

Company Site No.

**NON-EXCLUSIVE ANTENNA INSTALLATION AND
PROPERTY USE AGREEMENT
BETWEEN THE
CITY OF SAN JOSE AND**

This NON-EXCLUSIVE ANTENNA INSTALLATION AND PROPERTY USE AGREEMENT (“AGREEMENT”) is made and entered into by and between the CITY OF SAN JOSE, a California municipal corporation ("CITY"), and _____ having a place of business at _____ (“COMPANY”), upon execution by CITY and COMPANY (“Effective Date”).

RECITALS

A. **WHEREAS**, CITY is the owner of certain properties located in the City of San Jose, County of Santa Clara, more particularly described on the “Property Descriptions”, attached hereto as **EXHIBIT “A”**, and incorporated herein by reference (“PROPERTY” or “PROPERTIES”, collectively”); and

B. **WHEREAS**, COMPANY desires to construct and install at no cost to CITY certain telecommunications facilities and appurtenant structures on CITY-owned PROPERTIES, which shall be subject to review and permit by CITY as herein described and upon CITY approval shall be described with individual site maps/parcel maps in **EXHIBIT “A”**; and

C. **WHEREAS**, COMPANY desires to provide certain services, which services are more particularly described in **EXHIBIT “B”**, attached hereto (“SERVICES”); and

D. **WHEREAS**, in order to provide SERVICES, COMPANY desires to obtain from CITY and CITY desires to grant to COMPANY the right to use certain portions of the PROPERTIES, which portions are further described in **EXHIBIT “C”** attached hereto, (the “LICENSED AREAS”) for the purposes of installing, maintaining, using, modifying, repairing, replacing, monitoring, removing and operating a telecommunication facility and associated equipment to provide SERVICES, which antenna and associated equipment are more particularly described on the “Antenna Facilities Description” attached hereto as **EXHIBIT “D”** and the individual site facility/antenna equipment are attached to this exhibit as an addendum and incorporated herein by this reference (“ANTENNA FACILITIES”); and

E. **WHEREAS**, COMPANY desires to obtain from CITY and CITY desires to grant to

COMPANY the right to use the LICENSED AREAS located on the CITY-owned PROPERTY or PROPERTIES identified in this AGREEMENT pursuant to the terms of this AGREEMENT; and

F. **WHEREAS**, CITY desires to have the SERVICES available in CITY in accordance with the terms and conditions contained in this AGREEMENT.

NOW, THEREFORE, for valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

SECTION 1. RIGHT TO USE CITY PROPERTY

A. Right to Use.

CITY hereby grants COMPANY the right to use the LICENSED AREAS on a non-exclusive basis, for the purpose of installing, maintaining, using, modifying, repairing, replacing, monitoring, removing and operating the ANTENNA FACILITIES to provide SERVICES and for no other purpose. CITY reserves the right to enter into separate agreements allowing third parties the right to use areas of the CITY's PROPERTIES inside or outside of the LICENSED AREAS for such purposes as the CITY deems appropriate, subject to the provisions of this AGREEMENT.

B. Access.

1. COMPANY will be given reasonable access to the LICENSED AREAS between the hours of 7:00 a.m. and 7:00 p.m., seven (7) days a week to install, repair, maintain, use, modify, replace, monitor, operate or remove the ANTENNA FACILITIES, provided COMPANY provides CITY with at least five (5) days prior written notice of the times that COMPANY will need access to that portion of the LICENSED AREAS located on the PROPERTY or PROPERTIES and at least forty-eight (48) hours actual prior oral confirmation to CITY of the dates and times that COMPANY will need access to any other portion of the LICENSED AREAS or PROPERTY or PROPERTIES. CITY reserves the right to reasonably adjust the hours of access by written request to the COMPANY. The individuals or departments listed in **EXHIBIT "C"** (hereinafter "PROPERTY MANAGER") shall be CITY's contact for these purposes, unless CITY otherwise indicates in writing.
2. If an emergency repair of the ANTENNA FACILITIES is necessary, COMPANY may be allowed reasonable access to the LICENSED AREAS between 7:00 p.m. and 7:00 a.m., provided that COMPANY obtains the PROPERTY MANAGER's prior permission to enter the LICENSED AREAS. The CITY shall provide COMPANY with the phone number of the PROPERTY MANAGER, which number shall permit contact with the PROPERTY MANAGER, or his/her designate, twenty-four (24) hours per day, seven (7) days per week.

3. COMPANY shall allow a representative of CITY to observe any repair, maintenance or removal work performed at the LICENSED AREAS or any other portion of the PROPERTY or PROPERTIES.

C. Relocation and Removal.

1. At any time during the term of this AGREEMENT, CITY may require relocation of any of the ANTENNA FACILITIES to a location designated by CITY, provided that CITY shall provide COMPANY with a three hundred and sixty-five (365) day prior written notice that the ANTENNA FACILITIES must be relocated.
2. If, notwithstanding COMPANY's agreement to relocate the ANTENNA FACILITIES, COMPANY fails to relocate the ANTENNA FACILITIES or repair or restore the affected areas of the LICENSED AREAS and PROPERTY or PROPERTIES within the three hundred and sixty-five (365) day period, as that period may be extended as provided in this Section, City Manager, in his or her sole discretion and without limitation with respect to any other rights or remedies which he/she may have, may terminate the permit as issued for the LICENSED AREAS pursuant to **Section 9** of this AGREEMENT, effective no earlier than seven (7) days after the date of notice of termination, and CITY may remove any of COMPANY's property, including the ANTENNA FACILITIES from the PROPERTY or PROPERTIES, upon prior written notice to COMPANY.
3. If CITY removes the ANTENNA FACILITIES pursuant to this Section, COMPANY shall pay to CITY all costs associated with CITY's removal of the ANTENNA FACILITIES, including any storage costs and costs to repair and restore the PROPERTY or PROPERTIES, including the LICENSED AREAS, within ten (10) days after receipt by COMPANY of an itemized bill therefore.
4. COMPANY may remove a portion of the ANTENNA FACILITIES at any time during the term of this AGREEMENT. Any impacts to the USE CHARGE will be applied at the next Adjustment Date, as defined below.

D. Title to the ANTENNA FACILITY.

Title to the ANTENNA FACILITIES shall be and remain with COMPANY while the ANTENNA FACILITIES are installed and maintained at the PROPERTY or PROPERTIES in accordance and compliance with all of the terms of this AGREEMENT.

E. Title to improvements to the PROPERTY.

Notwithstanding Section 1.D above, title to the Improvements to the PROPERTY or PROPERTIES or LICENSED AREAS required for approval for the placement of the ANTENNA FACILITIES, including but not limited to buildings, equipment enclosures,

monopoles or other structures placed thereon (“Improvements”), shall be and remain with CITY. Title to all equipment installed for purposes of operating and providing wireless communications services pursuant to this AGREEMENT shall be and remain with COMPANY.

F. No Warranties of Suitability of PROPERTY.

It is COMPANY’s election to install and maintain the ANTENNA FACILITIES at the PROPERTY or PROPERTIES and COMPANY does so solely at its own risk. CITY makes no representations or warranties regarding the suitability, condition or fitness of the PROPERTY or PROPERTIES for the installation, maintenance or use of the ANTENNA FACILITIES.

G. Right of CITY Access.

CITY reserves, and COMPANY agrees to, the right of CITY, its authorized officers, employees, agents or contractors, to enter into and access the LICENSED AREAS and the PROPERTY or PROPERTIES at any time. Without limiting the foregoing, CITY and COMPANY agree that CITY may: (1) inspect the PROPERTY or PROPERTIES, LICENSED AREAS and ANTENNA FACILITIES for COMPANY’s compliance with the terms of this AGREEMENT; (2) make repairs, alterations or additions to the PROPERTY or PROPERTIES or LICENSED AREAS or maintain or use the PROPERTY or PROPERTIES or LICENSED AREAS in any manner not prohibited by the terms of this AGREEMENT, all without a claim by COMPANY for any loss of occupation or use of, or any abatement of, the USE CHARGE for use of the LICENSED AREAS.

SECTION 2. TERM

A. Initial Term.

The term of this AGREEMENT shall commence on the EFFECTIVE DATE set forth above, and shall continue for ten (10) years (“TERM”), expiring at 11:59 p.m. on the tenth anniversary of said EFFECTIVE DATE (“TERMINATION DATE”), unless earlier terminated as pursuant to the terms of this AGREEMENT.

B. Option to Extend.

COMPANY shall have the option to extend the term of this AGREEMENT beyond the initial term described herein for one (1) additional five (5) year period on the same terms, covenants and conditions that are contained in this AGREEMENT (“OPTION PERIOD”); CITY shall increase the USE CHARGE during the OPTION PERIOD in the manner as provided in Section 3B below. COMPANY shall exercise its OPTION PERIOD under this AGREEMENT, if at all, by providing CITY with written notice that COMPANY intends to exercise its OPTION PERIOD no later than one hundred and eighty (180) days prior to the

TERMINATION DATE.

SECTION 3. USE CHARGE.

A. Charge and Payment.

Commencing within 30 days of the EFFECTIVE DATE, COMPANY shall pay CITY the payment due, paid annually, in accordance with the CITY's Rate Schedule as shown in **EXHIBIT "E"** for each of the respective individual ANTENNA FACILITIES at each respective PROPERTY or PROPERTIES as described herein ("USE CHARGE"). For clarity, each ANTENNA FACILITY at each separate PROPERTY constitutes its own USE CHARGE based on the number of antennae or amount of "ground space" occupied at each PROPERTY in accordance with **EXHIBIT "E"**. For example, the initial annual USE CHARGE for each of the individual ANTENNA FACILITIES described in this AGREEMENT is as follows: Property 1 - \$ _____; Property 2 - \$ _____. The USE CHARGE will increase annually on the ADJUSTMENT DATE, as defined below, in accordance with **EXHIBIT "E"**. COMPANY shall make all payments to CITY at the following address:

City of San Jose
Real Estate Services
Office of Economic Development
200 East Santa Clara Street, 12th Floor
San Jose, CA 95113-1905

Initial payment by COMPANY for adjustments made for addition of antennas, pursuant to **EXHIBIT "E"** shall be due and payable at the address set forth above on the date CITY approves placement of said additional antennas on the ANTENNA FACILITIES and shall be prorated to reflect the remainder of the year of the TERM ("TERM YEAR"). CITY shall reimburse COMPANY for adjustments reflecting removal of antenna(s) no later than ninety (90) days after CITY is notified by COMPANY in writing of the completion of such removal. Adjustments to reflect removal of antenna(s) shall be prorated to reflect the portion of the TERM YEAR remaining after CITY receives said written notice of the removal.

B. Adjustment of USE CHARGE.

1. The USE CHARGE shall be increased annually on July 1 (each an "ADJUSTMENT DATE"), at an amount equal to 4% of the then current USE CHARGE rounded up to the next whole number.
2. The USE CHARGE for the OPTION PERIOD will be under the same terms and conditions of the original TERM.

4. The USE CHARGE adjustment shall occur on each ADJUSTMENT DATE.

C. Administrative Fee.

COMPANY shall pay CITY within thirty (30) days following the EFFECTIVE DATE of this AGREEMENT a one-time payment in the amount equal to three thousand dollars (\$3,000) as consideration for the negotiation and execution of this AGREEMENT (“ADMINISTRATIVE FEE”). In the event that this AGREEMENT is not fully executed by both COMPANY and CITY, COMPANY shall have no obligation to pay the ADMINISTRATIVE FEE.

SECTION 4. Right to Use Applicable Only to PROPERTY.

This AGREEMENT shall not be construed to permit construction, installation, maintenance or use of an ANTENNA FACILITIES on any portion of the PROPERTY or PROPERTIES other than the ANTENNA FACILITIES on the LICENSED AREAS.

SECTION 5. Compliance with Applicable Law and Approvals.

A. Facility to be Constructed in Accordance with Law.

COMPANY shall construct, install, operate, maintain and remove the ANTENNA FACILITIES in accordance with all applicable federal, state and local governmental laws, rules and regulations now in existence or as hereafter enacted or amended. Without limiting the foregoing, COMPANY shall obtain, maintain and fully comply with any and all permits or approvals required from CITY.

B. Utility User’s Tax.

COMPANY acknowledges and agrees that CITY requires users of communications services such as the SERVICES to pay to CITY a utility users’ tax pursuant to Chapter 4.68 of Title 4 of the San José Municipal Code, as the same may be amended from time to time. Without limiting the other provisions of this Section, COMPANY agrees that COMPANY shall collect from the users of the SERVICES and remit to CITY said utility users’ tax all in the manner described in, and in compliance with, Chapter 4.68 of Title 4 of the San José Municipal Code.

C. Licensing and Authorization.

(Applicable only if COMPANY operates its ANTENNA FACILITIES in such a way as to require licensure by the Federal Communications Commission)

COMPANY represents that it is licensed by the Federal Communications Commission to operate the ANTENNA FACILITIES and provide the SERVICES, and COMPANY agrees

to provide documentation evidencing such licensing and authorization within ten (10) days of a receiving a request by CITY for such documentation.

SECTION 6. Maintenance and Repair.

- A. COMPANY shall maintain and repair the ANTENNA FACILITIES, at no cost to CITY (except as specifically provided otherwise in this AGREEMENT) and to CITY's reasonable satisfaction, any and all damage to the PROPERTY or PROPERTIES or the LICENSED AREAS that may result from any installation, modification, relocation or removal of the ANTENNA FACILITIES or COMPANY's exercise of any of the rights and privileges hereby granted, including, without limitation, damage to any walls, floors, ceilings, doors or electrical system in the PROPERTY or PROPERTIES or the LICENSED AREAS. Upon removal of the ANTENNA FACILITIES and termination of this AGREEMENT, COMPANY shall restore the affected areas of the PROPERTY or PROPERTIES to at least as good condition and repair as before COMPANY's use thereof, except for ordinary wear and tear.
- B. COMPANY agrees to and shall: (1) keep each ANTENNA FACILITIES and the LICENSED AREAS in neat, clean and orderly condition at all times; (2) not cause rubbish, garbage or debris to accumulate or remain on or around the ANTENNA FACILITIES, LICENSED AREAS or PROPERTY or PROPERTIES at any time; (3) not commit, suffer or allow any acts to be done at or around each ANTENNA FACILITIES, LICENSED AREAS or PROPERTY or PROPERTIES in violation of any law, regulation, permit or rule; and, (4) not use or allow the use of the ANTENNA FACILITIES, LICENSED AREAS or PROPERTY or PROPERTIES for any illegal or immoral purpose.
- C. COMPANY shall mark cabling every 18 inches with identifying ownership markings and identify COMPANY's antennae with similar ownership markings.
- D. Prior to installation COMPANY shall submit plans and specifications to the CITY for approval of any proposed cable runs.

SECTION 7. Termination.

A. Termination with Cause.

Except as otherwise provided in this AGREEMENT, CITY shall have the right to terminate this AGREEMENT or any particular LICENSED AREAS, immediately: (i) if COMPANY fails to cure a material breach (the materiality of which shall be determined in CITY's sole discretion) of any term or condition hereof, within thirty (30) days after CITY has notified COMPANY, in writing, of such breach; (ii) if said cure cannot be reasonably be completed within thirty (30) days and COMPANY has not commenced curative action within said thirty (30) days and thereafter diligently (in CITY'S sole opinion) prosecuted such cure to completion; (iii) if COMPANY's operation is deemed by CITY to endanger or pose a threat

to the public health, safety or welfare, including, without limitation, and as an example, if operation of the ANTENNA FACILITIES adversely interferes with, or otherwise adversely affects CITY communications or operations; (iv) if CITY is mandated by law, a court order or decision, or the federal, state or local government to take certain actions that will cause or require the removal of the ANTENNA FACILITIES from the LICENSED AREAS; (v) if the removal of the ANTENNA FACILITIES from the LICENSED AREAS is needed to accommodate the construction, installation, operation, repair or maintenance of any improvement desired by CITY; (vi) the CITY-owned property or facility is required for some other governmental purpose; (vii) it is determined by the sole discretion of the City Council that the CITY-owned property or facility should be sold as or as part of surplus property; (viii) inspection of the property reveals that the CITY-owned property or facility is not being properly maintained; or (ix) operation or maintenance of the ANTENNA FACILITIES interferes with or adversely affects or impacts the CITY-owned property, facility, communications, or projects.

B. Termination without Cause.

CITY may terminate this AGREEMENT or any particular LICENSED AREAS without cause upon three hundred and sixty-five (365) days' prior written notice to COMPANY.

C. Removal of Facility Upon Termination.

COMPANY shall remove the ANTENNA FACILITIES and repair and restore the affected areas of the LICENSED AREAS and the PROPERTY or PROPERTIES prior to the termination of this AGREEMENT. If this AGREEMENT is terminated by either party earlier than the termination of the term, COMPANY shall remove the ANTENNA FACILITIES and repair and restore the affected areas of the LICENSED AREAS and the PROPERTY or PROPERTIES no later than ninety (90) days after notice of termination, provided that termination due to required relocation of the ANTENNA FACILITIES shall be governed by **Section 1.C**. Removal of the ANTENNA FACILITIES shall be at COMPANY's sole cost and expense, except as specifically provided otherwise in this AGREEMENT.

D. Prorated Use Charge Reimbursement

In the event of the early termination of this AGREEMENT or LICENSED AREAS, CITY will reimburse COMPANY the unused portion of the USE CHARGE after proration and proper computation.

SECTION 8. No Liability.

A. Liability.

CITY, its agents, officers, employees or contractors, shall not be liable for any damage from any cause whatsoever to the ANTENNA FACILITIES, specifically including, without limitation, damage, if any, resulting from CITY's maintenance operations adjacent to the ANTENNA FACILITIES or from vandalism or unauthorized use of the ANTENNA FACILITIES, except as such damage is solely caused by the gross negligence or willful misconduct of CITY, its agents, officers, employees or contractors.

B. Security.

COMPANY shall take reasonable precautions against damage to or unauthorized use of the ANTENNA FACILITIES. CITY shall not be liable for any vandalism or other damage that may occur to the ANTENNA FACILITIES or in the LICENSED AREAS or any unauthorized use of the ANTENNA FACILITIES except as provided in **SECTION 8.A.**, above.

SECTION 9. PLANS AND SPECIFICATIONS; PERMITS.

- A. Before COMPANY installs or alters (including without limitation, upgrades) any ANTENNA FACILITIES on CITY PROPERTY or PROPERTIES, COMPANY shall submit the location, plans and specifications of the ANTENNA FACILITIES to CITY. City staff shall distribute the information, preferably in electronic format, to all departments that require prior approval prior to submittal to the appropriate permitting department. Upon receipt of the required prior approval, City staff shall meet with COMPANY and the appropriate permitting department to submit four (4) sets of such plans and specifications and any required permitting fees. COMPANY shall supply the CITY any additional information it may request, in writing, before approving the plans and specifications for permit. Approval of plans, specifications and permits shall not release COMPANY from the responsibility for, or the correction of, any errors, omissions or other mistakes that may be contained in the plans, specifications and/or permits. COMPANY shall be responsible for notifying CITY and all other relevant parties immediately upon discovery of such omissions and/or errors.
- B. COMPANY agrees to perform any work in furtherance of the plans, specifications and permits at COMPANY's sole expense and in accordance with and in a manner CITY is satisfied conforms to plans, specifications and permits as may be approved by CITY in furtherance of this AGREEMENT.
- C. COMPANY shall apply for and obtain all applicable permits as are required by CITY to perform the work described in this AGREEMENT and shall comply with all of the terms and conditions set forth in such permits, including, without limitation, allowing CITY personnel to inspect the installation of the ANTENNA FACILITIES on the PROPERTY or PROPERTIES. COMPANY shall arrange for, obtain and bear costs of all: permits (including without limitation any fees as required by any federal, state or local law, statute, ordinance, rule or regulation); plan check and inspection fees; licenses; environmental impact

reports; site preparation; surface treatment and relocation of any facilities on the LICENSED AREA, as necessary or required for health or safety in the construction or alteration of the LICENSED AREA. As a condition of this AGREEMENT, COMPANY agrees to perform the covenants and conditions contained in any permit issued or to be issued to COMPANY by CITY's Chief Engineer or his designees.

- D. COMPANY shall not commence physical installation of an ANTENNA FACILITIES before approval of Plans and Specifications pursuant to **Subsection 9.A** and obtaining approval of all applicable permits pursuant to **Subsection 9.D**. Approval of Plans and Specifications by CITY Departments shall not release COMPANY from the responsibility for, or the correction of, any errors, omissions or other mistakes that may be contained in Plans and Specifications. COMPANY agrees to perform any work at COMPANY'S sole cost and at COMPANY'S sole expense and in accordance with and in a manner CITY is satisfied conforms to Plans and Specifications as may be approved by CITY in furtherance of this AGREEMENT.

SECTION 10. Indemnification.

COMPANY shall protect, defend, indemnify, and hold harmless CITY, its officers, employees and agents against any claim, loss or liability arising from or related to any damage, injury or loss caused by, or resulting from, the installation, maintenance, operation or use of the ANTENNA FACILITIES, the provision of SERVICES, or resulting in any way from COMPANY's occupation or use of the PROPERTY or PROPERTIES or the LICENSED AREAS, including, without limitation, that which is due, in whole or in part, to the willful misconduct or negligent acts (active or passive) or omissions by COMPANY, its officers, employees, consultants or agents. COMPANY's obligation to indemnify and hold harmless excludes only such claim, loss or liability that is due to the negligence or willful misconduct of CITY and/or its employees. All of COMPANY's obligations under this Section are intended to apply to the fullest extent permitted by law and shall survive the termination or sooner termination of this AGREEMENT.

In an action or claim against CITY in which COMPANY is defending CITY, CITY shall have the right to approve legal counsel providing CITY's defense.

SECTION 11. Taxes.

- A. COMPANY shall pay before delinquency any and all taxes, assessments, licenses, fees and other public charges which may be levied, assessed or imposed upon any of COMPANY's interests herein, upon COMPANY's businesses, upon COMPANY for the privilege of conducting business, or upon any property of COMPANY at the PROPERTY or PROPERTIES. COMPANY is advised that this AGREEMENT may, but is not intended to, create a possessory interest in the LICENSED AREAS, for which COMPANY may be subject to payment of possessory interest taxes therefore, for which CITY shall not be liable. Payment of any possessory interest tax shall not reduce in any way any charges or other fees required to be paid by COMPANY hereunder.

- B. COMPANY shall not permit or suffer any liens to be imposed upon the PROPERTY or PROPERTIES or any portion thereof, without promptly discharging the same, provided, however, that COMPANY may, if it so desires, contest the legality of same following prior written notice to CITY. In the event of a contest of a lien, COMPANY shall provide a bond in an amount and in a form acceptable to CITY immediately following request therefore by CITY.

SECTION 12. Insurance.

- A. COMPANY, at COMPANY's own expense throughout the TERM of this AGREEMENT, as extended, shall comply with the insurance requirements attached hereto as **EXHIBIT "F"** and incorporated by reference herein. The procuring of the policy or policies of insurance required by **EXHIBIT "F"** shall neither be construed to limit COMPANY's liability hereunder nor to fulfill the indemnification provisions and requirements of this AGREEMENT. Notwithstanding the policy or policies of insurance, COMPANY shall be obligated for the full and total amount of any damage, injury or loss caused by its negligence or willful misconduct arising out of this AGREEMENT or COMPANY's use of the PROPERTY or PROPERTIES or the LICENSED AREAS.
- B. COMPANY shall deposit with CITY, on or before the EFFECTIVE DATE, certificates of insurance and the required endorsements in forms reasonably satisfactory to CITY, indicating compliance with the insurance provisions of this AGREEMENT. COMPANY shall keep the insurance in effect, and the certificates evidencing the insurance on deposit with CITY, during the TERM of this AGREEMENT and as the same may be extended.

SECTION 13. Frequency Interference.

- A. COMPANY will not cause, permit or allow the installation, operation, maintenance or use of an ANTENNA FACILITIES or any other equipment installed pursuant to this AGREEMENT to interfere with: (1) any CITY use of the PROPERTY or PROPERTIES; (2) CITY equipment used at the PROPERTY or PROPERTIES; (3) CITY communications; and/or (4) or any pre-existing third party uses of the PROPERTY or PROPERTIES or any other CITY property, including uses of communications equipment, which uses were authorized or planned by CITY prior to the EFFECTIVE DATE of this AGREEMENT. Prior to commencement of construction of the ANTENNA FACILITIES, COMPANY shall immediately provide, in writing, to CITY at the address set forth for notices in **Section 15**, herein, the frequencies utilized in the operation of the ANTENNA FACILITIES. COMPANY shall also provide the CITY, at the same address, with written notice of any intended changes in those frequencies, a description of those frequencies and the dates that those frequency changes are anticipated to occur, at least thirty (30) days prior to the date that those frequency changes are anticipated to occur. COMPANY shall not begin any work on the PROPERTY or PROPERTIES pursuant to this AGREEMENT until these frequencies

have been approved in writing by CITY's Chief Information Officer or any other person that may be designated to make such approval by CITY's City Manager.

- B. COMPANY shall ensure that its use of an ANTENNA FACILITIES does not interfere with any communication transmissions in the vicinity of the PROPERTY or PROPERTIES, including without limitation, the CITY's public safety transmissions, police and fire communications, CITY's internal or external communications, communications by CITY's tenants, or communications used in the connection with the San Jose International Airport. COMPANY shall operate the ANTENNA FACILITIES in such a manner that all communications sent or received by the ANTENNA FACILITIES shall be separated from all CITY communications frequencies, including without limitation, CITY communications listed in the preceding sentence, by at least 1 megahertz.
- C. If COMPANY's construction, installation, maintenance, operation, use or removal of an ANTENNA FACILITIES violates the provisions of this **Section 13**, COMPANY shall immediately eliminate such violation or interference. COMPANY may coordinate with CITY to conduct intermittent testing on the interfering equipment. If COMPANY fails to immediately eliminate such violation or interference, CITY may, in addition to and without compromising any other remedy available to CITY, immediately cut off power to the facility in the manner set forth in **Section 14** below. CITY shall immediately provide notice to COMPANY of any interference, or the exercise of CITY's shut off rights pursuant to this Section.
- D. COMPANY shall use its best efforts to operate its communications equipment in a manner that is consistent with all applicable frequencies assigned to it by the Federal Communications Commission ("FCC") or otherwise allowed by the FCC, if any, and in compliance with all applicable FCC rules and regulations.

SECTION 14. EMERGENCY

- A. COMPANY understands that emergency situations may develop from time to time that require power to an ANTENNA FACILITIES to be shut off. Notwithstanding **Section 13**, COMPANY agrees that in the event that such a situation occurs, and there are frequency interferences of any nature between CITY's communication equipment and that of COMPANY, CITY shall have the right to shut off immediately any power to an ANTENNA FACILITIES and any equipment of COMPANY located on the PROPERTY or PROPERTIES for the duration of the emergency. COMPANY agrees not to hold CITY responsible or liable for and shall protect, defend, indemnify and hold CITY harmless pursuant to **Section 10** for any damage, loss, claim or liability of any nature suffered as a result of the loss of the use of an ANTENNA FACILITIES or other communication facilities at PROPERTY or PROPERTIES or affected by the power outage at PROPERTY or PROPERTIES. CITY shall endeavor to contact the COMPANY's emergency contact below in the event of a shut off of an ANTENNA FACILITIES.

**Emergency Contact Number for COMPANY:
(XXX) XXX-XXXX**

- B. COMPANY agrees to install a master power “cut-off” switch on their equipment for the purpose of assisting CITY in such an emergency.
- C. Unless otherwise specifically provided in a notice of termination of this AGREEMENT, CITY’s exercise of the right to shut off any power to an ANTENNA FACILITIES pursuant to this Section is not intended to constitute a termination of this AGREEMENT by either party. COMPANY and CITY shall meet after the CITY determines that an emergency situation has ended to establish the time and manner in which power shall be restored to the ANTENNA FACILITIES.
- D. CITY shall have the right to determine what constitutes an “emergency situation” pursuant to this Section.

SECTION 15. NOTICES

Except as otherwise specifically set forth and allowed under this AGREEMENT, all notices herein required to be given or which may be given by either party to the other shall be deemed to have been fully given when served personally on CITY or COMPANY, or when made in writing via email or deposited in the United States Mail (certified mail, return receipt requested, postage prepaid), or by courier service (charges prepaid), and addressed as follows:

To CITY: City of San José
 Real Estate & Asset Management
 200 E. Santa Clara Street
 San José, CA 95113-1905
 Email: _____

With a copy to: Office of the City Attorney
 City of San José
 200 E. Santa Clara Street
 San José, CA 95113-1905
 Email: cao.main@sanjoseca.gov

To COMPANY: _____

Either party may change its address for notice by notifying the other party in the manner provided in this Paragraph.

SECTION 16. RIGHT TO USE SUBORDINATE.

The right to use LICENSED AREAS herein granted by CITY to COMPANY, and all rights and privileges hereunder, are and shall be subordinate to the rights of CITY and to other existing tenants to use and occupy, and to any occupancy by them of the PROPERTY or PROPERTIES and LICENSED AREAS. In the event of conflict between COMPANY's right to use LICENSED AREAS and CITY's desired use thereof after the EFFECTIVE DATE, CITY may require COMPANY to redesign, adjust, relocate or remove an ANTENNA FACILITIES. COMPANY's right to install, maintain and operate an ANTENNA FACILITIES, or to remove an ANTENNA FACILITIES, shall be subject at all times to such rights as CITY may have to require the removal or relocation of an ANTENNA FACILITIES at the sole cost and expense of COMPANY, under the terms stated in **Section 1.C** of this AGREEMENT.

SECTION 17. ASSIGNMENT.

COMPANY shall not voluntarily or by operation of law, assign, transfer, mortgage, sublet, or otherwise transfer or encumber all or any part of COMPANY's interest in this AGREEMENT or in a LICENSED AREA, without CITY's prior written consent, which will not be unreasonably withheld, delayed or conditioned; provided, however, COMPANY shall have the right to sublease or assign its rights under this Agreement to any of its subsidiaries, affiliates or successor legal entities or to any entity acquiring substantially all of the assets of COMPANY.

SECTION 18. GOVERNING LAW.

This AGREEMENT shall be construed by, and in accordance with, the laws of the State of California.

SECTION 19. NO INTEREST IN PROPERTY.

Nothing herein shall be deemed to create a lease, or easement of any property, or to grant any interest in the PROPERTY or PROPERTIES, other than a real property license to use the LICENSED AREAS, revocable only as set forth herein.

SECTION 20. INSPECTION.

The LICENSED AREAS, including keys thereto, shall be at all times under control of the CITY, whose officials, employees and agents shall have the right to enter the LICENSED AREAS, and all portions thereof, for purposes of inspection (and other purposes contemplated by this AGREEMENT) at all times during the period covered by this AGREEMENT. In the event that CITY enters upon the ANTENNA FACILITIES, CITY shall endeavor to notify the COMPANY's contact below.

Contact Number for COMPANY:

SECTION 21. UTILITIES.

COMPANY shall be solely responsible for ensuring that a LICENSED AREAS has adequate electrical power and any other utility or fiber service necessary or useful to operation of an ANTENNA FACILITIES. COMPANY, at its sole cost, including but not limited, the cost to install, connect, maintain, and operate the ANTENNA FACILITIES, shall install a separate electrical meter, at CITY's discretion only when reasonably necessary due site limitations and/or logistics, or if the above is not necessary, COMPANY shall make a written request to CITY to install a sub-meter on CITY's existing utility service at COMPANY's sole cost and expense, provided there is adequate capacity available. COMPANY will reimburse CITY monthly for COMPANY's use of utilities at a rate equal to CITY's unit cost for the utilities. CITY is not obligated to make electricity or other utilities or fiber available if there is an interruption in such service(s) to the LICENSED AREAS or to the PROPERTY Or PROPERTIES. COMPANY shall not do, nor shall it permit anything to be done, which may interfere with the effectiveness or accessibility of the utility, heating, ventilation, diesel exhaust or air conditioning systems or portions thereof of the PROPERTY or PROPERTIES, nor shall COMPANY connect or use any electrical equipment that exceeds the capacity of the electrical system or in a manner not compatible with the intended use.

SECTION 22. NOT AGENT OF CITY.

Neither anything in this AGREEMENT nor any acts of COMPANY shall authorize COMPANY or any of its employees, agents or contractors to act as agent, contractor, joint venturer, or employee of CITY for any purpose.

SECTION 23. RESERVATION OF RIGHTS.

COMPANY understands, acknowledges and agrees that any and all authorizations granted to COMPANY under this AGREEMENT are nonexclusive and shall remain subject to all prior and continuing regulatory and proprietary rights and powers of CITY to regulate, govern and use CITY property, as well as any existing encumbrances, deeds, covenants, restrictions, easements, dedications and other claims of title that may affect CITY property. CITY and COMPANY agree that nothing contained in, or contemplated by, this AGREEMENT is intended to confer, convey, create or grant to COMPANY any perpetual interest in any CITY property or in any of CITY's public rights of way.

SECTION 24. CONFLICT OF INTEREST.

COMPANY shall avoid all conflict of interest or the appearance of conflict of interest in the performance of this AGREEMENT.

SECTION 25. GIFTS.

- A. COMPANY is familiar with CITY's prohibition against the acceptance of any gift by a CITY officer or designated employee, which prohibition is found in Chapter 12.08 of the San José Municipal Code.
- B. COMPANY agrees not to offer any CITY officer or designated employee any gift prohibited by said Chapter.
- C. The offer or giving of any gift prohibited by Chapter 12.08 shall constitute a material breach of this AGREEMENT by COMPANY. In addition to any other remedies CITY may have in law or equity, CITY may terminate this AGREEMENT for such breach as provided in **Section 7** of this AGREEMENT.

SECTION 26. DISQUALIFICATION OF FORMER EMPLOYEES.

COMPANY is familiar with the provisions relating to the disqualification of former officers and employees of CITY in matters, which are connected with former duties, or official responsibilities as set forth in Chapter 12.10 of the San José Municipal Code ("Revolving Door Ordinance"). COMPANY shall not utilize either directly or indirectly any officer, employee, or agent of COMPANY to perform services under this AGREEMENT, if in the performance of such services, the officer, employee, or agent would be in violation of the Revolving Door Ordinance.

SECTION 27. HOLDING OVER.

In the event that COMPANY, with or without the written consent of CITY, holds possession of the LICENSED AREAS or any portion of the PROPERTY or PROPERTIES after the TERMINATION DATE, COMPANY's use and occupancy shall continue on a year-to-year basis, at will and under the same terms and conditions of the AGREEMENT, until terminated by either COMPANY or CITY by providing a thirty (30) day written notice to the other. When "Holding Over", the COMPANY shall pay a USE CHARGE that is equal to one hundred and five percent (105%) of the then current USE CHARGE at the time of the TERM or OPTION PERIOD expiration and shall increase annually on the ADJUSTMENT DATE.

SECTION 28. MISCELLANEOUS.

- A. Whenever the singular number is used in this AGREEMENT and when required by the context, the same shall include the plural and the masculine gender shall include the feminine and neuter genders.
- B. If there be more than one entity designated in, or signatory to, this AGREEMENT, the obligations hereunder imposed upon COMPANY shall be joint and several; and the term COMPANY as used herein shall refer to each and every of said signatory parties, severally as well as jointly.

- C. This instrument contains all of the agreements and conditions entered into and made by and between the parties and may not be modified orally, or in any manner, other than by an agreement in writing signed by all the parties hereto or their respective successors-in interest.
- D. Time is, and shall be, of the essence for each term and provision of this AGREEMENT.
- E. Each and every term, condition, covenant and provision of this AGREEMENT is and shall be deemed to be a material part of the consideration for CITY's entry into this AGREEMENT and any breach hereof by COMPANY shall be deemed to be a material breach. Each term and provision of this AGREEMENT performable by COMPANY shall be construed to be both a covenant and a condition.
- F. The headings of the several paragraphs and sections of this AGREEMENT are inserted only as a matter of convenience and for reference and in no way define, limit or describe the scope or intent of any provisions of this AGREEMENT and shall not be construed to affect in any manner the terms and provisions hereof or the interpretation or construction thereof.
- G. In the event any covenant, condition or provision herein contained is held to be invalid by a court of competent jurisdiction, the invalidity of any such covenant, condition or provision shall in no way affect any other covenant, condition or provision herein contained, provided the invalidity of any such covenant, condition or provision does not materially prejudice either CITY or COMPANY in its respective rights and obligations contained in the valid covenants, conditions and provisions of this AGREEMENT.
- H. All exhibits and addenda referred to herein, and any exhibits or schedules which may from time to time be referred to in any duly executed amendment hereto, are by such reference incorporated herein and shall be deemed a part of this AGREEMENT as if set forth fully herein.
- I. This Agreement shall be interpreted and construed only by the contents hereof, and there shall be no presumption or standard of construction in favor of or against either party.
- J. Days, unless otherwise specified, shall mean calendar days.
- K. Whenever in this AGREEMENT the approval or consent of a party is required, such approval or consent must be in advance, shall be in writing, and shall be executed by a person having the express authority to grant such approval or consent unless the terms of this AGREEMENT specifically allow an oral approval or consent of a party.
- L. This Agreement may be executed in any number of counterparts, which may be delivered electronically, via facsimile or by other means. Each counterpart of this AGREEMENT shall be deemed to be an original, and all such counterparts (including those delivered electronically or via facsimile), when taken together, shall be deemed to constitute one and

the same instrument. In addition, telecopied signatures, electronic signatures (including, without limitation, DocuSign) or signatures transmitted by electronic mail in so-called “pdf” format may be used in place of original signatures on this AGREEMENT. Each party (i) intends to be bound by its respective telecopy or other electronic signature, (ii) is aware that the other will rely on such telecopied or other electronically transmitted signature, and (iii) acknowledges such reliance and waives any defenses to the enforcement of this AGREEMENT and the documents affecting the transaction contemplated by this AGREEMENT based on the fact that a signature was sent by telecopy or electronic transmission only.

[Signatures on next page]

IN WITNESS WHEREOF, the parties have executed this AGREEMENT as of the EFFECTIVE DATE.

APPROVED AS TO FORM

By: _____

“CITY”

CITY OF SAN JOSÉ,
a California municipal corporation

By: _____

“COMPANY”

By: _____

Name: _____

Title: _____

Date: _____

NVF:CHD:JMD
6/2/2023

Company Site No.

EXHIBIT A

PROPERTY DESCRIPTIONS

Property 1:

Property 2: (if applicable)

Property 3: (if applicable)

Property 4: (if applicable)

EXHIBIT B

SERVICES

The telecommunications facilities to be located on the City of San José owned property will provide additional/enhanced mobile phone coverage for their wireless communications network in and around the public, commercial, and residential communities.

EXHIBIT C

Description of LICENSED AREAS

(Individual sites will be added to the spreadsheet as provided in this exhibit.)

ADDRESS	PARCEL #	COMPANY ID	SITE MANAGER	CONTACT NUMBER

Exhibit D

ANTENNA FACILITIES DESCRIPTION

(Individual site facility/antenna equipment are attached to this exhibit as an addendum)

Property 1

EXHIBIT E
RATE SCHEDULE

E-1

T-3411.006 / 2027457_2

Council Agenda: 06-13-2023

Item No.: 2.7(a)

DRAFT – Contact the Office of the City Clerk at (408) 535-1260 or CityClerk@sanjoseca.gov for final document.

EXHIBIT F

INSURANCE

INSURANCE REQUIREMENTS. COMPANY shall procure and maintain for the duration of the agreement insurance against claims for injuries to persons or damages to property which may arise from, or in connection with, the performance of the work hereunder by the COMPANY, its agents, representatives, employees or contractors.

F-1 Minimum Scope of Insurance

Coverage shall be at least as broad as:

1. The coverage provided by Insurance Services Office Commercial General Liability coverage “occurrence” form CG 0001 including Fire Legal Liability; and
2. The coverage provided by Insurance Services Office form number CA 0001 covering Business Automobile Liability. Coverage shall be included for all owned, non-owned and hired automobiles; and
3. Workers’ Compensation insurance as required by the Labor Code of the State of California and Employers Liability insurance; and
4. Property insurance against all risks of loss to any COMPANY improvements or betterments, COMPANY stock, equipment, furniture, and fixtures.

There shall be no endorsement reducing the scope of coverage required above unless approved by the City’s Risk Manager.

F-2 Minimum Limits of Insurance

COMPANY shall maintain limits no less than:

1. Commercial General Liability: \$1,000,000 per occurrence for bodily injury, personal injury and property damage. If Commercial General Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit; Fire Legal Liability \$100,000; and
2. Business Automobile Liability: \$1,000,000 combined single limit per accident for bodily injury and property damage; and

3. Workers' Compensation and Employers Liability: Workers' Compensation limits as required by the Labor Code of the State of California and Employers Liability limits of \$1,000,000 per accident: and
4. Property insurance against all risks of loss including but not limited to fire, vandalism and malicious mischief, and other perils at the CITY's discretion, in an amount equal to 100% of the replacement cost of all COMPANY owned furniture, fixtures, stock and equipment, including fixtures, improvements and betterments installed by COMPANY, on the Licensed Areas.

F-3 Deductibles and Self-Insured Retentions

The CITY may set and may subsequently reduce or eliminate deductibles or self-insurance retentions, which must be reasonable for the telecommunications industry. Any self-insured retentions must be declared to, and approved by, the CITY.

F-4 Other Insurance Provisions

The policies are to contain, or be endorsed to contain, the following provisions:

1. General Liability and Automobile Liability Coverages
 - a. The City, its officials, employees, and agents are to be included as additional insureds as respects: liability arising out of activities performed by, or on behalf of, the COMPANY; products and completed operations of the COMPANY; premises owned, leased or used by the COMPANY; or automobiles owned, leased, hired or borrowed by the COMPANY. The coverage shall contain no special limitations on the scope of protection afforded to the City, its officials, employees, and agents.
 - b. The COMPANY's insurance coverage shall be primary insurance as respects the City, its officials, employees, and agents. Any insurance or self-insurance maintained by the City, its officials, employees, or agents shall be excess of the COMPANY's insurance and shall not contribute with it.
 - c. Any failure to comply with reporting provisions of the policies shall not affect coverage provided to the City, its officials, employees, or agents.
 - d. Coverage shall state that the COMPANY's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.
 - e. Coverage shall contain a waiver of subrogation in favor of the City, its officials, employees, and agents.
2. Workers' Compensation, Employers' Liability and Property Insurance

Coverage shall contain a waiver of subrogation in favor of the City, its officials' employees, and agents.

3. All Coverages

Each insurance policy required by this clause shall be endorsed to state that coverage shall not be, canceled, except after thirty (30) days' prior written notice has been given to the City, except that ten (10) days' prior written notice shall apply in the event of cancellation for non-payment of premium.

F-5 Acceptability of Insurance

Insurance is to be placed with insurers reasonably acceptable to the City's Risk Manager.

F-6 Verification of Coverage

COMPANY shall furnish the City with certificates of insurance and endorsements affecting coverage required by this clause. The certificates and copies of endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf.

Copies of all the required endorsements shall be attached to the certificate of insurance which shall be provided by the COMPANY's insurance COMPANY as evidence of the stipulated coverages. This proof of insurance shall then be delivered as follows:

Proof of insurance shall be emailed in pdf format to: Riskmgmt@sanjoseca.gov:

City of San Jose – Finance
Risk Management
200 East Santa Clara St., 14th Floor
San Jose, CA 95113-1905

F-7 Contractors

COMPANY shall require all of its contractors to obtain and keep in force and during the terms of their respective contracts, the same minimum insurance limits and coverages as COMPANY is required under this AGREEMENT.