

ORDINANCE NO. 20080821-032

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

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.

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

DEPARTMENT means the City of Austin Public Works Department.

DIRECTOR means the Director of the City of Austin Public Works Department.

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

GRANTEE means ZNET Texas, LP.

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

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

SECTION 2. PURPOSE.

- (A) On May 18, 2000, ZNET of Austin, Inc. obtained a license from the City through Ordinance No. 000518-52 to install in the City's public rights of way conduit infrastructure consisting of ten duct systems paired with manholes to provide conduit space for wire facilities, six duct systems of which it has since transferred. On February 11, 2005, ZNET Texas, LP ("ZNET") became the successor entity to ZNET of Austin, Inc. Although the license expired on May 29, 2007, ZNET held over and continued to maintain its remaining conduit infrastructure in the City's right of way.

- (B) As of the effective date of this ordinance, Grantee's conduit infrastructure consists of four duct systems in the City's public rights of way within the specific areas shown on Exhibit A that provide conduit space for wire facilities. This ordinance grants ZNET Texas, LP a license to maintain its current placement of conduit infrastructure in the public rights of way and is not a grant of license to construct, place, or maintain any additional conduit infrastructure in the public rights of way.

SECTION 3. CONSTRUCTION OBLIGATIONS.

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

- (B) Grantee shall furnish the City information relating to the construction, reconstruction, removal, maintenance, operation and repair of the conduit infrastructure performed by Grantee in the public rights 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 conduit infrastructure.

- (C) The use, maintenance, and operation of Grantee's conduit infrastructure and property are subject to all requirements set forth in Chapter 14-11 of the City Code (Use of Right-of-Way), such as applying for and receiving all applicable permits.

- (D) Grantee may prepay all excavation permitting and inspection fees required under the City Code on a yearly basis. Estimates of prepaid fees shall be determined by the Department, based upon the amount paid in the previous year. The actual fees accrued during the year must be reconciled with the prepaid amount at the calendar year end.

SECTION 4. CONDITIONS OF RIGHTS OF WAY OCCUPANCY.

- (A) The City has priority over all uses of the public rights of way. The City reserves the right to conduct all forms of work in the rights of way occupied by the Grantee, including:
 - (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) If the Director determines that removal, relocation, or change to Grantee's facilities is reasonably necessary for the construction or repair of any public improvement in the public rights of way, the Grantee shall remove or relocate its facilities at its own expense no later than the 120th day after written notice is sent by the City.
 - (1) The Director may require that the removal or relocation be either temporary or permanent.
 - (2) 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.
 - (3) 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, the City may remove or relocate the facilities at the expense of Grantee and without liability to the City.

SECTION 5. ACTS OF THE CITY.

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

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

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

SECTION 6. INDEMNITY AND INSURANCE.

- (A) Grantee shall defend, indemnify and hold the City harmless against all damages, cost, loss or expense arising out of, incident to, concerning or 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 including but not limited to the agents, officers and employees of Grantee, Grantee's subcontractors, the City, and third parties, no matter how, or to whom, the loss may occur.
- (B) The terms of each contract awarded by the Grantee for activities pursuant to this license shall contain indemnity provisions whereby the contractor must indemnify the City to the same extent as described in this section.
- (C) 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.
- (D) Grantee shall, at its sole expense, provide:
- (1) extended public liability insurance coverage, in an amount not less than \$600,000 for personal injury and \$600,000 for property damage, specifically naming the City as co-insured; or
 - (2) an equivalent means of providing protection acceptable to the City and covering all liabilities arising from the activities of Grantee, its officers, employees, agents, or contractors, relative to this license.

- (E) A copy of the instruments effecting this coverage shall be delivered to the Director no later than the 45th day after the execution date of this license.
- (F) The City's Office of Risk Management 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 shall pay the cost thereof.
- (G) All insurance certificates shall:
 - (1) name of the City of Austin and its officers, employees, board members and elected representatives as additional insured parties as to all applicable coverage except worker's compensation;
 - (2) provide 30 days notice to the City for cancellation, non-renewal, or material change; and
 - (3) provide for notice to both the Director and the Office of Risk Management by certified mail.

SECTION 7. LETTER OF CREDIT.

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

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

SECTION 8. RECORDS.

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

SECTION 9. NOTICE.

- (A) The Director 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) All notices to the City shall be to the following:

PUBLIC WORKS DEPARTMENT
City of Austin
P.O. Box 1088
Austin, TX 78767

Telephone: (512) 974-7185
Fax: (512) 974-7088

with a copy to:

FINANCIAL SERVICES DEPARTMENT
Telecommunications and Regulatory Affairs
City of Austin
P.O. Box 1088
Austin, TX 78767

Telephone: (512) 974-2999
Fax: (512) 974-2416

(C) All notices to Grantee shall be to:

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

Telephone (504) 452-9221
Fax: (504) 391-3247

with a copy to:

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

SECTION 10. ASSIGNMENT.

- (A) Neither this license, the conduit infrastructure in the public rights of way held by the Grantee for use under this license, nor any rights or privileges of the Grantee under this license, either separately or collectively, shall be sold, resold, assigned, transferred, or conveyed in full or in part by the Grantee to any other person, firm, affiliate or entity, without the prior written consent of the City by the Director of Public Works and the Director of Financial Services or their applicable successor officers. The approval shall not be unreasonably withheld.
- (B) Should the Grantee sell, assign, transfer, convey or otherwise dispose of its rights 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 45th 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 45th day after written notice is sent by the City.
- (D) This license may be terminated by the City for any other reason not sooner than the 91st day after written notice is sent to the Grantee and to any affected adjoining land owner, if any.

- (E) Grantee may not fraudulently or as a pretext assign or terminate this license to evade fees.

SECTION 12. TERM, RENEWAL AND AMENDMENTS.

- (A) This license is granted for a term of ten years, beginning on the effective date of this ordinance.
- (B) Grantee has an option to renew this license for one additional three-year term under the same terms and conditions, provided Grantee has fully complied with all terms and conditions of this license. If Grantee elects to exercise the renewal, it must file a written notice with the City no fewer than six months prior to expiration of the original ten-year license term.
- (C) Grantee must begin good faith negotiations with the City no later than six months prior to 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 the fair market value;
 - (2) request Grantee to remove the facilities; or
 - (3) allow Grantee to abandon the facilities.
- (D) Grantee is required to obtain additional licenses or agreements under other provisions of the City Code if Grantee wishes to offer services not allowed under this license.

PART 2. ESTABLISHING AN ANNUAL LICENSE FEE.

- (A) Grantee shall pay the City an annual license fee of \$20,800.00. Upon the completion of a sale of all ownership rights in one or more duct system by Grantee to another entity that is not a principal, agent or affiliate of Grantee, the annual license fee shall be recalculated by multiplying the annual license fee in effect before the sale by a fraction, the numerator being the number of duct systems owned by Grantee remaining after the sale and the denominator being the number of duct systems owned by the Grantee before the sale. The recalculated fee shall be effective from the effective date of the sale of the duct system and is subject to annual increases provided in Paragraph D of this Part.

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

PART 3. ACCEPTANCE OF LICENSE.

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

PART 4. SETTLEMENT OF OUTSTANDING CLAIMS.

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

PART 5. CONDITIONS PRECEDENT TO LICENSE: EFFECTIVE DATE

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

Unless the conditions precedent contained in this ordinance, including those specifically listed in this Part 5, are satisfied on or before the 90th day following the City's passage

and approval of this ordinance, this ordinance as it constitutes an offer of a license to Grantee expires and is of no further force and effect.

PART 6. This ordinance takes effect on September 1, 2008.

PASSED AND APPROVED

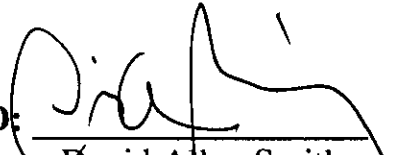
_____ August 21 _____, 2008

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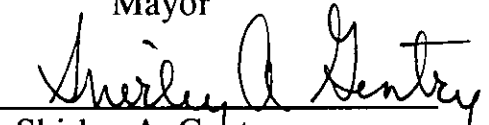
Will Wynn
Mayor

APPROVED:



David Allan Smith
City Attorney

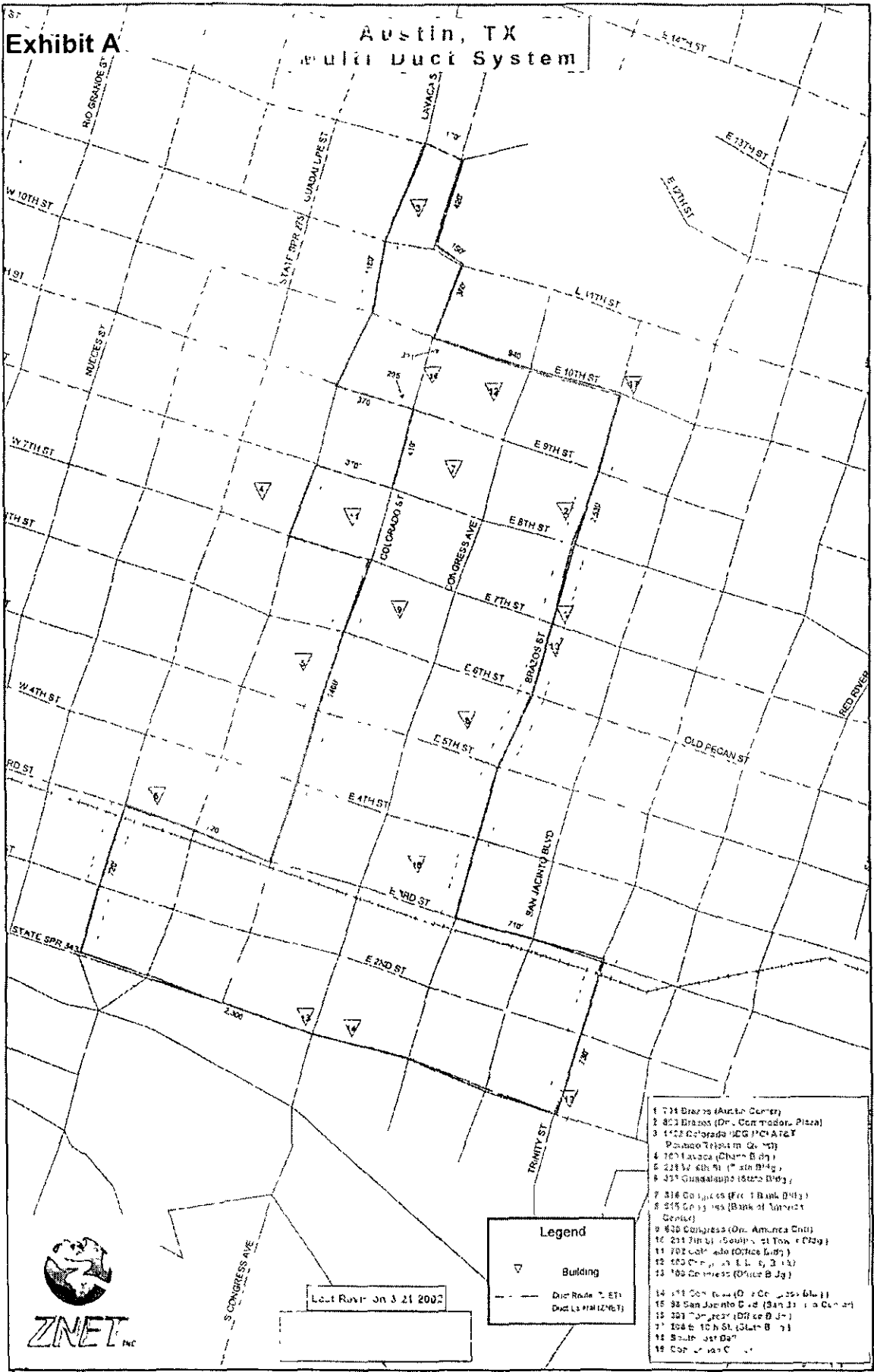
ATTEST:



Shirley A. Gentry
City Clerk

Exhibit A

Austin, TX Multi Duct System



- 1 734 Brazos (Austin Compt)
- 2 803 Brazos (Dr. Con modern Plaza)
- 3 1422 Colorado (DCG PCHA 767
Poulsen Telephon Co. Bldg)
- 4 1031 Lavaca (Cham-Bldg)
- 5 228 W 6th St (Texas Bldg)
- 6 357 Guadalupe (State Bldg)
- 7 316 Congress (Fed 1 Bank Bldg)
- 8 245 Congress (Bank of America
Genial)
- 9 830 Congress (Om. America Bldg)
- 10 233 7th St (South. 21 Tow. Bldg)
- 11 702 Congress (Office Bldg)
- 12 680 Congress (L.L. G. 2 1st)
- 13 180 Congress (Office Bldg)
- 14 111 Congress (D. C. 225 Bldg)
- 15 38 San Jacinto Blvd (San Jacinto Club)
- 16 303 Congress (Office Bldg)
- 17 158 E 10th St (State Bldg)
- 18 South 1st Bldg
- 19 Congress Ave

Legend

- ▽ Building
- Duct Route (2.5ft)
- Duct Line (12/16ft)

Last Revised 3 21 2002

