

ORDINANCE NO. \_\_\_\_\_

1     **AN ORDINANCE GRANTING ZNET TEXAS, LP, A LICENSE UNDER CITY**  
2     **CODE CHAPTER 14-11 (USE OF RIGHT-OF-WAY) FOR PRIVATE USE OF**  
3     **PUBLIC RIGHTS OF WAY.**

4  
5  
6     **BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:**

7  
8     **PART 1.   GRANT OF LICENSE.**

9  
10    **SECTION 1.       DEFINITIONS.**

11  
12    **CITY** means the City of Austin.

13  
14    **CONDUIT INFRASTRUCTURE** means underground conduits, manholes or other  
15    structures or appurtenances that allow placement of wire facilities in the public rights of  
16    way. The conduit infrastructure shall consist of four duct systems paired with manholes.

17  
18    **DEPARTMENT** means the City of Austin Public Works Department.

19  
20    **DIRECTOR** means the Director of the City of Austin Public Works Department.

21  
22    **DUCT SYSTEM** means high density polyethylene conduits grouped together for the  
23    placement of wire facilities in the public rights of way.

24  
25    **GRANTEE** means ZNET Texas, LP.

26  
27    **PUBLIC RIGHTS OF WAY** means the total surface area, and the area above and below  
28    the surface, between property lines that is dedicated, deeded, reserved by plat or  
29    otherwise owned or controlled by the City, for use by the public for pedestrian or  
30    vehicular travel.

31  
32    **WIRE FACILITIES** means all wires, cables, and equipment that allow the delivery of  
33    transmission services, telecommunications service or cable service.

1  
2 **SECTION 2.        PURPOSE.**  
3

- 4 (A) On May 18, 2000, ZNET of Austin, Inc. obtained a license from the City through  
5 Ordinance No. 000518-52 to install in the City's public rights of way conduit  
6 infrastructure consisting of ten duct systems paired with manholes to provide  
7 conduit space for wire facilities, six duct systems of which it has since transferred.  
8 On February 11, 2005, ZNET Texas, LP ("ZNET") became the successor entity to  
9 ZNET of Austin, Inc. Although the license expired on May 29, 2007, ZNET held  
10 over and continued to maintain its remaining conduit infrastructure in the City's  
11 right of way.
- 12
- 13 (B) As of the effective date of this ordinance, Grantee's conduit infrastructure consists  
14 of four duct systems in the City's public rights of way within the specific areas  
15 shown on Exhibit A that provide conduit space for wire facilities. This ordinance  
16 grants ZNET Texas, LP a license to maintain its current placement of conduit  
17 infrastructure in the public rights of way and is not a grant of license to construct,  
18 place, or maintain any additional conduit infrastructure in the public rights of way.

19  
20 **SECTION 3.        CONSTRUCTION OBLIGATIONS.**  
21

- 22 (A) Grantee is subject to the police powers of the City and other governmental powers  
23 in connection with the construction, reconstruction, maintenance or repair of  
24 facilities in the public rights of way. Grantee is subject to the City's rights as a  
25 property owner under state and federal laws.
- 26
- 27 (B) Grantee shall furnish the City information relating to the construction,  
28 reconstruction, removal, maintenance, operation and repair of the conduit  
29 infrastructure performed by Grantee in the public rights of way. Grantee shall be  
30 liable for the cost of delays and the additional expenses of the City's reliance on  
31 erroneous information regarding the location of Grantee's conduit infrastructure.
- 32
- 33 (C) The use, maintenance, and operation of Grantee's conduit infrastructure and  
34 property are subject to all requirements set forth in Chapter 14-11 of the City Code  
35 (Use of Right-of-Way), such as applying for and receiving all applicable permits.
- 36
- 37 (D) Grantee may prepay all excavation permitting and inspection fees required under  
38 the City Code on a yearly basis. Estimates of prepaid fees shall be determined by

1 the Department, based upon the amount paid in the previous year. The actual fees  
2 accrued during the year must be reconciled with the prepaid amount at the calendar  
3 year end.  
4

5 **SECTION 4.**            **CONDITIONS OF RIGHTS OF WAY OCCUPANCY.**  
6

7 (A) The City has priority over all uses of the public rights of way. The City reserves  
8 the right to conduct all forms of work in the rights of way occupied by the Grantee,  
9 including:

- 10  
11 (1) the installation of sewer, gas, water, and other pipe lines;  
12  
13 (2) the installation of cables and conduits;  
14  
15 (3) performing underground and overhead work; and  
16  
17 (4) changing the curbs, sidewalks, or the grade of streets.  
18

19 (B) If the Director determines that removal, relocation, or change to Grantee's facilities  
20 is reasonably necessary for the construction or repair of any public improvement in  
21 the public rights of way, the Grantee shall remove or relocate its facilities at its  
22 own expense no later than the 120<sup>th</sup> day after written notice is sent by the City.  
23

- 24 (1) The Director may require that the removal or relocation be either temporary  
25 or permanent.  
26  
27 (2) Nothing in this section shall be construed as preventing the Grantee from  
28 recovering the cost of removal or relocation of its facilities from a non-  
29 governmental third party responsible for the request.  
30  
31 (3) If the Grantee fails to remove or relocate its facilities to the satisfaction of  
32 the Director by the 120<sup>th</sup> day after the date of notice, the City may remove or  
33 relocate the facilities at the expense of Grantee and without liability to the  
34 City.  
35

36 **SECTION 5.**            **ACTS OF THE CITY.**  
37

38 (A) The Director shall assign priorities among competing private uses of the public  
39 rights of way according to the order permit applications are completed.  
40

1 (B) If the City authorizes abutting landowners to occupy space under the surface of any  
2 public street, alley, or rights of way, the grant shall be subject to the rights of  
3 Grantee.

4  
5 (C) If the City vacates public rights of way containing the Grantee's facilities, the  
6 conveyance shall be subject to the rights of the Grantee under this license.  
7

8 **SECTION 6. INDEMNITY AND INSURANCE.**

9  
10 (A) Grantee shall defend, indemnify and hold the City harmless against all damages,  
11 cost, loss or expense arising out of, incident to, concerning or resulting from the  
12 negligence or willful misconduct of Grantee, its agents, employees, or  
13 subcontractors in the performance of activities under this license for:  
14

15 (1) the repair, replacement, or restoration of City property, equipment,  
16 materials, structures, and facilities which are damaged, destroyed, or found  
17 to be defective;

18  
19 (2) damage to or loss of the property of any person including, but not limited to  
20 Grantee, its agents, officers, employees and subcontractors, the City's  
21 agents, officers and employees, and third parties; and  
22

23 (3) death, bodily injury, illness, disease, worker's compensation, loss of  
24 services, or loss of income or wages to any person including but not limited  
25 to the agents, officers and employees of Grantee, Grantee's subcontractors,  
26 the City, and third parties, no matter how, or to whom, the loss may occur.  
27

28 (B) The terms of each contract awarded by the Grantee for activities pursuant to this  
29 license shall contain indemnity provisions whereby the contractor must indemnify  
30 the City to the same extent as described in this section.  
31

32 (C) The Director shall give prompt written notice to Grantee of any claim for which  
33 the City seeks indemnification. Grantee shall have the right to investigate, defend  
34 and compromise these claims subject to the City Attorney's prior approval.  
35

36 (D) Grantee shall, at its sole expense, provide:  
37

38 (1) extended public liability insurance coverage, in an amount not less than  
39 \$600,000 for personal injury and \$600,000 for property damage, specifically  
40 naming the City as co-insured; or  
41

- 1 (2) an equivalent means of providing protection acceptable to the City and  
2 covering all liabilities arising from the activities of Grantee, its officers,  
3 employees, agents, or contractors, relative to this license.  
4
- 5 (E) A copy of the instruments effecting this coverage shall be delivered to the Director  
6 no later than the 45<sup>th</sup> day after the execution date of this license.  
7
- 8 (F) The City's Office of Risk Management shall be entitled, upon request and without  
9 expense, to receive copies of certificates of insurance evidencing coverage stated  
10 above. The City's Risk Manager may make any reasonable requests for deletion,  
11 revision or modification of particular policy terms, conditions, limitations or  
12 exclusions, except where policy provisions are established by law or regulation  
13 binding upon either City or the Grantee or upon the underwriter for any of such  
14 policies. Upon request for deletion, revision or modification by the City's Risk  
15 Manager, the Grantee shall make the requested changes and shall pay the cost  
16 thereof.  
17
- 18 (G) All insurance certificates shall:  
19
- 20 (1) name of the City of Austin and its officers, employees, board members and  
21 elected representatives as additional insured parties as to all applicable  
22 coverage except worker's compensation;  
23
- 24 (2) provide 30 days notice to the City for cancellation, non-renewal, or material  
25 change; and  
26
- 27 (3) provide for notice to both the Director and the Office of Risk Management  
28 by certified mail.  
29

30 **SECTION 7. LETTER OF CREDIT.**  
31

- 32 (A) Grantee shall provide and maintain a letter of credit on behalf of the City, at a bank  
33 in Austin, in the amount of \$100,000.00 in a form acceptable to the Director of  
34 Financial Services for the full term of this license. The letter of credit is to  
35 guarantee payment of the annual license fee and any accrued late payment penalty.  
36
- 37 (B) If the Grantee does not make its annual license fee payments within ten days after  
38 receipt of written notice from the City that such default has occurred, the Director  
39 may immediately withdraw without further notice to Grantee the amount due from  
40 the letter of credit maintained in accordance with this section. If all or any portion  
41 of the letter of credit is called during the term of this license, Grantee must  
42 replenish the letter of credit.

- 1  
2 (C) On or after the fifth anniversary of the effective date of this Ordinance, Grantee  
3 may request that the City reduce the amount of the letter of credit required to be  
4 maintained under this section. Upon receipt of a request to reduce the letter of  
5 credit, if the City's Director of Financial Services certifies that the Grantee has  
6 complied with the terms of the License without default, the Director of Financial  
7 Services may authorize in writing Grantee's reduction of the letter of credit. The  
8 letter of credit may not be reduced below an amount that the Director of Financial  
9 Services determines is adequate to ensure security against Grantee's default.

10  
11 **SECTION 8.        RECORDS.**

- 12  
13 (A) Grantee will provide the Director as-built plans and specifications as well as a  
14 complete and accurate map describing the location of facilities placed in the City's  
15 right of way not later than 60 days after the effective date of this ordinance.  
16  
17 (B) The City has the right to inspect, upon reasonable notice, all of Grantee's maps,  
18 construction drawings and specifications. Grantee shall fully cooperate in making  
19 available its maps, construction drawings, and specifications for inspection.  
20  
21 (C) The City shall maintain confidentiality of all competitively sensitive information to  
22 the extent allowed by law.

23  
24 **SECTION 9.        NOTICE.**

- 25  
26 (A) The Director and the Director of Financial Services are jointly responsible for the  
27 administration of this license. Grantee shall direct questions regarding the  
28 interpretation or application of this ordinance to the Director of Financial Services.  
29  
30 (B) All notices to the City shall be to the following:

31  
32 PUBLIC WORKS DEPARTMENT  
33 City of Austin  
34 P.O. Box 1088  
35 Austin, TX 78767

36  
37 Telephone: (512) 974-7185  
38 Fax: (512) 974-7088

1 with a copy to:

2  
3 FINANCIAL SERVICES DEPARTMENT  
4 Telecommunications and Regulatory Affairs  
5 City of Austin  
6 P.O. Box 1088  
7 Austin, TX 78767

8  
9 Telephone: (512) 974-2999  
10 Fax: (512) 974-2416

11  
12 (C) All notices to Grantee shall be to:

13  
14 ZNET Texas, LP  
15 P.O. Box 740683  
16 New Orleans, LA 70174-0683  
17 Attn: Joseph M. Zeno

18  
19 Telephone (504) 452-9221  
20 Fax: (504) 391-3247

21  
22 with a copy to:

23  
24 Richard L. Muller  
25 Allen, Boone Humphries Robinson, LLP  
26 3200 Southwest Freeway, Suite 2600  
27 Houston, TX 77027  
28 Telephone: (713) 860-6415  
29 Fax: (713) 860-6615

30  
31 **SECTION 10. ASSIGNMENT.**

32  
33 (A) Neither this license, the conduit infrastructure in the public rights of way held by  
34 the Grantee for use under this license, nor any rights or privileges of the Grantee  
35 under this license, either separately or collectively, shall be sold, resold, assigned,  
36 transferred, or conveyed in full or in part by the Grantee to any other person, firm,  
37 affiliate or entity, without the prior written consent of the City by the Director of  
38 Public Works and the Director of Financial Services or their applicable successor  
39 officers. The approval shall not be unreasonably withheld.

40  
41 (B) Should the Grantee sell, assign, transfer, convey or otherwise dispose of its rights  
42 or interests under this license, or attempt to do so, without the City's prior written

consent, the City may revoke this license. All rights and interest of the Grantee shall cease if this license is revoked.

- (C) A transfer in violation of this section is null, void and unenforceable.
- (D) The City may deny consent to a transfer of Grantee's interest if the transferee is not legally authorized by way of license, franchise, or state or federal law, to install facilities in the City's public rights of way.
- (E) This license does not prevent Grantee from selling, transferring, or otherwise conveying the right to occupy its conduit infrastructure.

#### **SECTION 11. TERMINATION.**

- (A) This license may be terminated with respect to the affected duct system by Grantee on written notice to the City no fewer than 60 days before the desired termination date only if:
  - (1) the Grantee abandons or sells all of its remaining ownership interest in the conduit infrastructure; or
  - (2) assigns this license with respect to all or part in accordance with Section 10.
- (B) Upon the termination or expiration of this license, Grantee may remove its conduit infrastructure from the public rights of way. Work to remove Grantee's conduit infrastructure must be pre-approved by the Director and may occur only if street areas are replaced in a manner to meet the same or better grade as before conduit infrastructure removal.
- (C) This license may be terminated by City on written notice to the Grantee no fewer than 15 days before the desired termination date if:
  - (1) Grantee fails to abide by the City's rights of way management rules and does not cure or begin a good faith effort to cure such failure sooner than the 45<sup>th</sup> day after written notice is sent by the City; or
  - (2) Grantee offers service not permitted under this license and does not cease to offer such service sooner than the 45<sup>th</sup> day after written notice is sent by the City.



- 1 (D) This license may be terminated by the City for any other reason not sooner than the  
2 91<sup>st</sup> day after written notice is sent to the Grantee and to any affected adjoining  
3 land owner, if any.  
4
- 5 (E) Grantee may not fraudulently or as a pretext assign or terminate this license to  
6 evade fees.  
7

8 **SECTION 12. TERM, RENEWAL AND AMENDMENTS.**  
9

- 10 (A) This license is granted for a term of ten years, beginning on the effective date of  
11 this ordinance.  
12
- 13 (B) Grantee has an option to renew this license for one additional three-year term  
14 under the same terms and conditions, provided Grantee has fully complied with all  
15 terms and conditions of this license. If Grantee elects to exercise the renewal, it  
16 must file a written notice with the City no fewer than six months prior to expiration  
17 of the original ten-year license term.  
18
- 19 (C) Grantee must begin good faith negotiations with the City no later than six months  
20 prior to the final expiration of this license. If no new license agreement has been  
21 executed on the final expiration date of the license, the City may:  
22
- 23 (1) purchase the facilities at the fair market value;  
24
- 25 (2) request Grantee to remove the facilities; or  
26
- 27 (3) allow Grantee to abandon the facilities.  
28
- 29 (D) Grantee is required to obtain additional licenses or agreements under other  
30 provisions of the City Code if Grantee wishes to offer services not allowed under  
31 this license.  
32

33 **PART 2. ESTABLISHING AN ANNUAL LICENSE FEE.**  
34

- 35 (A) Grantee shall pay the City an annual license fee of \$20,800.00. Upon the  
36 completion of a sale of all ownership rights in one or more duct system by Grantee  
37 to another entity that is not a principal, agent or affiliate of Grantee, the annual  
38 license fee shall be recalculated by multiplying the annual license fee in effect  
39 before the sale by a fraction, the numerator being the number of duct systems  
40 owned by Grantee remaining after the sale and the denominator being the number  
41 of duct systems owned by the Grantee before the sale. The recalculated fee shall

1 be effective from the effective date of the sale of the duct system and is subject to  
2 annual increases provided in Paragraph D of this Part.

- 3
- 4 (B) Payment shall be made to: Financial Services Department – Telecommunications  
5 and Regulatory Affairs Office, P.O. Box 1088, Austin, Texas 78767.
- 6
- 7 (C) The annual license fee for the upcoming year shall be paid on or before the  
8 anniversary date of this ordinance.
- 9
- 10 (D) The annual license fee shall be increased annually by four percent.
- 11
- 12 (E) In the event any quarterly payment is made after 5:00 p.m. on the date due, the  
13 Grantee shall pay to the City a late payment charge of the greater of:
- 14
- 15 (1) \$100.00; or
- 16 (2) Simple interest at ten percent annual percentage rate of the total amount past  
17 due.
- 18

19 **PART 3. ACCEPTANCE OF LICENSE.**

20

21 Grantee shall file with the City Clerk a statement accepting the terms of this license prior  
22 to the effective date of this ordinance.

23

24 **PART 4. SETTLEMENT OF OUTSTANDING CLAIMS.**

25

26 As a condition of this license, Grantee shall pay to City the sum of \$275,640 in settlement  
27 of all claims related to conduit infrastructure license fees due from ZNET and its  
28 predecessor, ZNET of Austin, Inc., under the license granted by Ordinance No. 000518-  
29 52, including those fees due for the holdover period ending on the effective date of the  
30 license granted by this Ordinance.

31

32 **PART 5. CONDITIONS PRECEDENT TO LICENSE: EFFECTIVE DATE**

33 This ordinance constitutes an offer to Grantee of a license according to its terms as it is  
34 passed and approved by the City on the date below. This ordinance is a contract duly  
35 executed by and between the Grantee and the City effective on the date that the City  
36 receives: (1) the statement of Grantee accepting the terms of this license required under  
37 Part 3; (2) the letter of credit required under Section 7 of Part 1; (3) payment of the  
38 annual license fee due for the first year of the term required under Part 2; and (4)  
39 payment of the settlement sum for past due outstanding claims required under Part 4.

1 Unless the conditions precedent contained in this ordinance, including those specifically  
2 listed in this Part 5, are satisfied on or before the 90<sup>th</sup> day following the City's passage  
3 and approval of this ordinance, this ordinance as it constitutes an offer of a license to  
4 Grantee expires and is of no further force and effect.

5 **PART 6.** This ordinance takes effect on \_\_\_\_\_, 2008.

6 **PASSED AND APPROVED**

7  
8  
9  
10 \_\_\_\_\_, 2008

§  
§  
§

11 \_\_\_\_\_  
12 Will Wynn  
13 Mayor

14  
15 **APPROVED:** \_\_\_\_\_  
16 David Allan Smith  
17 City Attorney

18  
19 **ATTEST:** \_\_\_\_\_  
20 Shirley A. Gentry  
21 City Clerk