ORDINANCE NO. 20050818-010

AN ORDINANCE GRANTING NEXTG NETWORKS OF ILLINOIS, INC. A LICENSE UNDER CHAPTER 14-11 OF THE CITY CODE TO INSTALL PRIVATE NETWORK FACILITIES IN THE PUBLIC RIGHTS-OF-WAY AND ON CITY FACILITIES.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

PART 1. GRANT OF LICENSE.

SECTION 1. DEFINITIONS.

CITY means the City of Austin.

CITY or MUNICIPAL FACILITIES are City-owned streetlight poles, decorative streetlight poles, lighting fixtures, electroliers, conduit, or other City-owned structures located within the public right-of-way, except for buildings, streetlight poles, traffic light poles, and facilities owned, occupied or maintained by Austin Energy, or facilities governed by Chapter 15-7 of the City Code.

DECORATIVE STREETLIGHT POLE shall mean any streetlight pole that incorporates artistic design elements not typically found in standard steel or aluminum streetlight poles.

DIRECTOR means the Director of the City of Austin Watershed Protection and Development Review Department.

FACILITIES mean the optical repeaters, DWDM and CWDM multiplexers, antennae, fiber optic cables, wires, and related equipment, whether referred to singly or collectively, installed and operated by Grantee.

FEE means any assessment, license, charge, fee, imposition, tax, or levy of general application to entities doing business in the City lawfully imposed by any governmental body (but excluding any utility users' tax, franchise fees, communications tax, or similar tax or fee).

GRANTEE means NextG Networks of Illinois, Inc.

INSTALLATION DATE means the date on or after which facilities may be installed by Grantee.

LICENSE HOLDER means anyone with a license from the City to use the right-of-way.

LICENSE CHALLENGE means initiating or participating in any legal action, whether brought by Grantee alone or in concert with others, that questions the applicability or validity of this license. A legal action includes, but is not limited to, the filing of any action in or with: a court of competent jurisdiction, state or federal; any agency or department of the State of Texas, including not limited to the Public Utility Commission of Texas; and any inquiries to the State Attorney General's office made for or on behalf of Grantee asking an opinion on the applicability or validity of this license.

NETWORK FACILITIES mean one or more of the neutral-host, protocol-agnostic, fiber-based optical repeater networks operated by NextG to serve its wireless carrier customers in the City.

NEXTG means NextG Networks of Illinois, Inc., a corporation duly organized and existing under the laws of the State of Delaware, and its lawful successors, assigns, and transferees.

PUBLIC RIGHT OF WAY means the total area above, on and below the surface, the space in, upon, above, along, across, and over the public streets, highways, lanes, courts, ways, alleys, boulevards, sidewalks, bicycle lanes, and the area between private property lines that is dedicated, deeded, reserved by plat, owned or otherwise controlled by the City. Except as provided by law or applicable agreement, the term does not include any property owned by any person or entity other than the City, nor any right-of-way owned or controlled by Travis or Williamson Counties, the State of Texas, or the federal government.

PUC means the Texas Public Utilities Commission.

SERVICE means the telecommunications services provided through the Network by Grantee to its customers under one or more tariffs filed with and regulated by the PUC and/or individual customer agreements authorized by Grantee's tariffs or Texas law.

STREETLIGHT POLE means any standard-design concrete, fiberglass, metal, or wooden pole used for street lighting purposes.

SECTION 2. LICENSE GRANTED.

The Council grants NextG Networks of Illinois, Inc. a license to place, attach, install, operate, maintain, control, remove, reattach, reinstall, relocate, and replace network facilities in the public right-of-way located within the corporate limits of the City of Austin, and in or on City facilities, as necessary to provide the services defined in this license. No other service may be provided under this license.

SECTION 3. INITIAL LICENSE TERM.

The term of this license commences with the effective date of this ordinance, and runs for an initial period of ten years, until August 31, 2015.

SECTION 4. LICENSE RENEWAL.

(A) Grantee may renew this license two times, with renewal term of five years each. This license shall finally terminate no later than August 31, 2025.

(B) Grantee is entitled to the renewal provided in this Section only if:

(1) Grantee is in substantial compliance with the material terms of this license; and

(2) Grantee provides written notice to the City no later than six months prior to the end of each term that it wishes to renew the term of the license.

(C) Grantee must begin negotiating a new license in good faith at least six months before the final expiration of this license. If no new license agreement has been executed on the final expiration date of the license, the City may:

(1) purchase the facilities at fair market value;

(2) request Grantee to remove the facilities; or

(3) allow Grantee to abandon the facilities.

SECTION 5. CONSTRUCTION OF SYSTEM.

(A) Grantee shall not attach, install, maintain, or operate any equipment in or on the public right-of-way and/or on municipal facilities without the prior written approval of the City for each location.

(B) Grantee shall comply with all applicable federal, State, and City technical specifications, requirements and local codes related to the construction, installation, operation, maintenance, and control of Grantee's equipment installed in the public right-of-way and on municipal facilities in the city.

(C) Grantee shall apply for and obtain all required permits to attach, install, operate, and maintain Grantee's facilities.

(1) Grantee shall pay any standard and customary application and permit fees.

(2) The City shall promptly respond to Grantee's permit applications and assist Grantee by facilitating network and facility deployment in a reasonable and timely manner.

(3) The permit process for Grantee's facilities shall be no more burdensome than the permitting process required for the City's public utilities.

(D) Grantee is solely responsible for the payment of all fees and charges associated with performance under this license, and all electrical utility charges to the applicable utility company based upon the equipment's usage of electricity and applicable tariffs.

(E) The City will timely review all applications by Grantee to place equipment in the public right-of-way. Decisions concerning Grantee's applications will not be unreasonably withheld. A decision by the City to deny a facility placement application in the public right-of-way shall be based solely on reasonable regulatory factors related to health, safety, welfare and other police powers as set forth in the City Code and Section 6 of this license.

SECTION 6. RULES GOVERNING OPERATION IN THE PUBLIC RIGHT-OF-WAY.

(A) Grantee is subject to the police powers of the City, the state and other governmental entities in connection with the construction, expansion, reconstruction, maintenance or repair of facilities in the public right-of-way. Grantee is subject to the City's rights as a property owner under state and federal laws.

(B) The construction, expansion, reconstruction, excavation, use, maintenance and operation of Grantee's network facilities are subject to Chapter 14-11 of the City Code and subsequently adopted rules.

(C) Removal of and maintenance on trees and shrubs in the public right-of-way may only be performed in accordance with Chapter 6-3 of the City Code, to insure the safe, reliable use and maintenance of Grantee's network.

SECTION 7. CONDITIONS FOR USE AND OCCUPANCY OF THE PUBLIC RIGHT-OF-WAY.

(A) The City has priority over all uses of the public right-of-way. The City reserves the right to conduct all forms of work in the right-of-way occupied by the Grantee, including, but not limited to:

(1) the installation of sewer, gas, water, and other pipe lines;

(2) the installation of cables and conduits;

(3) performing underground and overhead work; and

(4) changing the curbs, sidewalks, or the grade of streets.

(B) Grantee's use of the public right-of-way is subject to all restrictions or limitations imposed by deed, easement, dedication, condition, covenant, encumbrance, and claim of title of record. Nothing in this license may be construed to grant, convey, create, or vest in Grantee a real property interest in land, including any fee, leasehold interest, or easement.

(C) Grantee may perform excavation in the right-of-way only for the construction, expansion, reconstruction, use, maintenance and operation of its own facilities.

(D) Grantee shall furnish the City information relating to the construction, reconstruction, removal, maintenance, operation and repair of the network facilities performed by Grantee in the public right-of-way. Grantee shall be liable for the cost of delays and the additional expenses of the City's reliance on erroneous information regarding the location of Grantee's network facilities.

SECTION 8. USE OF GRANTEE'S FACILITIES BY OTHER LICENSE HOLDERS.

(A) The City may require the Grantee to permit attachment of another license holder's facilities to Grantee's poles and conduits.

(B) The City shall require a license holder seeking use of Grantee's facilities to provide notice at least 14 days before the attachment.

(C) A license holder's attachment to Grantee's facilities:

(1) is subject to space availability;

(2) requires payment of reasonable compensation to Grantee; and

(3) may not interfere with Grantee's use of its facilities.

(D) Nothing in this section relieves any person, agency, or utility from liability for damage to Grantee's facilities.

(E) Nothing in this license prohibits Grantee from using, with permission of the owner, existing or abandoned conduit of other license holders.

SECTION 9. GRANTEE'S USE OF CITY FACILITIES.

(A) Grantee may place, attach, install, operate, maintain, control, remove, reattach, reinstall, relocate, and replace network facilities in or on municipal facilities as necessary to operate the network and provide service.

(1) Grantee's use of City facilities, and the placement of Grantee's equipment in or on these facilities, must follow an approved facility attachment application filed with the Director of Watershed Protection and Development Review Department, with copies delivered to the Office of Telecommunications and Regulatory Affairs and the Office of Communications and Technology Management.

(2) Grantee shall provide the City with a preliminary list of facilities and equipment that it proposes to install in or attach to City facilities. The Director may approve in advance the use of any or all the facilities and equipment on the list for use in or on most City facilities.

(B) Grantee may not use, place, attach, install, operate, maintain, control, remove, reattach, reinstall, relocate, or replace network facilities in, on or using

(1) any network used, managed or controlled by the City;

(2) a network closet or other facility used to support or protect any such network; or

(3) the traffic signal arm portion of a traffic signal pole.

(C) City pathways inside traffic signal poles may be used only if installed according to specifications developed for traffic signals by the Department of Public Works. City pathways inside other municipal facilities may be used only if a security plan approved by the Director of Communications and Technology Management Department is implemented in advance of installation.

(D) Facilities used but not wholly owned by the City require the approval of all owners prior to issuance of a permit.

(E) The City will permit Grantee to make use of City-owned conduit to operate the network and provide service if such use does not conflict with an actual or proposed City use of the conduit.

(F) Grantee will give preference to City facility attachments over those of third parties if:

(1) City facilities are at least equally suitable to the operation of the network; and

(2) the rental fees and installation costs of attaching the equipment to the City facility over the term are equal to or less than those associated with the third party attachment.

(G) If Grantee notifies the City of its desire to relocate one or more of its facilities from one city facility to another, the City will use its best efforts to accommodate Grantee by making another reasonably equivalent facility available for use under the terms of this license.

(H) If the Director denies the Grantee's facility attachment application, Grantee may appeal the decision to the City Manager.

(I) Subject to the approval of the Building Services Officer, Grantee shall have the right to draw electricity for the operation of its facility from an associated power source. Grantee shall compensate City for all power use in addition to any other fees or charges imposed under this License, unless payment is made directly to the power provider.

(J) Grantee shall provide the City an exact and complete inventory of equipment and facility locations upon completion of installation.

(K) Notwithstanding the terms of this license agreement, attachments to buildings, streetlight poles, and facilities owned, occupied or maintained by Austin Energy, or facilities regulated by Chapter 15-7 of the City Code, shall be governed by a separate Utility Infrastructure Agreement negotiated and executed between the Grantee and Austin Energy.

SECTION 10. ATTACHING FACILITIES TO FACILITIES AND PROPERTY OWNED BY THIRD PARTIES.

The City authorizes Grantee to enter the public right-of-way to attach, install, operate, maintain, remove, reattach, reinstall, relocate, and replace Grantee's equipment in or on poles or other structures owned by public utility companies or other property owners located within the public right-of-way, subject to prior approval of the public utility company or property owner.

SECTION 11. INTERFERENCE WITH OTHER FACILITIES PROHIBITED.

(A) Grantee may not impede, obstruct or otherwise interfere with the installation, existence and operation of any other facility in the public and private right-of-way, sanitary sewers, water mains, storm drains, gas mains, poles, ærial and underground electrical infrastructure, cable television and telecommunication wires, electroliers, cable television, public safety and City networks, and other telecommunications, utility, or municipal property unless:

(1) the owner(s) of the affected property expressly authorize or approve of Grantee's action in writing expressly authorized to do so in writing by the property owner(s); or,

(2) as permitted by law or this license.

(B) A provision that similarly prohibits activities governed by this license will be included in all right-of-way licenses negotiated and executed subsequent to the effective date of this license.

SECTION 12. REMOVAL OR RELOCATION OF FACILITIES.

(A) Grantee shall remove or relocate its facilities at its own expense not later than 120 days receiving written notice that removal, relocation, or change to the facilities is reasonably necessary:

(1) for the construction, repair, relocation, or maintenance of a public improvement project in the public right of way;

(2) because Grantee's facility or equipment is interfering with or adversely affecting proper operation of City owned light poles, traffic signals, or other city facilities;

(3) to protect or preserve the public health or safety; and

(4) where the City affords Grantee a technically and financially reasonable alternative location for installation of Grantee's facilities and equipment.

(B) If the Director declares an emergency, removal, relocation, or change shall be performed by the deadline provided in the Director's request.

(C) The Director may require that the removal or relocation be either temporary or permanent.

(D) The Grantee and the City shall cooperate to the extent possible to assure continuity of service during relocation.

(E) Nothing in this section shall be construed as preventing the Grantee from recovering the cost of removal or relocation of its facilities from a non-governmental third party responsible for the request.

(F) If the Grantee fails to remove or relocate its facilities to the satisfaction of the Director by the 120th day after the date of notice, or in case of emergency the date provided in the Director's request, the City may remove or relocate the facilities at the expense of Grantee and without liability to the City.

(G) Any damage to the public right of way or adjacent property that occurs during the removal or relocation of Grantee's facilities or equipment shall be promptly repaired or replaced at Grantee's sole expense. Should Grantee not make adequate repairs after receiving written notice, the City may make all reasonable and necessary repairs on behalf of Grantee, and charge Grantee for the costs incurred. Grantee shall promptly remit payment of such costs when invoiced by the City.

(H) The Grantee shall temporarily remove, raise, or lower aerial facilities to permit the passage of oversize or special mobile equipment, as defined in the Texas Transportation Code, over right-of-way.

(I) The City shall provide written notice to Grantee no later than 48 hours before scheduled passage.

(J) The expense of temporarily removing, raising, or lowering of facilities shall be paid by the person or entity requesting or benefiting from the service.

(K) The Grantee may require the person or entity to make a deposit or post a bond to guarantee the payment of expenses associated with temporarily removing, raising, or lowering of its facilities.

SECTION 13. ACTS OF THE CITY.

(A) The Director shall assign priorities among competing private uses of the public right-of-way according to the order completed permit applications are received.

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

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

(D) Grantee waives all claims, demands, causes of action, and rights it may assert against the City because of any loss, damage, or injury to any equipment or any loss or degradation of services because of any event or occurrence which is beyond the reasonable control of the City.

(E) The City shall be liable only for the cost of repair to damaged equipment arising from the negligence or willful misconduct of City, its employees, agents, or contractors as prescribed by the Texas Tort Claims Act, and shall in no event be liable to indirect or consequential damages..

SECTION 14. INDEMNITY REQUIREMENTS.

(A) Grantee shall be liable for the acts and omissions of any contractor, subcontractor, or any party involved directly or indirectly in the construction and installation of Grantee's facilities. Any act or omission of such party shall be considered an act or omission of the Grantee.

(B) Grantee shall defend, indemnify and hold the City and its officers, employees, appointed and elected officials harmless against all damages, cost, loss or expense arising out of, incident to, directly or proximately resulting from the negligence or willful misconduct of Grantee, its agents, employees, or subcontractors in the performance of activities under this license for:

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

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

(3) death, bodily injury, illness, disease, worker's compensation, loss of services, or loss of income or wages to any person no matter how, or to whom, the loss may occur.

(C) The terms of each contract awarded by the Grantee for activities under this license shall contain indemnity provisions requiring the contractor to indemnify the City to the same extent as described in this section.

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

SECTION 15. INSURANCE REQUIREMENTS.

(A) Grantee shall, at its sole expense, provide either:

(1) extended public liability insurance coverage, in minimum policy amounts not less than $600,000 for personal injury and $600,000 for property damage, specifically naming the City of Austin as a named insured; or

(2) an equivalent means acceptable to the City, covering all liabilities arising from the activities of Grantee, its officers, employees, agents, or contractors, under this license.

(B) A copy of all instruments affecting this coverage shall be delivered to the Director not later than the 45th day after the execution date of this license.

(C) The City's Risk Manager shall be entitled, upon request and without expense, to receive copies of certificates of insurance evidencing coverage stated above. The City's Risk Manager may make any reasonable requests for deletion, revision or modification of particular policy terms, conditions, limitations or exclusions, except where policy provisions are established by law or regulation binding upon either City or the Grantee or upon the underwriter for any of such policies. Upon request for deletion, revision, or modification by the City's Risk Manager, the Grantee shall make the requested changes and pay any additional costs.

(D) Grantee shall obtain and maintain at all times during the term of this license statutory workers' compensation and employer's liability insurance with a minimum policy amount of not less than One Million Dollars ($1,000,000) and shall furnish the City with a certificate showing proof of such coverage.

(E) All insurance certificates shall:

(1) name the City of Austin and its officers, employees, board members and elected representatives as additional insured parties under all coverage except worker's compensation;

(2) provide at least 30 days notice to the City of any cancellation, non-renewal, or material change in coverage; and

(3) provide notice to both the Director and the Office of Risk Management by certified mail.

SECTION 16. SURETY.

(A) The Grantee shall obtain and maintain at its sole cost a corporate surety bond securing performance of its obligations and guaranteeing faithful adherence to the requirements of this license. The surety bond must be:

(1) in an amount not less than $10,000;

(2) issued by a surety company licensed to do business in the State of Texas; and

(3) acceptable to the City Attorney.

(B) The Grantee shall obtain this bond no later than the 30th day after the effective date of this license.

(C) The rights reserved to the City under the bond are in addition to all other rights. No action, proceeding or exercise of a right regarding the bond shall affect the City's rights to demand full and faithful performance under this license or limit the Grantee's liability for damages.

(D) The bond shall contain the following endorsement: "This bond may not be canceled nor subject to non-renewal by the surety until the 31st day after the Director receives notice of intent by certified mail.

SECTION 17. RECORDS.

(A) Grantee shall keep complete and accurate maps, construction drawings, and specifications describing the location of facilities. The maps, construction drawings, and specifications shall provide for separate and specific identification of facilities located in the public right-of-way and shall be kept and maintained within the city.

(B) The City has the right to inspect, after giving reasonable notice, all maps, construction drawings and specifications. Grantee shall fully cooperate in making available its maps, construction drawings, and specifications for inspection.

(C) Grantee shall keep complete and accurate books of accounts and records of its business and operations under this license according to generally acceptable accounting principles to enable determination of all amounts due to City under this license.

(D) The City may inspect Grantee's books pertaining to gross revenue derived from system operations in the city, and to any other aspect of this license. No later than the 30th day after receiving written notice from the City, Grantee shall make these

books and records available in Austin, at any time during regular business hours. The City may also audit Grantee's records from time to time at the City's sole expense.

(E) The City shall maintain confidentiality of all competitively sensitive information to the extent allowed by law.

SECTION 18. NOTICE.

(A) The Director of Watershed Protection and Development Review and the Director of Financial Services are jointly responsible for the administration of this license. Grantee shall direct questions regarding the interpretation or application of this ordinance to the Director of Financial Services.

(B) Notices shall be deemed delivered:

(1) upon receipt in the case of personal delivery;

(2) three (3) days after deposit in the mail; or

(3) the next business day in the case of facsimile, email, or overnight delivery.

(C) All notices to the City under this license shall be in writing and delivered:

(1) in person;

(2) through the United States mail, by registered or certified mail, postage prepaid;

(3) by prepaid overnight delivery service; or

(4) by facsimile or email transmission, if a hard copy of the same is followed by delivery through the U. S. mail or by overnight delivery service.

(D) All notices and copies of all documents sent to the City shall be delivered to:

OFFICE OF TELECOMMUNICATIONS &
REGULATORY AFFAIRS
City of Austin
P.O. Box 1088
Austin, Texas 78767
Telephone: (512) 974-2420
Fax: (512) 974-2416

DEPARTMENT OF WATERSHED PROTECTION AND
DEVELOPMENT REVIEW

City of Austin
P.O. Box 1088
Austin, Texas 78767
Telephone: (512) 974-7254
Fax: (512) 974

With a copy to:

CITY OF AUSTIN LAW DEPARTMENT
City of Austin City Hall, 4th Floor
301 West 2nd Street
Austin, Texas 78701

P.O. Box 1088
Austin, Texas 78767-1546
Telephone: (512) 974-2268
Fax: (512) 974-2312

(E) All notices to Grantee shall be delivered to:

NEXTG NETWORKS OF ILLINOIS, INC.
Attn: Network Real Estate
2216 O'Toole Ave
San Jose California 95131
Telephone: (408) 954-1580
Fax: (408) 383-5397

SECTION 19. ASSIGNMENT.

(A) Except as otherwise provided by this section, Grantee may not sell, assign, transfer, or convey this license, the network facilities held by the Grantee, or any other right or privilege of the Grantee to any other person, firm or entity, without the prior written consent of the Council by ordinance. The Council shall not unreasonably withhold its approval.

(B) Grantee may assign its rights under this license without prior consent of the Council only to:

(1) another license holder; or

(2) Grantee's parent, subsidiary, affiliate, or successor.

(C) The Council may revoke this license if the Grantee sells, assigns, transfers, conveys or otherwise disposes of its rights or interests under this license, or attempt to do so, without the Council's prior written consent. All rights and interest of the Grantee shall cease if this license is revoked.

(D) A transfer in violation of this section is void.

(E) The Council may deny consent to a transfer of interest if the transferee is not legally authorized to install facilities in the public right-of-way.

(F) Grantee may not assign or terminate this license to evade fee payment.

SECTION 20. DEFAULT AND TERMINATION - GRANTEE.

(A) Grantee may terminate this license agreement no sooner than 60 days after notifying the City in writing that Grantee:

(1) is no longer providing services using its network facilities; or

(2) has properly assigned or transferred the license according to the provisions above.

(B) If Grantee terminates this license, Grantee may remove its network facilities from the public right-of-way only if street areas are replaced to meet the same or better grade as before removal.

SECTION 21. DEFAULT AND TERMINATION – CITY.

(A) The City may terminate this license agreement if, 45 days after notifying Grantee in writing that Grantee is in violation of a rule regarding the use and occupancy of the public rights-of-way or is offering a service other than that permitted under this license, Grantee remains in violation or does not cease offering the service.

(B) The City may terminate this license for any other reason on or after the 91st day following written notice to Grantee and any affected adjoining landowner.

SECTION 22. DEFAULT AND TERMINATION – EITHER PARTY.

Either the City or the Grantee may terminate this license if, on or after the 45th day following written notice of a default issued by the non-defaulting party, the defaulting party:

(A) has not cured the default;

(B) did not commence a cure within forty-five (45) days if the default is impossible to cure within 45 days; or

(C) failed to diligently prosecute a cure to completion.

SECTION 23. CITY'S RIGHT TO PURCHASE GRANTEE'S FACILITIES.

(A) The City may purchase Grantee's facilities.

(B) The City shall notify Grantee of its intent to purchase in writing at least 90 days before the effective date of the purchase.

(C) The grantee and the City shall each appoint an appraiser experienced in the evaluation of similar facilities. The appointed appraisers shall agree on the appointment of a third appraiser.

(D) Each of the three appraisers shall conduct an independent appraisal of Grantee's facilities, and shall consider the following in arriving at a fair market value for Grantee's facilities:

(1) the book value of the assets constituting Grantee's facilities;

(2) the age and condition of the physical plant and equipment;

(3) the discounted future revenue stream generated from the customer base; and

(4) the remaining useful life of Grantee's facilities.

(E) The appraisers may not consider the value of the unexpired term of this license, or the potential for renewal.

SECTION 24. EFFECT OF GRANTEE'S CHALLENGE TO LICENSE.

(A) If Grantee initiates a challenge, legal or otherwise, to the validity of any part of this license, the entire license, all permits and permit applications to use the public right-of-way or a municipal facility is declared null and void as of the challenge date.

(B) Grantee shall inform the City no later than the second day after initiating such a challenge. Failure to provide the City with notice constitutes a material breach of the license agreement.

(C) Grantee must remove all facilities installed in the public right-of-way, or in, on, or around any City facility wherever located by no later than the 30th day after initiating the challenge.

(D) The City may remove a facility that remains in or around the public right-of-way or City facility on or after the 31st day following Grantee's challenge without incurring liability for the removal.

SECTION 25. MISCELLANEOUS PROVISIONS.

(A) Nonexclusive Use. This license does not provide Grantee with exclusive use of the public right-of-way nor any City facility. The City has the right and obligation to permit other communications service providers to install equipment or devices in the public right-of-way and on City facilities that may be shared with Grantee.

(B) Waiver of Breach. The waiver by either party of a breach or license shall not be deemed as a waiver or a continuing waiver of a subsequent breach or violation of the same or any other provision of this license.

(C) Governing Law; Jurisdiction. This license shall be governed in accordance with and construed by the laws of the State of Texas. If a party sues under this Use Agreement, the parties agree that trial of such action shall be vested exclusively in the Travis County State District Courts or in the United States District Court for the Western District of Texas.

(D) Severability of Provisions. If one or more provisions of this license are held to be void, voidable, or unenforceable by a court of competent jurisdiction in a final judicial action, the provision(s) are severed from the remaining provisions of the license. Such a provision shall not affect the legality, validity, or constitutionality of the remaining portions of this license. Both parties declare that they enter into this License and each of its provisions regardless of any provision that is held to be illegal, invalid, or unconstitutional.

(E) Attorneys' Fees. The prevailing party in any litigation involving this license shall be entitled to recover its costs of suit, including (without limitation) reasonable attorneys' fees.

(F) Consent Criteria. In any case where the approval or consent of one party is required, requested or otherwise needed under this license, such party shall not unreasonably delay, condition, or withhold its approval or consent.

(G) Representations and Warranties. Each party to this Agreement represents and warrants that it has the full right, power, legal capacity, and authority to enter into and perform the parties' respective obligations as required under this license, and that such obligations shall be binding upon the party without requiring approval or consent of any other person or entity.

(H) Amending the License. This license may not be amended unless in writing and signed by both parties.

(I) Entire Agreement. This license agreement represents the entire understanding between the parties with respect to all matters herein. There are no representations, agreements, or understandings (whether oral or written) between or among the

parties relating to the subject matter of this license that are not fully expressed herein.

PART 2. ACCEPTANCE OF LICENSE.

Grantee shall file with the City Clerk a statement accepting the terms of this license before the effective date of this ordinance. Grantee is ineligible to receive a permit of any kind from the City until and unless City Clerk receives the properly executed acceptance.

PART 3. COMPENSATION TO CITY FOR USE OF PUBLIC RIGHT-OF-WAY AND OTHER CITY FACILITIES.

(A) Right-of-Way Fee. Grantee shall pay to the City as compensation for use of the public right-of-way an amount equal to five percent (5%) of Grantee's Adjusted Gross Revenues (the "Right-of-Way Fee").

(B) Property and Facilities Attachment Fee. Grantee shall pay an aggregate annual fee to the City for using city property and facilities to attach Grantee's facilities and equipment. The fee is the sum of individual component fees, including:

(1) an annual property attachment fee of $15.00 per square foot used inside, on or outside of a City building, or $1,500.00 per building used, whichever is greater; and

(2) an annual facilities attachment fee of $15.00 per square foot used inside, on or outside of a City facility other than a building, or $1,500.00 per facility used, whichever is greater.

(C) In-Kind Services. Grantee agrees to reserve two (2) stands of fiber optic cabling within its system for the City's exclusive use in operating a noncommercial, City-owned Wi-Fi broadband network, or for any other noncommercial, City -operated data network or communications function.

(D) Fee Adjustment – Effective on the fifth anniversary of the license effective date, and continuing on each fifth (5^{th}) anniversary thereafter during the term, the property and facilities attachment fees shall be adjusted by an amount equal to the percentage change in the U.S. Department of Labor, Bureau of Labor Statistics Consumer Price Index for the same five year period (All Items, All Consumers, 1982-1984=100). This fee adjustment does not apply to the Right-of-Way Fee.

(E) Fees are payable no later than the thirtieth (30^{th}) day after the effective date of this license, and on the 30^{th} day following every subsequent anniversary date. Grantee shall furnish to the City with each fee payment a statement, executed by an officer

of the company, showing the adjusted gross revenue for the period covered by the payment.

(F) Payment shall be made to:

Financial Services Department
Office of Telecommunications and Regulatory Affairs
P.O. Box 1088
Austin, Texas 78767

Any overpayment to the City through error or otherwise shall be refunded or offset against the next payment due.

(G) The City's acceptance of a remitted fee payment under this section shall not:

(1) be construed as a waiver of breach;

(2) preclude the City from later establishing that a larger amount was actually due; nor

(3) prevent the collection of any balance due to the City.

PART 4. CONTRACTUAL WAIVER OF RIGHTS AND PRIVILEGES.

By filing the license acceptance with the City Clerk, Grantee acknowledges that:

(A) it has received the advice of competent legal counsel throughout the licensing process;

(B) it is voluntarily relinquishing any right or privilege Grantee may be afforded as certificated telecommunication provider under Chapter 283 of the Texas Local Government Code, when a statutory provision is or could be in conflict with a provision in this license, so that Grantee may instead be governed in all matters by this license agreement; and

(C) the provisions of this license control all matters between the parties.

PART 5. This ordinance takes effect on September 1, 2005.

PASSED AND APPROVED

August 18, 2005

§§§

Will Wynn
Mayor

APPROVED:

David Allan Smith
City Attorney

ATTEST:

Shirley A. Brown
City Clerk