or made impractical to perform by an action of the Texas Legislature or other branch or agency of Texas government; or if the Agreement is determined by PROVIDER to be infeasible or impractical to perform as the result of a legal claim or challenge. PROVIDER will, in its sole discretion and without liability for damages, take the following actions upon thirty (30) calendar days' notice:

- (a) disconnect the USER Fibers from any POP or Connecting Point;
- (b) remove, or require USER to remove, any USER Equipment from PROVIDER's premises, if any, upon commercially reasonable notice; and/or
- (c) terminate this Agreement, and take full right and possession of USER Fibers.

126 **Interest.** If either PROVIDER or USER fails to make any payment under this Agreement when due, such amounts shall accrue interest, from the date such payment is due until paid, including accrued interest, at the rate specified in Section 3.4 or, if lower, the highest percentage allowed by law.

127 **Bankruptcy.** A declaration of bankruptcy by USER will result in immediate termination of this Agreement and relinquishment of any right to use or occupy USER Fibers.

### **ARTICLE XIII – INDEMNIFICATION**

13.1 **Indemnification.** USER (“INDEMNITOR”) SHALL PROTECT, DEFEND, HOLD HARMLESS AND INDEMNIFY PROVIDER, ITS OFFICERS, AGENTS, EMPLOYEES FROM, AND ASSUME LIABILITY FOR, ANY AND ALL CLAIMS, DEMANDS, EXPENSES, LIABILITY OR CAUSES OF ACTION FOR INJURY TO ANY PERSON, INCLUDING DEATH, AND FOR DAMAGE TO ANY PROPERTY, TANGIBLE OR INTANGIBLE, OR FOR ANY BREACH OF CONTRACT ARISING OUT OF OR IN ANY MANNER CONNECTED WITH THE WORK DONE BY ANY PERSON UNDER THIS AGREEMENT. IT IS THE INTENT OF THE PARTIES THAT THIS PROVISION SHALL EXTEND TO, AND INCLUDE, ANY AND ALL CLAIMS, CAUSES OF ACTION OR LIABILITY CAUSED BY THE CONCURRENT, JOINT AND/OR CONTRIBUTORY NEGLIGENCE OF PROVIDER, AN ALLEGED BREACH OF AN EXPRESS OR IMPLIED WARRANTY BY PROVIDER OR WHICH ARISES OUT OF ANY THEORY OF STRICT OR PRODUCTS LIABILITY.

132 **Release.** USER releases, relinquishes, and discharges PROVIDER, its elected and appointed officials, officers, agents, and employees from all claims, demands, and causes of action of every kind and character, including the cost of defense thereof, for any injury to, sickness or death of the USER or its employees and any loss of or damage to any property of USER or its employees that is caused by or alleged to be caused by, arises out of, or is in connection with this Agreement. Both PROVIDER and USER expressly intend that this release shall apply regardless of whether said claims, demands, and causes of action are covered, in whole or in part, by insurance and in the event of injury, sickness, death, loss, or damage suffered by USER or its employees, but not otherwise, this release shall apply regardless of whether such loss, damage, injury, or death was caused in whole or in part by PROVIDER, any other



party released hereunder, USER, or any third party.

- 133 **Claims of Customers.** In addition to the foregoing indemnities, with respect to third parties that use services provided over the USER Fibers, USER shall defend, indemnify and hold harmless PROVIDER against any claims by such third parties for damages arising or resulting from any defect in or failure of the USER Fibers or the System.
- 134 **Material and Continuing Obligation.** USER's obligation to indemnify, defend, protect, and save PROVIDER harmless is a material obligation to the continuing performance of PROVIDER's obligations hereunder and shall survive termination of this agreement.

#### **ARTICLE XIV - LIMITATION OF LIABILITY**

- 14.1 **GENERAL EXCLUSION OF CONSEQUENTIAL DAMAGES.** NOTWITHSTANDING ANY OTHER PROVISION HEREIN TO THE CONTRARY, NEITHER PARTY NOR ANY OF THE OFFICERS, EMPLOYEES, OR AGENTS OF A PARTY SHALL BE LIABLE TO THE OTHER PARTY FOR SPECIAL, PUNITIVE, EXEMPLARY, CONSEQUENTIAL, INCIDENTAL OR INDIRECT LOSSES OR LOST REVENUES OR PROFITS, COST OF REPLACEMENT FACILITIES OR SERVICES (WHETHER ARISING OUT OF TRANSMISSION INTERRUPTIONS OR PROBLEMS, ANY INTERRUPTION OR DEGRADATION OF SERVICE OR OTHERWISE), WHETHER OR NOT FORESEEABLE, SUFFERED BY SUCH OTHER PARTY AS A RESULT OF THE PERFORMANCE OR NONPERFORMANCE OF ITS OBLIGATIONS UNDER THIS AGREEMENT, OR ITS ACTS OR OMISSIONS RELATED TO THIS AGREEMENT OR ITS USE OF THE SYSTEM, WHETHER OR NOT ARISING FROM SOLE, JOINT OR CONCURRENT NEGLIGENCE, STRICT LIABILITY, VIOLATION OF LAW BREACH OF CONTRACT, BREACH OF WARRANTY OR ANY OTHER SOURCE EVEN IF THE PARTIES HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THE TOTAL LIABILITY OF PROVIDER FOR ANY CLAIM OR DEMAND OF USER ARISING OUT OF THIS AGREEMENT SHALL NOT EXCEED THE AMOUNT OF THE FEES PAID BY USER TO PROVIDER PRIOR TO THE DATE OF THE CLAIM OR DEMAND.
- 142 **Pursuit of Actions Against Third Parties.** Nothing contained in this Agreement shall operate as a limitation on the right of either PROVIDER or USER to bring an action or claim for damages against any third party (other than officers, agents, and employees).
- 143 **Customer Contracts.** USER, in any contract or tariff offering of service, capacity, or rights of use that in any of the preceding instances involves use of the System, shall include in such contract or tariff a written limitation of liability that is binding on USER's customers and in all material respects at least as restrictive as the limitations set forth in Section 14.1.

## **ARTICLE XV - INSURANCE**

### **Obligation to Obtain.**

During the term of this Agreement, USER's insurance policies shall meet the following requirements:

- I. Standard Insurance Policies Required:
  - A. Commercial General Liability
  - B. Business Automobile Liability
  - C. Workers' Compensation
  
- II. General Requirements Applicable to All Policies:
  - A. Only Insurance Carriers licensed and admitted to do business in the State of Texas will be accepted.
  - B. Deductibles shall be listed on the Certificate of Insurance and are acceptable only on a per occurrence basis for property damage only.
  - C. "Claims made" policies are not accepted.
  - D. Each insurance policy shall be endorsed to state that coverage shall not be suspended, voided, canceled, reduced in coverage or in limits except after thirty (30) days prior written notice by certified mail, return receipt requested, has been given to the City of Bryan.
  - E. Upon request, certified copies of all insurance policies shall be furnished to the City of Bryan.
  - F. The Provider, its officials, employees and volunteers, are to be named as "Additional Insured" to the Commercial General and Business Automobile Liability policies. The coverage shall contain no special limitations on the scope of protection afforded to the City of Bryan, its officials, employees or volunteers.
  
- III. Commercial General Liability
  - A. General Liability insurance shall be written by a carrier with a A:VIII or better rating in accordance with the current Best Key Rating Guide.
  - B. Limit of \$1,000,000.00 per occurrence for bodily injury and property damage with an annual aggregate limit of \$2,000,000.00, which limits shall be endorsed to be per Project.
  - C. Coverage shall be at least as broad as ISO form GC 00 01.

- D. No coverage shall be excluded from the standard policy without notification of individual exclusions being attached for review and acceptance.
- E. The coverage shall include but not be limited to the following: premises/operations with separate aggregate; independent contracts; products/completed operations; contractual liability (insuring the indemnity provided herein) Personal & Advertising Liability; and, Explosion, Collapse, and Underground coverage.

IV. Business Automobile Liability

- A. Business Automobile Liability insurance shall be written by a carrier with a A:VIII or better rating in accordance with the current Best Key Rating Guide.
- B. Minimum Combined Single Limit of \$1,000,000.00 per occurrence for bodily injury and property damage.
- C. Coverage shall be at least as broad as Insurance Service's Office Number CA 00 01.
- D. The Business Auto Policy must show Symbol 1 in the Covered Autos Portion of the liability section in Item 2 on the declarations page.
- E. The coverage shall include owned, leased or rented autos, non-owned autos, any autos and hired autos.
- F. Pollution Liability coverage shall be provided by endorsement MCS-90, with a limit of \$1,000,000.00.

- V. Those policies set forth in Paragraphs III and IV shall contain an endorsement naming the City, including all departments of the City as an additional insured and further providing that those policies are primary to any insurance policies procured by PROVIDER. The additional insured endorsement shall be in a form at least as broad as ISO form GC 2026. Waiver of subrogation in a form at least as broad as ISO form 2404 shall be provided in favor of PROVIDER on all policies obtained by USER in compliance with the terms of this Agreement. USER shall be responsible for all deductibles which may exist on any policies obtained in compliance with the terms of this Agreement. All coverage for subcontractors shall be subject to all of the requirements stated herein. All Certificates of Insurance and endorsements shall be furnished to PROVIDER's Representative at the time of execution of this Agreement, attached hereto as Exhibit G, and approved by PROVIDER before work commences.

VI. Workers' Compensation Insurance

- A. Pursuant to the requirements set forth in Title 28, Section 110.110 of the Texas Administrative Code, all employees of USER, all employees of any and all

subcontractors, and all other persons providing services under this Agreement must be covered by a workers' compensation insurance policy: either directly through their employer's policy (USER's or subcontractor's policy) or through an executed coverage agreement on an approved Texas Department of Insurance Division of Workers Compensation (DWC) form. Accordingly, if a subcontractor does not have his or her own policy and a coverage agreement is used, contractors and subcontractors must use that portion of the form whereby the hiring contractor agrees to provide coverage to the employees of the subcontractor. The portion of the form that would otherwise allow them not to provide coverage for the employees of an independent contractor may not be used.

B. The worker's compensation insurance shall include the following terms:

1. Employer's Liability limits of \$1,000,000.00 for each accident are required.
2. "Texas Waiver of Our Right to Recover From Others Endorsement, WC 42 03 04" shall be included in this policy.
3. Texas must appear in Item 3A of the Workers Compensation coverage or Item 3C must contain the following: All States except those listed in Item 3A and the States of NV, ND, OH, WA, WV, and WY.

C. Pursuant to the explicit terms of Title 28, Section 110.110(c) (7) of the Texas Administrative Code, this Agreement, and all subcontracts providing services under this Agreement must include the following terms and conditions in the following language, without any additional words or changes, except those required to accommodate the specific document in which they are contained or to impose stricter standards of documentation:

"A. *Definitions:*

***Certificate of coverage ("certificate")*** - A copy of a certificate of insurance, a certificate of authority to self-insure issued by the Division of Workers Compensation, or a coverage agreement (DWC-81, DWC-83, or DWC-84), showing statutory workers' compensation insurance coverage for the person's or entity's employees providing services on a project, for the duration of the project.

***Duration of the project*** - includes the time from the beginning of the work on the project until the Contractor's/person's work on the project has been completed and accepted by the governmental entity.

***Persons providing services on the project ("subcontractors" in § 406.096 [of the Texas Labor Code])*** - includes all persons or entities performing all or part of the services the Contractor has undertaken to perform on the project, regardless of whether that person contracted directly with the Contractor and

*regardless of whether that person has employees. This includes, without limitation, independent Contractors, subcontractors, leasing companies, motor carriers, owner-operators, employees of any such entity, or employees of any entity which furnishes persons to provide services on the project. "Services" include, without limitation, providing, hauling, or delivering equipment or materials, or providing labor, transportation, or other service related to a project. "Services" does not include activities unrelated to the project, such as food/beverage vendors, office supply deliveries, and delivery of portable toilets.*

- B. The Contractor shall provide coverage, based on proper reporting of classification codes and payroll amounts and filing of any coverage agreements, that meets the statutory requirements of Texas Labor Code, Section 401.011(44) for all employees of the Contractor providing services on the project, for the duration of the project.*
- C. The Contractor must provide a certificate of coverage to the governmental entity prior to being awarded the contract.*
- D. If the coverage period shown on the Contractor's current certificate of coverage ends during the duration of the project, the Contractor must, prior to the end of the coverage period, file a new certificate of coverage with the governmental entity showing that coverage has been extended.*
- E. The Contractor shall obtain from each person providing services on a project, and provide to the governmental entity:
  - (1) a certificate of coverage, prior to that person beginning work on the project, so the governmental entity will have on file certificates of coverage showing coverage for all persons providing services on the project; and*
  - (2) no later than seven calendar days after receipt by the Contractor, a new certificate of coverage showing extension of coverage, if the coverage period shown on the current certificate of coverage ends during the duration of the project.**
- F. The Contractor shall retain all required certificates of coverage for the duration of the project and for one year thereafter.*
- G. The Contractor shall notify the governmental entity in writing by certified mail or personal delivery, within 10 calendar days after the Contractor knew or should have known, or any change that materially affects the provision of coverage of any person providing services on the project.*
- H. The Contractor shall post on each project site a notice, in the text, form and manner prescribed by the Division of Workers Compensation, informing all*

*persons providing services on the project that they are required to be covered, and stating how a person may verify coverage and report lack of coverage.*

- I. *The Contractor shall contractually require each person with whom it contracts to provide services on a project, to:*
  - (1) *provide coverage, based on proper reporting of classification codes and payroll amounts and filing of any coverage agreements, that meets the statutory requirements of Texas Labor Code, Section 401.011(44) for all of its employees providing services on the project, for the duration of the project;*
  - (2) *provide to the Contractor, prior to that person beginning work on the project, a certificate of coverage showing that coverage is being provided for all employees of the person providing services on the project, for the duration of the project;*
  - (3) *provide the Contractor, prior to the end of the coverage period, a new certificate of coverage showing extension of coverage, if the coverage period shown on the current certificate of coverage ends during the duration of the project;*
  - (4) *obtain from each other person with whom it contracts, and provide to the Contractor:*
    - (a) *A certificate of coverage, prior to the other person beginning work on the project; and*
    - (b) *A new certificate of coverage showing extension of coverage, prior to the end of the coverage period, if the coverage period shown on the current certificate of coverage ends during the duration of the project;*
  - (5) *retain all required certificates of coverage on file for the duration of the project and for one year thereafter;*
  - (6) *notify the governmental entity in writing by certified mail or personal delivery, within 10 calendar days after the person knew or should have known, of any change that materially affects the provision of coverage of any person providing services on the project; and*
  - (7) *Contractually require each person with whom it contracts to perform as required by paragraphs (a) - (g), with the certificates of coverage to be provided to the person for whom they are providing services.*
- J. *By signing this contract, or providing, or causing to be provided a certificate*

*of coverage, the Contractor is representing to the governmental entity that all employees of the Contractor who will provide services on the project will be covered by workers' compensation coverage for the duration of the project; that the coverage will be based on proper reporting of classification codes and payroll amounts; and that all coverage agreements will be filed with the appropriate insurance carrier or, in the case of a self-insured, with the Commission's Division of Self-Insurance Regulation. Providing false or misleading information may subject the Contractor to administrative penalties, criminal penalties, civil penalties, or other civil actions.*

*K. The Contractor's failure to comply with any of these provisions is a breach of contract by the Contractor that entitles the governmental entity to declare the contract void if the Contractor does not remedy the breach within ten calendar days after receipt of notice of breach from the governmental entity.”*

- VII. Certificates of Insurance shall be prepared and executed by the insurance company or its authorized agent, and shall contain the following provisions and warranties:
- A. The company is licensed and admitted to do business in the State of Texas.
  - B. The insurance policies provided by the insurance company are underwritten on forms provided by the Texas State Board of Insurance or ISO.
  - C. All endorsements and insurance coverages according to requirements and instructions contained herein.
  - D. The form of the notice of cancellation, termination, or change in coverage provisions to the City of College Station.
  - E. Original endorsements affecting coverage required by this section shall be furnished with the certificates of insurance.

## **ARTICLE XVI - TAXES AND FEES**

- 16.1 **USER Obligations.** For periods subsequent to the Acceptance Date, USER shall timely report, make filings for, and pay any and all sales, use, income, gross receipts, excise, transfer, ad valorem, property or other taxes, and any and all charges, surcharges, franchise fees or similar fees (collectively, “Assessments”) assessed against it due to its operation of the infrastructure included in this Agreement, its use of the USER Fibers, including the provision of services over the USER Fibers, its use of any other part of the System, or its ownership or use of equipment or facilities connected to the USER Fibers. The above obligation applies to Assessments applicable to this Agreement or Assessments imposed on or based upon the provision or sale of maintenance, collocation, or other PROVIDER services provided pursuant to this Agreement; provided that, with regard to such Assessments, if required by law, PROVIDER shall charge USER and USER shall pay to

PROVIDER such Assessments unless USER provides PROVIDER with a valid resale or other exemption certificate acceptable to PROVIDER.

162 **PROVIDER Obligations.** Subject to Section 16.1 above, PROVIDER shall timely report and pay any and all Assessments assessed against it due to its construction, ownership or use of the System, provided that, in the event that any property taxes (including ad valorem, use, property, or similar taxes, franchise fees, or Assessments that are based on the value of property or of a property right) are imposed on PROVIDER with respect to any portion of the System that is included in this Agreement, the USER Fibers or the Associated Conduit, and this Agreement, the USER Fibers or the Associated Conduit are not separately assessed by the taxing authority imposing such property taxes, USER shall reimburse PROVIDER within thirty (30) days of receipt of invoice from PROVIDER for USER's Pro Rata Share of such property taxes. PROVIDER shall provide USER with all information reasonably requested by USER with respect to any such property tax reimbursement sufficient to verify USER's Pro Rata Share. In the event PROVIDER receives a refund or credit of any property taxes previously reimbursed in whole or in part by USER under the provisions of this Section 16.2, PROVIDER shall, within thirty (30) days of its receipt of such refund or credit, advance USER its Pro Rata Share of such refund or credit with related accrued interest paid or credited by the taxing authority (if any) and PROVIDER shall provide USER with all information reasonably requested by USER to verify USER's Pro Rata Share of the refund or credit.

163 **Reimbursement of Taxes Paid on USER's Behalf.** If PROVIDER is assessed for any Assessments related to USER's participation in this Agreement or USER's use of the USER Fibers or any Assessments that USER is obligated to pay pursuant to Sections 16.1 or 16.2, PROVIDER shall, within thirty (30) days of its receipt of such Assessment, provide USER with a copy of such Assessment, and all information reasonably requested by USER with respect to such Assessment including, without limitation, the amount and due date for payment of the Assessment. USER shall, at its option, pay the amount of such Assessment (i) directly to the appropriate taxing authority, or (ii) to PROVIDER at least ten (10) business days prior to the due date of such Assessment, in which case PROVIDER shall promptly pay the amount of such Assessment to the appropriate taxing authority. If USER elects to pay the Assessment directly to the appropriate taxing authority, USER shall notify PROVIDER in writing of its intentions at least ten (10) business days prior to the due date of such Assessment and USER shall provide PROVIDER all information reasonably requested by PROVIDER to provide evidence of USER's payment of the Assessment. USER, at its option, shall have the right, at its sole cost, to contest any such Assessments. If USER elects to contest any Assessment subject to this Section, USER shall notify PROVIDER in writing of its intention to contest the Assessment and PROVIDER will reasonably cooperate with USER in pursuing any such contest. USER, at its option, may pay the Assessment prior to any such contest, or contest the Assessment without payment; provided that (i) USER shall take such steps as are reasonably necessary to prevent any forfeiture of PROVIDER's rights or property, or the imposition of any lien on the System and (ii) USER shall indemnify and hold PROVIDER harmless from any expense, legal action or cost, including reasonable attorneys' fees, resulting from USER's exercise of its rights to contest an Assessment under this Section. If, within ten (10)



business days prior to the due date of such Assessment, USER does not pay the Assessment to PROVIDER, notify PROVIDER in writing of its intentions to pay the Assessment directly to the appropriate taxing authority, or notify PROVIDER in writing of its intention to contest the Assessment, then PROVIDER, in its sole discretion, may pay the Assessment and invoice USER for reimbursement. In such case, USER shall reimburse PROVIDER within thirty (30) days of receipt of invoice from PROVIDER. In the event PROVIDER receives a refund or credit of an Assessment previously paid to a taxing authority by USER or PROVIDER under the provisions of this Section, PROVIDER shall, within thirty (30) days of its receipt of such refund or credit, advance USER such refund or credit with related accrued interest paid or credited by the taxing authority, if any, and PROVIDER shall provide USER with all information reasonably requested by USER with respect to the refund or credit.

164 **Cooperation and Efforts to Reduce Tax.** The parties shall cooperate in any contest of any Assessments and in making tax-related reports and filings, so as to avoid, to the extent reasonably possible, prejudicing the interests of the other party and the parties shall use commercially reasonable and acceptable efforts to reduce or eliminate any Assessments described in this Article XVI.

165 **Penalties and Interest.** Notwithstanding any other provision of this Article XVI, in the event that either party to this Agreement incurs penalties, interest, or additional Assessments as a result of non-compliance, non-payment, or delinquent payment of any Assessment discussed under this Article XVI when due, the party causing the incurrence of the penalty, interest or additional Assessment shall be solely responsible for such penalty, interest or additional Assessment.

## **ARTICLE XVII - NOTICE**

17.1 **Notice Addresses.** Unless otherwise provided in this Agreement, all notices and communications concerning this Agreement shall be in writing and addressed to the other party as follows:

If to PROVIDER:  
City of Bryan  
Attn: City Manager  
300 South Texas Avenue  
Bryan, Texas 77803

If to USER:  
XYZ Company  
Attn: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

or at such other address as may be designated in writing to the other party.

- 17.2 **Notice Delivery.** Unless otherwise provided herein, notices shall be hand delivered, sent by registered or certified U.S. Mail, postage prepaid, or by commercial overnight delivery service, and shall be deemed served or delivered to the addressee or its office when received at the address for notice specified above when hand delivered, on the day after being sent when sent by overnight delivery service, or upon receipt as evidenced by the return receipt for registered or certified U.S. Mail.

## **ARTICLE XVIII - CONFIDENTIALITY**

- 18.1 **Confidentiality Obligations.** The parties acknowledge that USER will disclose proprietary and confidential network and business information to PROVIDER in order to perform under this Agreement. This information if disclosed to competitors of either party, would give or increase such competitors' advantage over the party or diminish that party's advantage over its competitors ("Confidential Information"). PROVIDER agrees to take all reasonable steps to protect such proprietary and confidential information from public disclosure, and to make available such information internally only to PROVIDER personnel with a need to know or to its legal counsel, or as otherwise required by law or court order. In the event of a request under the Texas Open Records Act, PROVIDER will respond as provided in TEXAS GOVERNMENT CODE, Section 552.305.

18.2 **Publicity and Advertising.**

- (a) Neither party shall publish or use any advertising, sales promotions, or other publicity materials that use the other party's logo, trademarks, or service marks without the prior written approval of the other party.
- (b) Each party shall have the right to review and approve any publicity material, press releases, or other public statements by the other that refer to such party or that describe any aspect of this Agreement. Each party agrees not to issue any such publicity materials, press releases, or public statements without the prior written approval of the other party, except as is required to comply with federal or state laws.
- (c) Nothing in this Agreement establishes a lease, license or right for either party to use any of the other party's brands, marks, or logos without prior written approval of the other party.

## **ARTICLE XIX - FORCE MAJEURE**

- 19.1 **Excused Performance.** Neither PROVIDER nor USER shall be in default under this

Agreement with respect to any delay in its performance (other than a failure to make payments when due) caused by any of the following conditions (each a “Force Majeure Event”): (a) act of God; (b) fire; (c) flood; (d) material shortage or unavailability not resulting from the responsible party’s failure to timely place orders or take other necessary actions therefor; (e) government codes, ordinances, laws, rules, regulations, or court orders; (f) war or civil disorder; or (g) any other cause beyond the reasonable control of such party. The party claiming relief under this Article shall promptly notify the other in writing of the existence of the Force Majeure Event relied on, the expected duration of the Force Majeure Event, and the cessation or termination of the Force Majeure Event. The party claiming relief under this Article shall exercise commercially reasonable efforts to minimize the time for any such delay.

## **19.2 Damage or Destruction.**

- (a) **USER’s Fibers.** In the event of a total or partial destruction of substantially all of USER Equipment where such casualty occurs as a result of an event of Force Majeure, whether or not such casualty is covered under a policy of insurance carried by USER, this Agreement may be terminated at the option of USER, or USER at its sole cost and expense, may commence and complete as soon as practicable the repair or restoration of the damaged USER Equipment, or any part thereof.
- (b) **System.** In the event of a total or partial destruction of the System, or any part thereof, including USER Fibers, where such casualty occurs as a result of an event of Force Majeure, whether or not such casualty is self-insured or covered under a policy of insurance carried by PROVIDER, the Agreement may be terminated at PROVIDER’s option, or PROVIDER, at its sole cost and expense, may commence and complete as soon as practicable, the repairs or restoration of the damaged System, or any part thereof, including USER Fibers, to substantially their same condition immediately before the event of destruction. If PROVIDER elects to terminate the Agreement, PROVIDER shall be relieved of any obligation to USER, and USER shall be released from its obligations under this Agreement.

## **ARTICLE XX - PAYMENT DISPUTE RESOLUTION**

USER and PROVIDER shall attempt in good faith to resolve any bona fide dispute arising out of or relating to any monetary obligation under this Agreement as expeditiously as possible by negotiations between an executive of USER or his or her designated representative with sufficient authority to negotiate a resolution of the dispute and an executive of PROVIDER with similar authority, subject to final council approval. Either USER or PROVIDER may give the other party written notice of any such payment dispute which notice shall include documentation substantiating the dispute. Within twenty (20) days after delivery of notice of a payment dispute as described above, the designated executives shall meet at a mutually acceptable time and place, and thereafter as often as they reasonably deem necessary to exchange information and to attempt to resolve the dispute. If the matter has not been resolved within thirty (30) days after the first meeting, Section 12.2 herein shall apply.

## **ARTICLE XXI - RULES OF CONSTRUCTION**

- 21.1 **Interpretation.** The captions or headings in this Agreement are strictly for convenience and shall not be considered in interpreting this Agreement or as amplifying or limiting any of its content. Words in this Agreement that import the singular connotation shall be interpreted as plural, and words that import the plural connotation shall be interpreted as singular, as the identity of the parties or objects referred to may require. References to “person” or “entity” each include natural persons and legal entities, including corporations, limited liability companies, partnerships, sole proprietorships, business divisions, unincorporated associations, governmental entities, and any entities entitled to bring an action in, or that are subject to suit in an action before, any state or federal court of the United States. The word “including” means “including, but not limited to.” “Days” refers to calendar days, except that references to “banking days” exclude Saturdays, Sundays and holidays during which nationally chartered banks in Houston, Texas are authorized or required to close. Unless expressly defined herein, words having well-known technical or trade meanings shall be so construed.
- 21.2 **Cumulative Remedies: Insurance.** Except as set forth to the contrary herein, any right or remedy of PROVIDER or USER allowed by this Agreement shall be cumulative and without prejudice to any other right or remedy set forth herein. The provisions of Article XV (Insurance) shall not be construed as limiting the Indemnitor’s obligations pursuant to Article XIII (Indemnification) or other provisions of this Agreement.
- 21.3 **No Third-Party Rights.** Nothing in this Agreement is intended to provide any legal rights to anyone not an executing party of this Agreement.
- 21.4 **Agreement Fully Negotiated.** This Agreement has been fully negotiated between and jointly drafted by PROVIDER and USER.
- 21.5 **Document Precedence.** In the event of a conflict between the provisions of this Agreement and those of any Exhibit, the provisions of this Agreement shall prevail and such Exhibits shall be corrected accordingly.
- 21.6 **Industry Standards.** Except as otherwise set forth herein, for the purpose of this Agreement the normal standards of performance within the telecommunications industry in the relevant market shall be the measure of whether a party’s performance is reasonable and timely.
- 21.7 **Cross References.** Except as the context otherwise indicates, all references to Exhibits, Articles, Sections, Subsections, Clauses, and Paragraphs refer to provisions of this Agreement.
- 21.8 **Limited Effect of Waiver.** The failure of either PROVIDER or USER to enforce any of the provisions of this Agreement, or the waiver thereof in any instance, shall not be

construed as a general waiver or relinquishment on its part of any such provision, but the same shall nevertheless be and remain in full force and effect.

- 21.9 **Applicable Law and Venue.** This Agreement shall be governed by and construed in accordance with the domestic laws of the State of Texas without reference to its choice of law principles. The laws of such state shall govern the statute of limitations and the remedies for any wrongs that may be found. The venue for any court proceeding shall be in Brazos County, Texas.
- 21.10 **Severability.** If any term, covenant or condition in this Agreement shall, to any extent, be invalid or unenforceable in any respect under the laws governing this Agreement, the remainder of this Agreement shall not be affected thereby, and each term, covenant or condition of this Agreement shall be valid and enforceable to the fullest extent permitted by law.
- 21.11 **No Partnership Created.** The relationship between PROVIDER and USER shall not be that of partners, agents, or joint venturers for one another, and nothing contained in this Agreement shall be deemed to constitute a partnership or agency agreement between them for any purposes, including federal income tax purposes. PROVIDER and USER, in performing any of their obligations hereunder, shall be independent contractors or independent parties and shall discharge their contractual obligations at their own risk.

## **ARTICLE XXII - ASSIGNMENT**

- 22.1 **Restrictions on Assignment.** Except as otherwise provided herein, USER may not sell, assign, sublease or otherwise transfer in whole or in part (whether voluntarily or by action of law), directly, indirectly, or contingently this Agreement or any interest herein to any third party.
- 22.2 **Assignments to Particular Classes of Entities.** The provisions of Section 22.1 notwithstanding:
- (a) **Assignment to Affiliate.** With final approval by the PROVIDER, the USER may assign, sublease, or otherwise transfer in whole or in part (whether voluntarily or by action of law), directly, indirectly, or contingently this Agreement or any interest herein to an Affiliate, so long as that Affiliate provides information to PROVIDER within thirty (30) days of the assignment, establishing that it has the ability to meet the financial obligations under this Agreement. If Affiliate fails to meet this criteria set forth above, the Assignment shall be null and void.
  - (b) **Assignment to Third Party Providing Similar Services.** With final approval by the PROVIDER, the USER may assign, sublease, or transfer, pursuant to a merger, sale or transfer of all or substantially all of the assets or stock of USER, all of its rights and obligations under this Agreement to any party that provides similar services as USER, so long as the surviving or purchasing entity assumes, in writing,

all of the obligations of USER under this Agreement, and provides information acceptable to PROVIDER within thirty (30) days after the Assignment, sublease, transfer, merger or sale, sufficient to satisfy PROVIDER that the proposed assignee can meet those obligations. If the proposed assignee cannot establish to PROVIDER's reasonable satisfaction that it can meet those obligations, then the assignment shall be null and void.

- 223 **Agreement Binds Successors.** This Agreement and the rights and obligations under this Agreement (including the limitations on liability and recourse set forth in this Agreement benefiting the other party) shall be binding upon and shall inure to the benefit of PROVIDER and USER and their respective permitted successors and assigns.
- 224 **Change in Control Not an Assignment.** Notwithstanding any presumptions under applicable state law that a change in control of a party constitutes an assignment of an agreement, a change in control of a party, not made for purposes of circumventing restrictions on assignment or of depriving the other party of rights under this Agreement, shall not be deemed an assignment for purposes of this Agreement.
- 225 **Right to Subcontract.** PROVIDER may subcontract for testing, maintenance, repair, restoration, relocation, or other operational and technical services it is obligated to provide hereunder or may have its contractor perform such obligations.
- 226 **Financing Arrangements.** Subject to Section 9.6, either party shall have the right, directly or through an Affiliate, to enter into financing arrangements (including secured loans, leases, sales with lease-back, or leases with lease-back arrangements, purchase-money or vendor financing, conditional sales transactions, or other arrangements) with one or more financial institutions, vendors, suppliers or other financing sources (individually and collectively, "Lenders"), that, with respect to PROVIDER, relate to the System and, with respect to USER, relate to the USER License (and not to any property right in the System).

#### **ARTICLE XXIII - ENTIRE AGREEMENT; AMENDMENT; EXECUTION**

- 23.1 **Integration; Exhibits.** This Agreement constitutes the entire and final agreement and understanding between PROVIDER and USER with respect to the subject matter hereof and supersedes all prior agreements relating to the subject matter hereof, which are of no further force or effect. The Exhibits referred to herein are integral parts hereof and are made a part of this Agreement by reference.
- 23.2 **No Parol Amendment.** This Agreement may only be amended, modified, or supplemented by an instrument in writing executed by duly authorized representatives of PROVIDER and USER.
- 23.3 **Counterparts.** This Agreement may be executed in one or more counterparts, all of which taken together shall constitute one and the same instrument.

IN WITNESS WHEREOF and in confirmation of their consent to the terms and conditions contained in this Agreement and intending to be legally bound hereby, PROVIDER and USER have executed this Agreement as of the dates set forth opposite the signatures of their respective authorized officers below.

CITY OF BRYAN

Date: \_\_\_\_\_

By: \_\_\_\_\_

J. Kean Register, City Manager  
Or Mayor

ATTEST:

\_\_\_\_\_  
Mary Lynne Stratta, City Secretary

APPROVED AS TO FORM:

\_\_\_\_\_  
Janis Hampton, City Attorney

**“USER”:**



Date: \_\_\_\_\_

By: \_\_\_\_\_

Authorized signer

**EXHIBIT A - MAP ROUTES COVERED BY THIS LEASE**

This map is a representation of possible fiber paths only and is subject to change without update or notification.

**EXHIBIT A – (continued)**

**EXHIBIT A – (Continued)**

**Overall Fiber Map Representation**

**Downtown Area Fiber Map Representation**

**Northwest Fiber Map Representation**



**EXHIBIT A – (Continued)**

**Southwest Fiber Map Representation**

**EXHIBIT A – (Continued)**

**Southeast Fiber Map Representation**

**EXHIBIT A – (Continued)**

**EXHIBIT A-1 - ROUTE SEGMENT LISTING  
AND PAYMENTS**

Page 1

**Northeast Fiber Map Representation**

**Right to Fibers on PROVIDER System Route Segments**

xxxxx fiber strands on the main city fiber infrastructure as shown in Exhibit A  
xxxx fiber strands on the Route Segment running from the splice point in the vicinity of Point 1 to Point 2.

**Calculation of License Payment Amount – Fiber**

The USER License Payment for the USER Fibers is an imputed one-time rate of \$500.00 per Fiber Strand Mile. Fractional decimals are always rounded up to the nearest integer.

Example:

Fiber Distance	<u>18.8 miles</u>
Other segments	<u>1.3 miles</u>
Total miles	<u>21.0 miles</u>

**Example calculation:**

Two (2) fiber strands for each segment

2 fiber strands x 21 miles = 42 Fiber Strand Miles

42 Fiber Strand Miles x \$500.00/Fiber Strand Miles = \$21,000.00 User License Payment Amount

**Calculation of Annual Maintenance Amount - Fiber**

Following the Effective Date for each USER Fiber on a Route Segment, USER will pay an annual maintenance fee per Fiber Mile per year. The annual maintenance will be calculated annually and is based on the personnel cost (payroll and benefits) times the estimated percent of city staff time spent conducting fiber operations and maintenance activities. This amount provides the total staff cost devoted to fiber operations and maintenance activities. This amount is then divided by the total number of fiber strand miles to determine the annual maintenance cost per fiber strand mile

Current City staff cost devoted to fiber activities \$68,885. Total current city fiber strand miles = 2,192

Current maintenance cost per fiber optic strand mile:  $\$68,885/2192 = \$31.43$  per fiber strand mile

**Annual maintenance cost:** \$31.43/fiber strand mile x 42 fiber strand miles leased = **\$1,320.06**

**Calculation of License Payment Amount - Conduit**

The USER License Payment for the USER Fibers is an imputed rate of \$1.00 per linear foot of conduit/innerduct per year. Fractional decimals are always rounded up to the nearest integer.

Example:

Conduit Leased Distance	1 conduit x 2.1 miles x 5,280 feet = 11,088 linear feet
Innerduct in Second Conduit	1 innerduct x 0.4 miles x 5,280 feet = 2,112 linear feet
Total miles	<u>2.5 miles x 5,280 feet = 13,200 linear feet</u>

**Example calculation:**

One (1) – 3 inch conduit and One (1) – 1 ¼ inch innerduct installed in another conduit.

13,200 Linear Feet of conduit/innerduct x \$1.00/Linear Foot of Conduit/Innerduct = **\$13,200.00 User License Payment Amount per Year**

**EXHIBIT A-1 - ROUTE SEGMENT LISTING AND PAYMENTS**

Page 2

**Due Date for Payment**

The License Payment shall be paid by USER to PROVIDER as follows:

- (a) 100% of the License Payment and the first year Maintenance Amount is due and payable upon execution of the Agreement by the parties.

**EXHIBIT A-1 - ROUTE SEGMENT LISTING AND PAYMENTS**

**Initial Route Segments:**

As of the Effective Date, This Lease will be effective for the following Fibers in the following Route Segments:

**Order 1**

ROUTE SEGMENTS Origin/Destination or Network Description	Scheduled Delivery Date	Estimated Route Miles	Type of Fiber	No. of Fibers	Estimated Fiber Miles	Annual Maintenance
Fiber	Upon execution	18.8	SM	2	37.6	1181.76
As needed	Upon execution	x.x	SM	2	x.x	x.x
As needed	Upon execution	x.xx	SM	2	x.xx	x.x
<b>Totals:</b>	--	xx.xx	--		xx.xx	\$x,xxx.xx

**Process for Additional USER Fibers Elections Following the Effective Date:**

USER may request availability of additional Fibers on Route Segments by written notice to PROVIDER identifying the Route Segment and number of Fibers requested. Subject to verification of availability by PROVIDER within thirty (30) calendar days of written notice of the request, PROVIDER and USER may execute additional Lease Agreements, or amend this Agreement to include additional Fibers or Route Segments.

## **EXHIBIT B - Fiber Cable Splicing, Testing and Acceptance Procedures**

Page 1

1. PROVIDER will perform all tests, provide documentation, and meet the standards identified in this exhibit. Analysis of final bi-directional OTDR data will be the tool used to make final acceptance of the fibers.

### **2 ACCEPTANCE STANDARDS**

#### **A. Bi-directional Traces**

Bi-directional OTDR traces will be taken without a launch reel. OTDR traces should be taken in both directions at 1550 nm. The traces for all fibers should be recorded on removable media and provided to the other party.

#### **B. Light Source and Power Meter Test**

A bi-directional End-to-End test will be performed, as needed, on each fiber in a Span at 1550 nm with a Light Source and Power Meter. The purpose of this test is to determine actual Span loss and to prove there is a one-to-one correspondence of all fibers

### **3 NAMING OF TRACES**

OTDR traces taken for bi-directional testing and the OTDR traces of the splice and recorded on removable media and provided to the other party. To name the traces, each party will provide alpha abbreviations for the sites. The 8-character file name plus 3-numbers, including fiber strand should follow this example:

First four letters (Provider Approved) = source point Letters 5, 6, 7, 8 (Provider Approved) = Destination point 3 numbers = fiber number  
SOR = file extension

**NOTE: ALL HEADER INFORMATION ON OTDR TRACE MUST BE COMPLETED.**

### **4 OTDR SETUP**

**NOTE: BEFORE THE START OF ANY TESTING, ALL CONNECTORS WILL BE CLEANED WITH A CONNECTOR CLEANER.**

## **EXHIBIT B - Fiber Cable Splicing, Testing and Acceptance Procedures**

Page 2

The OTDR used to perform testing is the EXFO, Model FTB-150 or equivalent model.

The following settings were used.

### **Index of Refraction**

**Fiber type**            **1550 nm**

All                      1.4677

**NOTE: THESE SETTINGS ARE GUIDELINES ONLY. EACH PROJECT OR TESTING SITUATION MAY REQUIRE ADJUSTMENT OF SETTINGS TO OBTAIN THE BEST TEST RESULTS POSSIBLE.**

## **5. TEST PACKAGES**

PROVIDER provided a package containing the following test data for each fiber. All data provided was saved on removable media.

- A. OTDR Span traces taken at 1550 nm.
- B. An Excel spreadsheet containing the power meter and light source data for both directions at 1550 nm. The spreadsheet should also include the average for each fiber.



## **EXHIBIT C - Fiber Optic Cable Specifications**

The fiber optic cable for each Route Segment is described on attached Exhibit A-2.

The majority of PROVIDER fiber optic cable is OFS ADSS (All-Dielectric Self-Supporting) Singlemode fiber optic cable such as AT-3BE27DT-048-CLCB\_ Double Jkt PowerGuide ADSS Double PE Jkts, Dielectric Central Member ALLWAVE-SM- .35/.31/.25 db/km@1310/1385/1550 CABLE DIAMETER: 16.8 mm (0.662 in.) or similar.

ADSS (All-Dielectric Self-Supporting) is a loose tube non-metallic fiber optic cable that is designed to be installed without the assistance of metal strand. ADSS cable uses aramid yarn and a high tensile central strength member for support. ADSS cable attaches directly to the pole or tower with the use of special attachment hardware.

## **EXHIBIT D - Fiber Optic Cable Facilities Installation Specifications**

The System has been constructed in accordance with Industry Standards.

## **EXHIBIT E - Operations Specifications**

Page 1

All capitalized terms not otherwise defined herein shall have their respective meanings as set forth in the Dark Fiber Lease Agreement of which this Exhibit forms a part.

### 1. Maintenance.

- (a) Scheduled Maintenance. Routine Maintenance and repair of the System described in this section (“Scheduled Maintenance”) shall be performed by or under the direction of PROVIDER, at PROVIDER’s reasonable discretion or at USER’s request. Scheduled Maintenance shall commence with respect to each Segment upon the Execution Date. Scheduled Maintenance may include the following activities:
  - (i) Monitoring of the System on a regular basis;
  - (ii) Participation in the “Texas811” program and all required and related cable locates;
  - (iii) Modification and/or additional construction to fiber path (Fiber patch panel, splice can and fiber path).
  
- (b) Unscheduled Maintenance. Non-Routine Maintenance and repair of the System which is not included as Scheduled Maintenance (“Unscheduled Maintenance”) shall be performed by or under the direction of PROVIDER. Unscheduled Maintenance shall commence with respect to each Segment upon the Effective Date. Unscheduled Maintenance shall consist of:
  - (i) “Emergency Unscheduled Maintenance” in response to an alarm identification by PROVIDER, notification by USER or notification by any third party of any failure, interruption or impairment in the operation of the System, or any event imminently likely to cause the failure, interruption or impairment in the operation of the System.
  - (ii) “Non-Emergency Unscheduled Maintenance” in response to any potential service-affecting situation to prevent any failure, interruption or impairment in the operation of the System.

USER shall immediately report the need for Unscheduled Maintenance to PROVIDER in accordance with procedures promulgated by PROVIDER from time to time. PROVIDER will log the time of USER’s report, verify the problem and dispatch personnel within a reasonable time to take corrective action. PROVIDER will use the same procedures and level of effort to restore USER service as used to restore service to PROVIDER Fiber Optic Cable Facilities.

## **EXHIBIT E - Operations Specifications**

Page 2

### 3. Cooperation and Coordination.

USER shall utilize an Escalation List provided by PROVIDER, as updated from time to time, to report and seek immediate initial redress of exceptions noted in the

- (a) performance of PROVIDER personnel in meeting maintenance service objectives.
- (b) USER will, as necessary, arrange for unescorted access for PROVIDER to all sites of the USER Fibers in the System, subject to applicable contractual, underlying real property and other third-party limitations and restrictions.
- (c) USER shall furnish to PROVIDER, and update as changes occur, the current name, title, telephone number and personal device communications number of a USER representative to contact regarding maintenance schedules and actions.
- (d) In performing its services hereunder, PROVIDER will take workmanlike care to prevent impairment to the signal continuity and performance of the System. The precautions to be taken by PROVIDER shall include notifications to USER of service affecting activities or conditions. In addition, PROVIDER shall reasonably cooperate with USER in sharing information and analyzing the disturbances regarding the Fiber Optic Cable Facilities and/or fibers. In the event that any Scheduled or Unscheduled Maintenance hereunder requires a traffic roll or reconfiguration involving Fiber Optic Cable Facilities, fiber, electronic equipment, or regeneration or other facilities of the USER, then USER shall, at PROVIDER's reasonable request, make such personnel of USER available as may be necessary in order to accomplish such maintenance, which personnel shall coordinate and cooperate with PROVIDER in performing such maintenance as required of PROVIDER hereunder.
- (e) PROVIDER will notify USER at least five (5) business days prior, or when practical, ten (10) calendar days prior to the date in connection with any Planned Service Work Period (PSWP) of any Scheduled Maintenance and as soon as possible after becoming aware of the need for Unscheduled Maintenance. USER shall have the right to be present during the performance of any Scheduled Maintenance or Unscheduled Maintenance so long as this requirement does not interfere with PROVIDER's ability to perform its obligations under this Agreement. In the event that after any such notification the Scheduled Maintenance is canceled, or delayed, PROVIDER shall notify USER at PROVIDER's earliest opportunity, and will comply with the provisions of the previous sentence to reschedule any delayed activity.

## **EXHIBIT E - Operations Specifications**

Page 3

### 4. Facilities.

- (a) PROVIDER will maintain the System in a manner which will permit USER's use, in accordance with the terms and conditions of the Agreement and the USER Fibers required to be provided under the terms of the Agreement.
- (b) Except to the extent otherwise expressly provided in the Agreement, USER will be solely responsible for providing and paying for any and all maintenance of all electronic, optronic and other equipment, materials and facilities used by USER in connection with the operation of the Dark Fibers, none of which is included in the maintenance services to be provided hereunder.

### 5. Fiber Optic Cable Facilities/Fibers.

- (a) PROVIDER will perform appropriate Scheduled Maintenance on the Fiber Optic Cable Facilities contained in the System in a good and workmanlike manner and in accordance with PROVIDER's then current preventative maintenance procedures.
- (b) PROVIDER will maintain sufficient capability to teleconference with USER during an Emergency Unscheduled Maintenance in order to provide regular communications during the repair process. When correcting or repairing Fiber Optic Cable Facilities discontinuity or damage, including but not limited to Emergency Unscheduled Maintenance, PROVIDER will use the same effort to restore USER service as used to restore PROVIDER service. In order to accomplish such objective, it is acknowledged that the repairs so effected may be temporary in nature. In such event, within twenty-four (24) hours after completion of any such Emergency Unscheduled Maintenance, PROVIDER shall commence its planning for permanent repair, and thereafter promptly shall notify USER of such plans, and shall implement such permanent repair within an appropriate time thereafter. Restoration of open fibers on fiber strands not immediately required for service shall be completed on a mutually agreed-upon schedule. If the fiber is required for immediate service, the repair shall be scheduled for the next available Planned Service Work Period (PSWP).
- (c) PROVIDER will maintain and supply an inventory of spare Fiber Optic Cable Facilities in storage facilities supplied and maintained by PROVIDER at strategic locations to facilitate timely restoration.

### 6. Planned Service Work Period (PSWP).

Scheduled maintenance, which is reasonably expected to produce any signal discontinuity, must be coordinated between the parties. Users schedule will be considered, however ultimately, the Provider will set the timeline for all scheduled work.

## **EXHIBIT E - Operations Specifications**

Page 4

### 7. Subcontracting.

PROVIDER may subcontract any of the maintenance services hereunder; provided that PROVIDER shall require the subcontractor(s) to perform in accordance with the requirements and procedures set forth herein. The use of any such subcontractor shall not relieve PROVIDER of any of its obligations hereunder.

## **EXHIBIT F - Interconnections**

Page 1

### 1. USER's Right to Interconnect.

- (a) Route Segments. The initial connection points for each Route Segment are described on Exhibit A-2.
- (b) Splice Point - will be established at the PROVIDER selected splice points or at such other location as is acceptable to PROVIDER.
- (c) Other Interconnection Points. USER may request that PROVIDER establish other interconnections of the USER Fibers at fiber distribution panels at Fiber Optic Cable Facilities end points or other particular agreed to splice points in meet me vaults subject to the terms and conditions of this Exhibit and the Agreement. USER shall reimburse PROVIDER's Costs of such installation work, including but not limited to reimbursement of all Costs associated with establishing the splice points.
- (d) Access. USER shall have no right to access any Fibers within the Fiber Optic Cable Facilities or to enter any splice or PROVIDER vault. PROVIDER shall undertake all work to interconnect the USER Fibers and to construct and install the Associated Conduit, Fiber Optic Cable Facilities and appurtenances on its side of the demarcation point, and USER shall reimburse PROVIDER for its charges associated with such work within thirty (30) days of receipt of PROVIDER's invoice therefor.

### 2. Requests for Interconnections.

- (a) Connection Requests. USER shall provide PROVIDER at least forty five (45) days' notice (the "Interconnect Notice") of the interconnection request and/or the date USER requests that a connection be completed. The Interconnect Notice shall set forth a description of the work required to be performed, including:
  - (i) the connection location;
  - (ii) a copy of USER's construction design drawings including a diagram of the desired location of the Interconnect; and
  - (iii) all other information reasonably required by PROVIDER.
- (b) Response to Requests. Within ten (10) days after receiving the Interconnect Notice, PROVIDER shall respond with its acceptance or objections to the proposed interconnection. PROVIDER will use commercially reasonable efforts to accommodate the request to establish a Route Segment within thirty (30) days of its acceptance of the proposed interconnection unless a longer period of time to establish the entrance is stated in PROVIDER's acceptance. Notwithstanding the foregoing, PROVIDER may restrict any work establishing an interconnection to a planned service work period. Interconnection of Buildings not interconnected to PROVIDER's network on the Route

Segment will be considered on a case-by- case basis. PROVIDER may decline to make a requested connection at their sole discretion.

3. Demarcation Points. PROVIDER shall designate an installation demarcation point and a maintenance demarcation point (which may be a different point) for each interconnection of the USER Fibers as necessary to safeguard and maintain PROVIDER's control over the System and in accordance with section 1 (b) above. PROVIDER shall perform all installation work on facilities on its side of the installation demarcation point and shall perform all post-installation work on facilities on its side of the maintenance demarcation point. USER shall reimburse PROVIDER's charges of such installation work as set forth in this Exhibit. All post-installation work shall be part of PROVIDER's maintenance obligations under the Agreement.
4. Testing following Interconnects. Following splicing at agreed upon interconnect points, PROVIDER and USER will cooperate, including access to each other's facilities to conduct fiber testing to verify connectivity.
5. Installation of Interconnect Facilities.
  - (a) Building Entrance Cable. If applicable, USER shall, prior to the requested connection date, provide a fiber optic cable containing the applicable number of fibers of sufficient length to allow PROVIDER to pull such cable from the installation demarcation point to the splice point, as applicable, with an additional length (minimum of 100 feet) sufficient for PROVIDER to perform splicing (the "Building Entrance Cable").
  - (b) Construction Standards. All Interconnect Facilities constructed and installed by PROVIDER for USER will meet or exceed generally accepted telecommunications industry standards, as reasonably determined by PROVIDER, and all requirements of PROVIDER's building management or insurance underwriters, and any applicable local, state and federal codes and public health and safety laws and regulations (including fire regulations and the National Electric Code).
  - (c) Right of Way Obligations. Except as otherwise agreed between the parties, USER shall provide, at its sole cost and expense, any and all necessary rights of way, easements, permits, access rights and/or any required consents or authorizations to the extent Interconnect Facilities are located outside of PROVIDER's existing System and the PROVIDER splice point located outside of the applicable Building, and PROVIDER-approved materials and equipment (including cables and conduit) necessary for the construction, use operation, maintenance and repair of each such Interconnect facility.
  - (d) Building Access. Notwithstanding anything herein to the contrary, USER shall be responsible for acquiring and maintaining, at its sole cost and expense, building access rights and the right to distribute USER's facilities and services in each Building to be connected to the USER Fibers pursuant to this Agreement. USER shall be solely responsible for third party cross connect fees and other charges and costs related to interconnection to the USER Fibers associated with each Building entrance.



- (e) Determination of Splice Point and Demarcation Points for Building Entrances. Upon receipt of an Interconnection Request for a Building entrance, the parties agree to reasonably cooperate in determining the suitable locations for the splice point and demarcation points for the applicable Building. In Buildings where PROVIDER does not have Building access, the splice point will generally be located at the Building serving manhole, and the installation demarcation point and maintenance demarcation point will be located at the interface of the Building with the applicable Building serving vault and/or electric conduit serving the Building. If the parties cannot reach agreement with respect to the locations of the splice point and demarcation points for any Building, PROVIDER shall have the right to determine the applicable locations; provided that USER may withdraw its Installation Request for the applicable Building prior to commencement of construction of the Building entrance if USER objects to the selected splice point and demarcation points.
  
- (f) Space Constraints. Except for PROVIDER lit Buildings, PROVIDER may decline to establish a requested Building entrance if there is not adequate space remaining in the applicable Building conduit or other applicable facilities for a Building Entrance Cable containing the proposed number of fibers such that installation thereof would interfere with the operation of the other cables then installed within the Building conduit or facilities or would create an unreasonable risk of such interference as determined by PROVIDER in its reasonable discretion consistent with generally accepted standards and/or practices in the telecommunications industry.

6. Maintenance and Modification of Interconnect Facilities. USER shall provide all maintenance and repair of the Interconnect Facility on USER's side of the maintenance demarcation point and PROVIDER shall provide all maintenance and repair of the Interconnect facility on PROVIDER's side of the maintenance demarcation point. Any improvement, modification, addition to, relocation, or removal of the Interconnect facility by USER shall be subject to PROVIDER's prior review and written approval. USER shall pay the cost of such improvement, modification, addition to, relocation, or removal of the Interconnect Facility and the cost of repairing any damage due to USER's actions. However, subject to the terms of the Agreement, if PROVIDER initiates relocation or modification of the splice point and/or demarcation point for any Building entrance, such relocation or modification shall be at PROVIDER's Cost. PROVIDER's maintenance responsibility shall be limited to the Interconnect Facilities on its side of the maintenance demarcation point.

**EXHIBIT G - Insurance**