

INFRASTRUCTURE USAGE AGREEMENT

(Traffic Signal Pole)

License Agreement between City of Austin and Network Provider

This License Agreement ("Agreement") is between the City of Austin, a Texas home-rule municipal corporation ("COA"), and [*name*], a [*state*] [*corporate form*] ("Licensee"); hereinafter referred to individually as "Party" or collectively as "Parties".

WHEREAS, Licensee desires to attach equipment to provide wireless services within the City of Austin; and

WHEREAS, Licensee will need to place and maintain equipment and other facilities within the City's jurisdiction and desires to place such equipment and facilities on City-owned traffic signal poles, and within the public right-of-way; and

WHEREAS, the City is willing to grant Licensee revocable, non-exclusive licenses to use certain COA owned traffic signal poles on the strict terms and conditions set forth in this Agreement and subject to the terms of the City of Austin code (Austin City Code Chapter 15-7) and the rules and regulations of the City of Austin adopted thereunder, as each may be amended from time to time; and

WHEREAS, COA is willing to allow Licensee to undertake the make-ready construction work necessary to prepare certain COA-owned traffic signal poles to accommodate Licensee's equipment, and facilities under the strict terms and conditions set forth in this Agreement.

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

Article 1

Definitions and Construction

1.1 **Definitions:** For purposes of this Agreement, unless specifically set out below, terms have the meanings assigned to them by Section 15-7-1 of the City of Austin City Code:

- A. **Annual Usage Charge** means the recurring charge that Licensee is to pay COA annually under this Agreement for the use of Traffic Poles. The Annual Usage Charge is in addition to any Costs and Filing Fees Licensee may incur during a Contract Year, and shall be determined by COA as of December 1 of each Contract Year, other than the first Contract Year. To the extent lawfully permitted, the Annual Usage Charge for any Contract Year shall be the number of Attachments shown on COA's records to exist as of December 1 of the preceding Contract Year multiplied by the Usage Rate for the new Contract Year. Unless otherwise expressly provided in this Agreement, Annual Usage Charges are not refundable.
- B. **Application** means Licensee's formal request in the form required by the COA to attach Licensee's network node to a Traffic Pole.
- C. **Attachment** means each network node or equipment of a Licensee supported by, affixed to, contained in, or placed on or in a Traffic Pole.
- D. **Attachment License** means the contract granting Licensee an Attachment Right to a Traffic Pole.
- E. **Collocate and Collocation** means the installation, mounting, maintenance, modification, operation, or replacement of network nodes in a public right-of-way on or adjacent to a Traffic Pole.
- F. **Contract Year** means any calendar year during which this Agreement is in effect, beginning January 1 and ending December 31, except that the first Contract Year shall run from the Effective Date until December 31 of that year and the final Contract Year shall run from January 1 of that year until the date of termination.
- G. **Contractor** includes subcontractors.
- H. **Cost** means the total cost reasonably incurred by COA for any particular task under this Agreement, and includes without limitation reasonable labor, material, equipment usage, outside Contractor and vendor charges, reasonable overhead, and reasonable general and administrative expenses. Costs may be incurred for, without limitation, engineering and engineering review, Make-Ready Work, inspections and oversight, auditing, and other services. Certain Cost rates are specified in the fee schedule adopted by the City of Austin commonly referred to as the City of Austin Fee Schedule. Cost rates shall be based on COA's actual and reasonable cost of labor, materials, and equipment usage. Subject to the foregoing, Costs shall be determined by COA in its reasonable judgment and reasonable

discretion, and shall be paid by Licensee in accordance with either of the following, at COA's sole option:

1. Any advance estimate provided by COA, in which event COA shall have the right to refuse to incur the Costs until the estimate is paid; and/or
 2. Any final invoice submitted by COA. In the event an advance estimate was paid by Licensee for Costs, the final invoice will reflect such payment.
- I. **Effective Date** means the last date on which a party signs this Agreement as shown on the signature page of this Agreement.
- J. **Filing Fee** means the initial, non-refundable fee charged to Licensee for filing an Application for an Attachment License. Filing Fees are currently set by city ordinance, though will be set by COA to the extent they are no longer set by ordinance (in which case the Filing Fee shall not exceed the actual and reasonable cost to COA of reviewing and processing an Application). The Filing Fee is solely to compensate COA for reviewing and processing an Application and does not include or offset Costs or Annual Usage Charges.
- K. **Infrastructure Usage Ordinance** means Austin City Code Chapter 15-7 and any other City ordinance that may be enacted to govern Traffic Pole usage or rental.
- L. **Make-Ready Work** means work required to accommodate a network provider's attachments to COA infrastructure to ensure the installation meets all City codes and generally accepted engineering and construction standards.
- M. **Third Party User** means any attaching entity not part of this Agreement that has, or may be granted, a valid Attachment License or other right to attach with respect to a Traffic Pole.
- N. **Unauthorized Attachment** means an Attachment or any other affixing or placing of Licensee's facilities onto COA property for which Licensee does not have a valid Attachment License, or which does not comply with the terms of this Agreement, the Transportation Criteria Manual or Design Documents.
- O. **Usage Rate** means, for each given Contract Year, the amount Licensee must pay COA for each Attachment.

1.2 **Interpretation.** Except as otherwise expressly provided herein, all nouns, pronouns and variations thereof shall be deemed to refer to the singular and plural. The descriptive headings in this Agreement are only for the convenience of the parties and shall not be deemed to affect the meaning or construction of any provision. The rule of construction that ambiguities in a contract are to be construed against the drafting party shall not apply to this Agreement. Any reference to a law, code or document shall mean such law, code or document as it may be amended from time to time.

1.3 **Compliance with Infrastructure Usage Ordinance and Rules** This Agreement is intended to further the goals and policies of the Infrastructure Usage Ordinance and the Transportation Criteria Manual. To the extent they do not directly and irreconcilably conflict, this Agreement, the Transportation Criteria

Manual and the Infrastructure Usage Ordinance are cumulative and applicable to Licensee. To the extent a provision of the Infrastructure Usage Ordinance or Transportation Criteria Manual has been rendered invalid or preempted by state or federal law, this Agreement shall control unless preempted by state or federal law. The absence in this Agreement of a provision that appears in the Infrastructure Usage Ordinance or Transportation Criteria Manual, or vice versa, shall not be construed to relieve Licensee from complying with or being subject to such provision.

Article 2

Scope and Term of Agreement

2.1 **Term** This Agreement commences on the Effective Date and continues thereafter for an initial term of five (5) years. Following the expiration of the initial term, this Agreement shall automatically renew for successive one-year terms until such time that this Agreement is terminated by either Party upon giving the other Party six (6) months' written notice of termination. Expiration or termination of Licensee's privileges under this Agreement or under any valid Attachment License issued pursuant to this Agreement shall not relieve Licensee of any obligation, whether indemnity or otherwise, which has accrued prior to such expiration or termination.

2.2 **Existing Facilities Only** Except as otherwise set forth in the Transportation Criteria Manual, (i) COA is under no obligation to add, build, keep, maintain, or replace Traffic Poles or any other facilities for the use or convenience of Licensee; and (ii) the maintenance, replacement, removal, relocation, or addition of Traffic Poles and facilities shall remain within the sole province and discretion of COA.

2.3 **Poles Only** This Agreement addresses only Attachments to Traffic Poles. This Agreement does not authorize Licensee to install or maintain Attachments on other COA property and facilities, including without limitation conduits, mast arms, and buildings.

2.4 **City Rights-of-Ways** Nothing in this Agreement shall be construed to grant Licensee any right or authorization to use or occupy the public streets or rights-of-way of the City of Austin, except for the placement of Attachments on Traffic Poles or other facilities covered by this Agreement which may be located in the public streets or rights-of-way, including access in the public streets or rights-of-way to such Attachments, subject to permit approval.

2.5 **No Property Rights in Poles** All Traffic Poles shall remain the property of COA and no payment made by Licensee shall create or vest in Licensee any ownership right, title, or interest in any Traffic Pole, but Licensee's interest shall remain a bare license. The existence of such a license shall not in any way alter or affect COA's right to use, change, operate, maintain, or remove its Traffic Poles, subject to the terms and conditions hereof.

2.6 **License not Exclusive** Licensee acknowledges that COA has entered into before, and may enter into in the future, similar or other agreements concerning the use of Traffic Poles by third parties, including Licensee's competitors. Nothing in this Agreement shall be construed to limit or in any way affect COA's right or ability to enter into or honor other agreements, or to grant any rights, licenses, or access

concerning any Traffic Pole, irrespective of the character or degree of economic competition or loss caused to Licensee.

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

Article 3

Usage Rates and Charges

3.1 **Calculation of Usage Rates** For each Contract Year, the Usage Rate shall be calculated per the Ordinance governing Traffic Pole attachments.

- A. If Licensee disagrees in good faith with COA's determination of the Usage Rate, Licensee may protest in writing within thirty (30) days of receipt of the notice. The protest shall include copies of all records and other documentation that support Licensee's position.
- B. Failure to timely protest COA's proposed Usage Rate shall constitute agreement to and acceptance of COA's determination.
- C. If Licensee does timely protest a proposed Usage Rate, the parties shall endeavor in good faith to negotiate a resolution of the dispute.
- D. If the dispute is not resolved by the time the Annual Usage Charge invoice is issued, Licensee shall nonetheless pay the invoice based upon the disputed Usage Rate. Payment by Licensee of the invoice shall not prejudice Licensee's ability to continue to contest the Usage Rate, and COA agrees not to interpose any claim, defense, or counterclaim that Licensee has waived its right to contest the Usage Rate by paying the disputed invoice.

3.2 **Subsequent Annual Usage Charges** In each January of each Contract Year and continuing thereafter until the termination of this Agreement, COA will invoice for, and Licensee shall pay, within forty-five (45) days after receipt of invoice, the Annual Usage Charge for the new Contract Year.

3.3 **Invoice Disputes** If Licensee believes in good faith that an invoice is incorrect, it may pay the invoice under protest. To protest an invoice, Licensee must give COA written notice of the nature of its protest no later than the due date for payment of the invoice together with copies of records and other documentation supporting its position. If Licensee's protest concerns the Attachment count used to calculate the Annual Usage Charge, the parties shall promptly meet to resolve the discrepancies in their records to determine the correct Attachment count. If the parties are unable to resolve a discrepancy as to the correct count, the parties shall jointly conduct a physical inventory of a statistically significant number

of geographical grids or other mutually agreeable census to determine the correct count. The cost to conduct such inventory or census shall be equally divided between the parties.

3.4 **Adjustments** If upon resolution of a dispute between the parties under paragraph 3.1 or paragraph 3.3, a refund is due to Licensee, COA shall refund the amount of the overcharge together with interest at the rate specified in paragraph 10.5 from the date of COA's receipt of the protested Annual Usage Charge payment. If Licensee owes additional money, a corrected invoice shall be issued by COA for the additional Annual Usage Charge due, plus accrued interest at the rate specified in paragraph 10.5 from the due date of the original invoice.

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

Article 4

General Requirements

4.1 **Public Safety** In performing any work on or near Traffic Poles supporting traffic control or warning devices. It has been determined that these devices are necessary for the safe and convenient movement of various modes of traffic. Licensee shall take all steps to ensure their construction activities do not adversely impact the operation of these devices. Should the Licensee's activities impact the effectiveness of these devices, the Licensee shall take every step necessary to return these devices to their fully functioning capacity. LICENSEE SHALL DEFEND, INDEMNIFY AND HOLD THE CITY HARMLESS FROM AND AGAINST ALL CLAIMS, DEMANDS, ACTIONS, SUITS AND JUDGMENTS ARISING FROM OR CONCERNING A BREACH BY LICENSEE OF ITS OBLIGATIONS UNDER THIS PARAGRAPH.

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

4.3 **Design Manual** The Licensee shall adhere and comply with the Rules and Design Manual for Network Nodes in the right of way, as defined in Section 12 of the Transportation Criteria Manual.

Article 5

Unauthorized Attachments

5.1 **Unauthorized Attachments** Licensee shall not place any Attachments on a Traffic Pole or other COA infrastructure except as authorized by an Attachment License. If one or more unauthorized Attachments are discovered, COA may, but shall not be required to, remove the unauthorized Attachment without incurring any liability to Licensee and at Licensee's sole Cost. With respect to any unauthorized Attachment, COA may opt to:

- A. require that Licensee remove such unauthorized Attachment upon demand or, if Licensee fails to do so, COA may remove such Attachment at Licensee's sole cost and risk; or
- B. require that Licensee submit an Application for each such unauthorized Attachment, together with the then-current application filing fee and Annual Usage Charge relating back to the installation date of such unauthorized Attachment, or the time at which such Attachment was deemed an unauthorized Attachment pursuant to the terms and conditions of under the terms of the License Agreement. If such Application and charges are not received by COA within fifteen (15) days of notice of the unauthorized Attachment, COA may then opt to proceed under part A of this section.

5.2 **Excessive Unauthorized Attachments** If COA determines that Licensee has made more than fifty (50) Unauthorized Attachments cumulatively during any Contract Year, Licensee shall be considered to be in material breach of this Agreement and COA will have the right to terminate this Agreement and require removal of Licensee's Attachments in accordance with Article 6 of this Agreement.

5.3 **Remedies Cumulative** The remedies afforded COA under this agreement are in addition to any civil or criminal penalties provided by the Infrastructure Usage Ordinance for Unauthorized Attachments or related rules.

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

Article 6

Termination

6.1 **Right of Suspension** If Licensee fails either to make any payment required under this Agreement, including timely payments to Contractors for Make-Ready Work, or to perform timely any material obligation under this Agreement, and such default continues for thirty (30) days after the date the payment or performance is due, then, in addition to any other available right or remedy, COA may, upon written notice to Licensee, immediately suspend all Attachment Licenses of Licensee and decline to review any application for Attachment Licenses of Licensee, until such time as the default is cured. The payment under protest of a disputed amount in order to avoid, or lift, suspension of Attachment Licenses shall not prejudice the rights of Licensee to continue the payment dispute. A suspension of Attachment Licenses under this paragraph shall not prevent Licensee from operating, maintaining, repairing or removing its existing Attachments, but Licensee shall not install any new or additional Attachments or make any changes

to existing Attachments (except for removal or routine repair or maintenance necessary to continue to provide services to then-existing Licensee customers) during the period of suspension.

6.2 **Termination of Agreement by COA** If Licensee fails either to pay any payment required under this Agreement, including timely payments to Contractors for Make-Ready Work, or timely perform any material obligation under this Agreement, and if such default has not been cured within ninety (90) days of Licensee's receipt of written notice of default, COA may terminate this Agreement and all Attachment Licenses upon written notice to Licensee. Upon receipt of a notice of termination, Licensee shall promptly begin the process of removing all Attachments from Traffic Poles. All such Attachments shall be removed within thirty (30) days after the date of the notice of termination, or within such time as COA may agree. Until all of Licensee's Attachments are removed, Licensee shall continue to comply with all of the terms of this Agreement and perform all of its duties and obligations hereunder, including without limitation the obligation to pay Annual Usage Charges for its Attachments. Such payment by Licensee or acceptance by COA of Annual Usage Charges shall not act to cure the default that triggered the termination nor shall it reinstate this Agreement or Licensee's Attachment Licenses hereunder. If in the director's sole discretion and determination, Licensee's default is isolated to an Attachment License, COA may terminate the Attachment License allowing for notice and cure in accordance with this paragraph.

6.3 **Failure to Remove Attachments** If Licensee has not removed all its Attachments within the period of time specified in the preceding paragraph, or such additional period of time granted by COA in writing, then COA may remove Licensee's Attachments at Licensee's sole Cost and risk, in which event Licensee shall pay to COA as liquidated damages, and not as a penalty, for the use and occupancy of Traffic Poles a sum equal to one half of the monthly Usage Rate for each Traffic Pole Contact for each month (or part thereof) until all such Attachments have been removed. Alternatively, COA may, in its reasonable discretion and upon written notice to Licensee, deem the Attachments to have been abandoned and assume ownership thereof.

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

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

Article 7

Assignments

7.1 **Permissible Assignments** Licensee may not assign or otherwise transfer this Agreement or any Attachment Licenses without COA's prior written consent, except that Licensee may without consent:

- A. transfer or assign this Agreement to an affiliate or subsidiary of Licensee. Licensee's rights and obligations hereunder shall pass to such successor only upon receipt by COA of written notice of such transfer or assignment, together with true copies of the documents specified in paragraph 7.2 below; and
- B. mortgage any or all of its property, rights, privileges and franchises, or to enter into any merger, consolidation, or sale of its assets in the City of Austin substantially in their entirety. Licensee shall provide advance written notice of foreclosure, merger, consolidation or sale, together with true copies of the documents specified in paragraph 7.2 below within thirty (30) days of closing such transaction.

7.2 **Information to COA** In the event of a transfer or assignment of this Agreement, Licensee shall provide COA with true and complete copies of the transfer or assignment documents; documents showing the ownership of the assignee and its relationship to Licensee, if any; a copy of the assignee's most current audited annual financial statement (or unaudited financial statement if an audited annual financial statement has not been prepared); a copy of the assignee's franchise with the City, if any; copies of all insurance certificates and bonds required by this Agreement; and such other information as COA may reasonably request.

7.3 **Other Assignments Void** A purported assignment or transfer made in violation of the provisions of this Article 7 shall not be binding upon COA and shall be deemed to be a material default of this Agreement.

7.4 **Assignment by COA** COA may assign this Agreement in whole or in part without the consent of Licensee. COA shall give Licensee written notice of the transaction within ten (10) days after closing.

7.5 **Partial Assignments** If Licensee sells, conveys, or transfers some, but not all, of Licensee's Attachments, and such assignment complies with this Article 7, the assignee must nonetheless obtain a separate agreement from COA for the assignee's Attachments in accordance with City of Austin and COA policies, rules, regulations and Ordinances in effect at that time. Until the assignee executes a separate agreement, the assignment is not binding upon COA and the assignee's Attachments shall continue to be deemed to be the Attachments of Licensee for all purposes hereunder, including billing and payment of Annual Usage Charges.

Article 8

Liability & Indemnity; Warranty

8.1 **COA Liability** COA reserves to itself the right to maintain and operate its Traffic Poles in such manner as will best enable it to fulfill public safety requirements, subject in all respects to the terms and conditions of this Agreement. COA shall not be liable for any damages incurred by Licensee for damage or interruption to its Attachments except for actual repair costs caused by the negligence or intentional misconduct of COA; provided, however, that COA shall not be liable to Licensee for any interruption of Licensee's service or for interference with the operation of Licensee's Attachments. **NEITHER COA NOR**

LICENSEE SHALL BE LIABLE TO THE OTHER FOR ANY SPECIAL, INDIRECT, PUNITIVE, OR CONSEQUENTIAL DAMAGES ARISING IN CONNECTION WITH THE USE OF OR DAMAGE TO COA'S OR LICENSEE'S FACILITIES.

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

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

8.4 **Dangerous Nature of the Work** Licensee acknowledges that in performing the work contemplated by this Agreement, Licensee and its agents, servants, employees, and Contractors will work within the public right of way and on Traffic Poles with existing energized equipment. Licensee shall ensure that its employees, servants, agents, and Contractors have the necessary qualifications, skill, knowledge, training, and experience to protect themselves, their fellow employees, employees of COA, and the general public, from harm or injury while performing work permitted by this Agreement. In addition, Licensee shall furnish its employees, and shall require its agents and Contractors to furnish their employees, with competent supervision and sufficient and adequate tools and equipment for their work to be performed in a safe manner. Licensee further warrants that it is apprised of, conscious of, and understands the imminent dangers (INCLUDING SERIOUS BODILY INJURY OR DEATH) inherent in the work necessary to make installations on Traffic Poles by Licensee's employees, servants, agents, and Contractors, and accepts it as its duty and sole responsibility to notify and inform Licensee's employees, and to require its agents and Contractors to inform their employees, of such dangers, and to keep them informed regarding same.

8.5 **Licensee Liability and Indemnity** Subject only to paragraph 8.7, Licensee shall defend, indemnify and hold harmless COA and all affiliated entities of COA, whether existing now or in the future, and their respective officials, officers, departments, agencies, boards, representatives, employees, agents, Contractors and attorneys against any and all liability, claims, costs, damages, fines, taxes, penalties, punitive damages, expenses, demands, lawsuits or disputes (including reasonable attorney fees of counsel selected by COA and all other costs and expenses of litigation) arising from or related to any of the following:

- A. All acts or omissions by Licensee or its Contractors done in the course of Make-Ready or installation construction or in the maintenance, use, or operation of Licensee's Attachments;
- B. Any work performed by COA that was necessitated by the installation, maintenance, presence, use or removal of Licensee's Attachments or from any work this Agreement authorizes COA to perform on Licensee's behalf;
- C. All claims or causes of action for damage to property or injury to or death of any persons, including payments made by COA under any Worker's Compensation Laws or under any plan for employees' disability and death benefits, arising out of the erection, maintenance, repair, presence, use, relocation, transfer or removal of Licensee's Attachments or the proximity of Licensee's Attachments to COA's facilities or the property of any other Third Party User, or by any act or omission of Licensee on or in the vicinity of Traffic Poles;
- D. All claims or causes of action for property damage, bodily injury or death arising out of the performance or nonperformance of any work or obligation undertaken by Licensee pursuant to this Agreement;
- E. Any claim or cause of action related to Licensee's erection, maintenance, repair, presence, use, relocation, transfer or removal of Licensee's Attachments, including liabilities incurred as a result of violation of any law, rule, or regulation of the United States, State of Texas or any other governmental entity or administrative agency;
- F. A violation of any state or federal law arising out of Licensee's erection, maintenance, repair, presence or use, relocation, transfer or removal of Licensee's Attachments or the proximity of Licensee's Attachments to COA's facilities or the property of any Third Party User, or by any act or omission of Licensee on or in the vicinity of Traffic Poles, whether such violation is the result of a violation of a statute by COA or the Licensee solely or any joint violation thereof.
- G. Claims of governmental bodies, property owners or others alleging that Licensee does not have a sufficient right or authority for placing and maintaining Licensee's facilities at the locations of Traffic Poles.
- H. Claims for taxes by others that arise directly or indirectly from the construction, maintenance or operation of Licensee's facilities.
- I. Claims or causes of action caused by or relating in any manner to a breach of this Agreement or a failure to follow the terms of this Agreement by Licensee or its agents and employees or by Licensee's contractors or their agents and employees.
- J. All claims or causes of action of Third Party Users alleging interference from Licensee's Attachments or damage to Third Party User Attachments or facilities.

- K. Any third party claims or causes of action alleging that Licensee's use of any hardware, software or other materials embedded in Licensee's Attachments infringes or misappropriates such third party's intellectual property rights in such hardware, software or other materials.

8.6 **COA Fault** **SUBJECT ONLY TO PARAGRAPH 8.7, IT IS THE EXPRESS INTENT OF THE PARTIES THAT THE FOREGOING INDEMNITY IS TO PROTECT AND INDEMNIFY COA AGAINST THE CONSEQUENCES OF ITS OWN FAULT WHERE COA'S FAULT IS A CONCURRENT CAUSE OF THE INDEMNIFIED LIABILITY.**

8.7 **Joint Liability** The indemnity obligations set forth in paragraph 8.5 shall apply to fully protect and indemnify COA from all such claimed damages unless the indemnified liability was the result of intentional or reckless misconduct or negligence on the part of COA, or their agents, servants, employees, or contractors, in which case each party shall be liable for its found percentage of damages in accordance with Texas law based upon a final judgment in which a finder of fact determines COA's percentage of responsibility for the indemnified liability.

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

8.9 **Licensee's Construction Warranty** LICENSEE WARRANTS AND GUARANTEES TO COA THAT ALL MAKE-READY WORK WILL CONFORM TO THE COA'S UTILITY CRITERIA MANUAL AND TRANSPORTATION CRITERIA MANUAL AND THE DESIGN DOCUMENTS, BE PERFORMED IN A GOOD AND WORKMANLIKE MANNER IN ACCORDANCE WITH THIS AGREEMENT, AND WILL NOT BE DEFECTIVE. LICENSEE'S WARRANTY AND GUARANTEE HEREUNDER EXCLUDES DEFECTS OR DAMAGE CAUSED BY: (I) ABUSE, MODIFICATION OR IMPROPER MAINTENANCE OR OPERATION BY PERSONS OTHER THAN LICENSEE, ITS SUBCONTRACTORS OR SUPPLIERS; OR (II) NORMAL WEAR AND TEAR UNDER NORMAL USAGE.

8.10 **Survival** This Article 8 shall survive the termination of this Agreement.

Article 9

Insurance

9.1 **Insurance Required** Licensee, and all Contractors of Licensee performing work on a Traffic Pole, shall at all times carry insurance issued by companies duly licensed to provide insurance in the State of Texas and approved by the director to protect Licensee (or its contractor) and the City of Austin against any and all claims, demands, actions, judgments, costs, expenses, or liabilities of every kind that may arise, directly or indirectly, from or by reason of losses, injuries, or damages described in this Section.

9.2. **Minimum Coverages** At a minimum, Licensee and its contractors shall carry and maintain the following coverages and shall furnish the City Risk Manager certificates of insurance as evidence thereof:

- A. Commercial General Liability coverage in the minimum amount of \$2,000,000 per occurrence;

- B. Worker's Compensation coverage with statutory benefits as set forth in the Texas Worker's Compensation Act and Employer's Liability coverage of not less than \$1,000,000 bodily injury per accident, \$1,000,000 bodily injury per disease and \$1,000,000 per disease per employee;
- C. Business Automobile Liability Insurance for all owned, non-owned and hired vehicles with a minimum combined single limit of \$1,000,000.

9.3 **City as Additional Insured** The Commercial General Liability and Business Automobile Liability Policies shall name the City of Austin as an additional insured as its interest may appear. The City's risk manager will be included as a party to be notified under the policy at least thirty (30) days before any non-renewal, cancellation or material change in coverage in accordance with the terms of such policy. The "other insurance" clause shall not apply to the City; it being the intention of the parties that the above policies covering Licensee and the City shall be considered primary coverage. Each policy shall contain a waiver of all rights of recovery or subrogation against the City, its officers, agents, employees, and elected officials.

Article 10

Miscellaneous Provisions

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

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

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

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

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

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

City

Licensee

Austin Transportation Department

3701 Lake Austin Boulevard

Austin, TX 78703

Phone (512)

Fax (512)

Attn: Asst. Director, _____

IN WITNESS WHEREOF, the undersigned have executed this Agreement through their duly authorized representatives.

LICENSEE:

By: _____

Name: _____

Title: _____

Date: _____

CITY OF AUSTIN

BY ITS TRANSPORTATION DEPARTMENT

By: _____

Name: _____

Title: _____

Date: _____