

City of Naperville

RIGHT-OF-WAY USE LICENSE AGREEMENT

**THIS RIGHT-OF-WAY USE LICENSE AGREEMENT** (hereinafter referred to as this “Agreement”), made and entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2019, pursuant to authority of the Illinois Constitution, State Statutes, and the Naperville Municipal Code, between the CITY OF NAPERVILLE, an Illinois municipal corporation and home rule unit of local government, with its principal office located at 400 South Eagle Street, Naperville, Illinois 60540, (hereinafter referred to as the "CITY") \_\_\_\_\_ (hereinafter referred to as the "LICENSEE"). The CITY and the LICENSEE may be hereinafter referenced individually as “Party” or cumulatively as “Parties”.

**RECITALS**

**WHEREAS**, the CITY is a home rule municipal corporation situated in Will and DuPage Counties under and by virtue of the Constitution and laws of the State of Illinois, and has acted in the exercise of its statutory and home rule authority entering into this Agreement; and

**WHEREAS**, the LICENSEE is engaged in the business of designing, selling, constructing, installing, maintaining and operating a digital, fiber optic based alternative access telecommunications system, for special access and private line service; and

**WHEREAS**, Section 9-1B-1 of the Naperville Municipal Code requires any Person, other than the CITY, who desires to construct, install, operate, maintain, or otherwise locate facilities in, under, over or across any specific public street of the CITY under the CITY’s jurisdiction, or any CITY utility easement such Person is not a grantee of the easement, overhead facilities or other property of the CITY, for the purpose of providing services to itself or any other Persons in areas within or outside the CITY to obtain a right-of-way use license, except as otherwise provided by applicable law; and

**WHEREAS**, the LICENSEE desires a right-of-way use license to construct, install, operate, maintain, or otherwise locate facilities in, under, over or across any specific public street of the CITY under the CITY’s jurisdiction, or any CITY utility easement such Person is not a grantee of the easement, overhead facilities or other property of the CITY, for the purpose of providing services to itself or any other Persons in areas within or outside the CITY; and

**WHEREAS**, the LICENSEE has filed an application for a right-of-way use license with the CITY pursuant to 9-1B-3 of the Naperville Municipal Code; and

**WHEREAS**, the CITY has reviewed and approved the application pursuant to 9-1B-4 of the Naperville Municipal Code; and

**WHEREAS**, Section 9-1B-4 of the Naperville Municipal Code requires that a right-of-way use license shall not be effective until the Parties have executed a written agreement setting forth the particular terms and provisions under which the license to occupy and use public ways or property of the City will be granted; and

**WHEREAS**, the Naperville City Council, after due and careful consideration, have concluded that granting a nonexclusive, revocable right-of-way use license to the LICENSEE pursuant to and in accordance with this Agreement would be in the best interests of the CITY and its residents and is suitable and convenient for the public health, welfare and safety for the CITY; and

**WHEREAS**, at its regular meeting held on the \_\_\_\_\_ day of \_\_\_\_\_, 2019, the Naperville City Council adopted Ordinance Number \_\_\_\_\_ a nonexclusive, revocable right-of-way use license to the LICENSEE conditioned upon the execution of this Agreement by the LICENSEE and the CITY of all terms and conditions of this Agreement.

**IT IS, THEREFORE, AGREED** by and between the CITY and the LICENSEE, in consideration of the public health, welfare and safety, and the promises and mutual covenants contained herein, as follows:

1. **RECITALS INCORPORATED BY REFERENCE:** The Recitals set forth above are specifically incorporated into and made a part of this Agreement as though fully set forth in this Section 1.
  
2. **INTERPRETATIONS AND DEFINITIONS:**
  - a. **Interpretation:**
    - i. **Word Use:** When not inconsistent with the context, words used in the present tense include the future, words in the plural number include the singular number and words in the singular number include the plural number. The words “shall” or “will” are always mandatory and not merely directory, and the word “may” is permissive.
    - ii. **Conflicting Provisions:**
      1. In the event of an express conflict or ambiguity between a provision in this Agreement and a provision in the Ordinance (as hereinafter defined), the provision in this Agreement shall control.

2. In no event shall prior drafts of this Agreement or the Ordinance be used, considered or relied upon in interpreting or construing any provision of this Agreement.
  3. Headings and captions contained in this Agreement are for convenience and reference only and are not a part of this Agreement and shall not be used in construing this Agreement and shall not in any way affect the construction or interpretation hereof.
- b. **Definitions:** Whenever used in this Agreement, the following terms shall have the following meanings:
- i. **Corporate Authorities:** The City Council of the CITY;
  - ii. **Effective Date:** The date of this Agreement as set forth on the beginning of the first page of this Agreement, which date shall be used for reference purposes and all other purposes;
  - iii. **Facilities:** The individual parts that together make the LICENSEE's Telecommunications System operational for the purposes set forth herein, including, without limitation, all cables, conduits, access manholes, pedestals, boxes, equipment, devices and other appurtenances in the Public Way.
  - iv. **Final Plans and Specifications:** Those certain plans and specifications for the Telecommunications System approved by the CITY pursuant to this Agreement.
  - v. **Governmental Authority:** The United States of America, the State of Illinois, the Counties of DuPage and Will and any political subdivision thereof, including, without limitation, the City of Naperville and any agency, department, commission, board, bureau or other instrumentality of any of them that has jurisdiction over the Telecommunications System or any property over, under, above or along which the Telecommunications System shall be installed.
  - vi. **License:** The nonexclusive, revocable license granted to the LICENSEE in this Agreement, to use certain Public Ways within the license area for the purposes of constructing, installing, using, maintaining, testing, inspecting, operating, repairing and removing the Telecommunications System pursuant to and in accordance with this Agreement.
  - vii. **License Fee:** The fees required to be paid pursuant to this Agreement in consideration for the License.

- viii. **Ordinance:** Ordinance Number \_\_\_\_\_ adopted by the Corporate Authorities on the \_\_\_\_\_ day of \_\_\_\_\_, 2019, enabling the CITY to grant a nonexclusive, revocable right-of-way use license to the LICENSEE.
- ix. **Permits:** All approvals, consents, permits, certificates, licenses, easements and authorizations required to be obtained from all Governmental Authorities and Persons, in connection with the Telecommunications Systems, including those needed to obtain access to or use of any real property.
- x. **Person:** Any natural person, or association, firm, partnership, joint venture, corporation, limited liability company or other legally recognized entity or organization, whether for profit, not-for-profit, excluding Governmental Authorities.
- xi. **Preliminary Plans and Specifications:** Those certain plans and specifications for the Telecommunications System submitted by the LICENSEE to the CITY's project manager, or his or her designee, pursuant to this Agreement.
- xii. **Public Way:** A public street or drive, utility easement or utility facility or other public right-of-way now or hereafter held by the CITY in a proprietary or governmental/regulatory capacity.
- xiii. **Public Street:** A public highway, lane, path, alley, sidewalk, boulevard, or other public right-of-way under the municipal street system, now or hereafter held by the CITY in its governmental/regulatory capacity.
- xiv. **Service:** The provision or offering of all telecommunications services (either directly or as a carrier for others) and other services authorized by law to persons or entities by means of the Telecommunications System, provided that such service shall not include the operation of a cable television system as defined under the Cable Acts of 1984 and 1992.
- xv. **Telecommunications System:** The telecommunications network consisting primarily of fiber optic cables to be constructed and installed by the LICENSEE pursuant to and in accordance with this Agreement, including, without limitation, all Facilities to be used by the LICENSEE to make the telecommunications network fully operational, for the purposes of transmitting, receiving and distributing telecommunications and other information, including, without limitation, voice, data, signals and other forms of communications, provided that the LICENSEE shall

not be a cable operator, as such term as defined under the Cable Acts of 1984 and 1992, as amended or as may be amended in the future.

### 3. **GRANT AND ACCEPTANCE OF LICENSE**

- a. **Grant of License**: The CITY hereby grants to the LICENSEE a License for the Term of this Agreement to occupy and use only those certain Public Streets and Public Ways within the CITY as detailed in the Final Plans and Specifications referenced in this Agreement for the purposes of constructing, installing, using, maintaining, testing, inspecting, operating, repairing and removing the Telecommunications System. This License is limited to only the specific route and those certain Public Streets and Public Ways, within the CITY detailed in the Final Plans and Specifications. This Agreement does not convey any right, title or interest in the Public Streets, Public Ways or property of the CITY, but shall be deemed a license only to use and occupy the Public Streets, Public Ways or property of the CITY for the limited purposes stated in this Agreement. Neither the Ordinance, this Agreement nor the License shall be construed as any warranty of title.
- b. **Acceptance of License**: The LICENSEE hereby accepts the License and agrees to strictly comply with this Agreement.
- c. **License, Permits and Approvals**: With the exception of those rights granted herein, this Agreement shall not take the place of any license, permit or approval that is or may in the future be required to be, secured by the LICENSEE from any Governmental Authority or Person in order to:
  - i. install, use, maintain, test, inspect, operate, repair or remove the Telecommunications System;
  - ii. access, possess or otherwise use any real property; or
  - iii. engage in, maintain, operate or carry on a business within the CITY.
- d. **Nonexclusivity of Grant**: This Agreement does not confer any exclusive right, privilege, license or franchise to occupy or use the Public Streets, Public Ways or property of the CITY for the provision of any services or any other purpose. Nothing contained in the Ordinance or in this Agreement shall prohibit the CITY from granting any other Governmental Authority or Person a license similar to the one granted herein to construct, install, maintain and operate a telecommunications system in the CITY.

e. **License Term:** The Term of the License shall begin on the Effective Date and shall expire five (5) years from the Effective Date, and may be renewed or terminated pursuant to this Agreement.

i. **Renewal**

1. The LICENSEE may seek to renew its License by filing a Renewal Application, not more than one hundred fifty (150) days, nor less than sixty (60) days before expiration of the current license Term. Said Application shall include the information required pursuant to Section 9-1B-4 of the Naperville Municipal Code and any other information required by the CITY.
2. Within ninety (90) days after the receiving the Renewal Application, the CITY's Corporate Authorities shall issue a written determination granting or denying the Renewal Application in whole or in part, applying the following standards. If the Renewal Application is denied, the written determination shall include the reasons for nonrenewal, which include, but are not limited to the following:
  - a. The financial and technical ability of the LICENSEE to provide the services permitted and perform its obligation under the license agreement and applicable laws and ordinances.
  - b. The legal ability of the LICENSEE to provide the services permitted and perform its obligations under the license agreement and applicable laws and ordinances.
  - c. The continuing capacity of the public streets or ways or other City property to accommodate the LICENSEE's existing facilities.
  - d. The LICENSEE's compliance with the requirements of the Naperville Municipal Code and this Agreement.
  - e. Applicable Federal, State and local laws, rules and policies.
  - f. Such other factors as may demonstrate whether the continued license for use of the public ways will serve the community interest.
3. The LICENSEE's License shall not be renewed until any and all ongoing violations or defaults in the LICENSEE's performance of this Agreement, as the case may be, or of the requirements of Section 9-1B of the Naperville

Municipal Code, have been cured, or a plan detailing the corrective action to be taken has been approved by the CITY's City Manager.

#### 4. **FEES, COSTS AND COMPENSATION**

- a. **CITY Costs**: For and in consideration of the License and as a condition of this Agreement and of the License granted pursuant to this Agreement, the LICENSEE shall pay all direct and indirect costs and expenses of the CITY related to the enforcement and administration of this Agreement.
- b. **Annual License Fee**: The LICENSEE shall pay the CITY an Annual License Fee of one dollar fifty cents (\$1.50) per each linear foot of the facilities which consisted of new construction, laying, boring, poling or the like, except for excess or surplus facilities not being used, but required under this Agreement, located in the CITY's public streets, public ways, or other CITY property, and an Annual License Fee of fifty cents (\$0.50) per each linear foot of the facilities being located in existing excess or surplus facilities in the CITY's Public Streets, Public Ways or property of the CITY.
  - i. Any discrepancy in linear footage actually installed will be reconciled by the Parties upon submission of as built drawings at the conclusion of the project.
  - ii. Such Annual License Fee serve as reimbursement for the CITY's costs in connection with reviewing, inspecting and supervising the use and occupancy of the public streets, property and ways on behalf of the public and existing or future users.
- c. **Electrical System Connection Fees And Charges**: The LICENSEE shall, prior to connection of any of its facilities to the CITY's electric distribution system, pay the CITY all required connection fees, including any applicable infrastructure availability charges; and shall agree to comply with all service rate requirements under Title 8 of the Naperville Municipal Code.
- d. **Cable Franchise Fees And Other Regulatory Fees And Compensation**:
  - i. The LICENSEE is separately responsible for any and all applicable franchise, PEG (public, educational and governmental), and other federal, state, and local regulatory fees related to the LICENSEE's facilities in the CITY's right-of-ways and the CITY does not waive and in fact reserves its rights to any and all other applicable fees and compensation. The Parties acknowledge that the right and authority of the CITY to impose and collect a franchise fee for the installation and use of fiber optic lines in public streets has been defined by federal and

state law. This Agreement has been negotiated and does not include a franchise fee or other payment to compensate the CITY for use of its Public Streets. The fees and charges imposed under this Agreement are those which the parties acknowledge are reasonably related to legitimate expenses of the CITY in negotiating, entering into and administering this Agreement. In the event the state or federal law, now or in the future, requires the imposition and collection of a franchise fee for use of public streets in the way the, the CITY may cause this Agreement to be amended to provide for the payment of a lawful franchise, license or permit fees to replace the fees and charges imposed under this Agreement by serving written notice on the LICENSEE.

- ii. In the event the CITY causes this Agreement to be amended pursuant to and in accordance with the subsection above to provide for the payment of a lawful franchise, license or permit fee, and further in the event the LICENSEE thereafter accepts from any other Illinois municipality in DuPage or Will Counties with a population of less than 1,000,000 residents a telecommunications franchise, ordinance, license, permit or other authorization to install, maintain or otherwise operate a telecommunications system, containing terms, conditions or provision which would be more favorable to the CITY than those provided in this Agreement, including, but not limited to, the payment by the LICENSEE of a franchise fee or similar provision to provide compensation for use of public rights-of-way, the LICENSEE shall inform the CITY of such fact and provide a copy of such franchise, ordinance, permit or other authorization to the CITY. If, within ninety (90) days of delivery of such notice, the CITY, by providing written notice to the LICENSEE, adopts such more favorable provisions of such other municipality, the Parties agree that this Agreement shall be deemed amended to incorporate such more favorable provisions. In such event, all other unaffected provisions of this Agreement shall remain in full force and effect.
- e. **Other City Costs:** The LICENSEE shall reimburse the CITY for all additional costs and expenses incurred by the CITY in connection with any issuance, modification, amendment, renewal or transfer of this Agreement or of the Right-Of-Way Use License granted pursuant to this Agreement. The regulatory fees and costs provided for in this Agreement, and any



compensation charged and paid for the public streets, ways or CITY property provided for in this Agreement, are separate from, and additional to, any and all federal, State, local and CITY taxes as may be levied, imposed or due from any Person or its customers or subscribers, or on account of any business, activity or services, whether or not relating to use of right-of-way.

f. **Service to the CITY:**

In the event that any portion of the Telecommunications System is placed in any Public Street located adjacent to property on which a municipal building is located and used for municipal purposes, the LICENSEE shall provide, upon written request by the CITY, up to two termination (splice) points into any such municipal building from the closest point on the LICENSEE's backbone network, which the LICENSEE shall terminate with connectors within the building at or near the building entrance point. The City Manager or his or her designee shall designate, in timely fashion, the buildings to be so served and shall arrange for access for the LICENSEE. The LICENSEE shall construct up to, but no more than, a total of six thousand (6,000) linear feet of lateral connections from its backbone network to municipal buildings. In the event a building is served by more than one lateral connection, the footage of each such lateral connection shall apply toward use of the six thousand (6,000) foot maximum allotment. The CITY shall be responsible for building and maintaining its system from the connectors within its buildings.

g. **Nondiscrimination:** The LICENSEE shall make its Services available to any customer within its area who shall request such Service, without discrimination as to the terms, conditions, rates or charges for the LICENSEE's Services; provided, however, that nothing shall prohibit the LICENSEE from making any reasonable classifications among differently situated customers consistent with public utility, Federal Communications Commission (FCC), Illinois Commerce Commission (ICC) or other applicable regulatory standards.

h. **Leased Capacity:** The LICENSEE shall have the right, without prior CITY approval, to offer or provide surplus or excess capacity to its customers; provided the LICENSEE shall furnish the CITY with a copy of any such lease or agreement and the LICENSEE's customer or lessee has complied, to the extent applicable, with this Agreement and the requirements of Section 9-1B of the Naperville Municipal Code.

## 5. **BILLING AND PAYMENTS**

- a. The Annual License Fee shall be paid on the Effective Date of this Agreement and on each anniversary date of the Effective Date while this Agreement or any renewal of this Agreement remains in effect. The Annual License Fee shall be payable to the “City of Naperville” and shall be timely delivered by the LICENSEE to the CITY’s Treasurer.
- b. The CITY shall issue the LICENSEE invoices for the amount of any other fees, costs and compensation due to the CITY from the LICENSEE pursuant to this Agreement.
- c. Each invoice shall be paid by the LICENSEE within thirty (30) days from the date of issuance of said invoice.
- d. Any payment more than 30 days past due shall be deemed delinquent, and shall accrue interest at the rate of 18%, compounded annually.
- e. The LICENSEE agrees to pay the CITY’s reasonable attorney’s fees and costs of collection, including litigation costs, should the LICENSEE default on this Agreement.
- f. The acceptance by the CITY of any payment shall not be construed as an accord by the CITY that the amount of such payment is the correct amount due from the LICENSEE pursuant to this Agreement, nor shall such acceptance of any payment be construed to be a release or waiver of any claim the CITY may have for further or additional sums due and payable pursuant to this Agreement.
- g. All payments due to the CITY from the LICENSEE pursuant to this Agreement shall be paid without counterclaim, setoff, deduction or defense. In the event the LICENSEE does setoff or deduct any amount from any such payment or otherwise reduces the amount due based on a counterclaim or defense, the CITY shall have the right to, without any liability to the LICENSEE, its customers or any third Persons, pursue any and all remedies available to it at law or in equity, including without limitation, revocation of the LICENSEE’s License.
- h. Payment by the LICENSEE to the CITY of the fees and charges set forth in this Agreement are compensation for CITY services and shall not be considered in the nature of a tax. Such payments shall be separate from, and additional to, any and all federal, state, local and municipal taxes, as may be due, which are separate and distinct obligations of the LICENSEE.

**6. INTERCITY CIRCUITS AND REPORTING REQUIREMENTS**

- a. This Agreement contemplates that the LICENSEE might construct circuits from within the CITY limits of the CITY extending to points beyond such CITY limits and providing

point-to-point nonswitched interexchange telecommunications services with no intermediate Services within the CITY ("Intercity Circuits"). Should Intercity Circuits be established, the LICENSEE agrees to bill its customers separately for telecommunication Services provided through IntercityCircuits.

- b. The LICENSEE shall furnish to the City Treasurer such information as may be reasonably required by the City Treasurer to effect compliance by the LICENSEE and the LICENSEE's customers with the City of Naperville Utility Tax Ordinance (Title 3, Chapter 1, of the Naperville Municipal Code, as amended) and any other ordinances of the CITY which shall be in effect from time to time regulating, taxing or otherwise concerning the LICENSEE's operation of a Telecommunications System pursuant to this Agreement. The Parties hereto expressly intend and acknowledge that the LICENSEE's fiber optic cables and telecommunication lines will be personal property of the LICENSEE and not fixtures. The LICENSEE also specifically acknowledges its duty to collect and remit to the CITY the CITY's Utility Tax and acknowledges its duty and obligation to comply with the ordinances of the CITY, including any ordinances that require the payment or collection of another CITY tax or the obtaining of any CITY licenses. Breaching the provisions of this Section shall be a default under this Agreement.
7. **LOCATION OF FACILITIES:** All facilities shall be constructed, installed and located in accordance, with the following terms and conditions:
- a. The LICENSEE shall locate all of its Facilities underground in new or existing ducts, conduits or vaults.
  - b. The LICENSEE shall use existing ducts, conduits or vaults whenever excess capacity exists within such facilities.
  - c. Whenever any existing electric utilities or facilities are located underground within a public way of the CITY where the LICENSEE also seeks to occupy the same public way, the LICENSEE must also locate its facilities underground.
  - d. Whenever any new or existing CITY-owned electric utilities, or other CITY-owned facilities are located or relocated underground within a public way of the CITY, the LICENSEE that currently occupies the same public way shall relocate its facilities underground, at its sole expense within eighteen (18) months, which in no event shall be later than the end of the grant term. Such relocation shall be made concurrently to minimize the disruption of the public ways.

- e. The LICENSEE's facilities permitted to be installed underground shall be installed within an existing underground duct or conduit owned by the LICENSEE whenever surplus capacity is reasonably available within such existing facilities. The LICENSEE's facilities permitted to be installed on overhead facilities shall be installed on pole attachments to existing utility poles owned by the LICENSEE whenever surplus capacity is reasonably available within such existing facilities.
- f. The LICENSEE's facilities permitted to be installed underground shall be installed within an existing underground duct or conduit owned by other entities using or occupying the right-of-way, street or other property whenever surplus capacity is reasonably available within such existing facilities, and permission for such use is reasonably available from the other entity. The LICENSEE's facilities permitted to be installed on overhead facilities shall be installed on pole attachments to existing utility poles owned by other entities whenever surplus capacity is reasonably available within such existing facilities, and permission for such use is reasonably available from the other entity.
- g. Whenever surplus capacity on the LICENSEE's or other entity's existing facilities, or permission for the LICENSEE to use surplus capacity on other entity's facilities, is not reasonably available to reasonably accommodate the LICENSEE's new facilities, thereby requiring the LICENSEE to construct or install new facilities within public streets, utilities or easements, the LICENSEE shall so construct and install such facilities to industry standards so as to provide additional capacity in the form of ducts, conduits, manholes and other facilities to reasonably accommodate future entities on a nondiscriminatory access basis, and shall reasonably permit such use by such future entities; provided however, the CITY shall pass any necessary ordinances and take all reasonable steps legally available to require any such future entities to utilize the LICENSEE's excess capacity if the LICENSEE's excess capacity will reasonably accommodate such future entity's needs, and such future entity pays the LICENSEE compensation in accordance with Federal Communications Commission (FCC), Illinois Commerce Commission (ICC) or other applicable regulatory standards.
- h. The LICENSEE must obtain written permission from the CITY to install any aerial or overhead facilities within the jurisdictional limits of the City of Naperville. If permission is granted to install any aerial or overhead facilities, the LICENSEE shall install its facilities on

pole attachments to existing utility poles only, and then only if surplus space is available and in accordance with any applicable pole attachment agreements.

- i. Before making any attachments to any CITY owned poles, the LICENSEE and the CITY shall in good faith negotiate and agree upon a reasonable and lawful franchise fee to be paid by the LICENSEE to the CITY for the use of such poles.
- j. Pursuant to provisions of the Illinois Administrative Code, Title 83, Part 305, within fourteen (14) days of the CITY's request, the LICENSEE shall provide all pertinent data and information, including data relative to proposed and existing construction, and changes in operating conditions which may affect or likely affect situations of proximity.

## **8. CONSTRUCTION OF TELECOMMUNICATIONS SYSTEM**

### **a. Plans and Specifications**

- i. **Submission of Plans and Specifications:** The LICENSEE shall, within forty five (45) days after the Effective Date, submit to the CITY's designated project manager, for review and comment, six (6) complete sets of the Preliminary Plans and Specifications which shall include, without limitation:

- 1. A map in sufficient detail indicating:

- a. the proposed route for all cable lines, including detailed drawings of the location in each Public Street where such cables are proposed to be placed underground;
- b. all existing utilities in such Public Streets;
- c. all trees, structures, improvements and obstructions in such Public Ways; and
- d. the names of owners of all properties, public or private, under, over or across that the cable lines are proposed to be constructed and/or installed. Such map shall also identify which trees, utility facilities, structures, other improvements and all other obstructions that the LICENSEE proposes to temporarily or permanently remove or relocate.

- 2. A complete list of all permits required to be obtained from Governmental Authorities.

- 3. A written traffic control plan delineating the proposed construction schedule and traffic impacts on Public Ways. The plan shall be proposed

in accordance with the Manual on Uniform Traffic Control Devices published by the United States Department of Transportation, Federal Highway Administration.

- ii. **Review by the CITY:** The CITY's designated project manager, or his or her designee, shall review, within thirty (30) days, the Preliminary Plans and Specifications. After said review, CITY's designated project manager, or his or her designee, shall submit any comments in writing to the LICENSEE.
- iii. **Submission of Final Plans and Specifications:** The LICENSEE shall, within thirty (30) days of the date the LICENSEE receives the written comments respecting the Preliminary Plans and Specifications, submit to the CITY's designated project manager, or his or her designee, for review and approval, six (6) complete sets of the Final Plans and Specifications. The Final Plans and Specifications shall consist of final, complete and revised versions of each of the Preliminary Plans and Specifications. If the CITY's designated project manager, or his or her designee, is satisfied that the Final Plans and Specifications are in order and reflect all of the revisions that the CITY's designated project manager, or his or her designee, requested in connection with the review of the Preliminary Plans and Specifications, then the CITY's designated project manager, or his or her designee, shall approve the Final Plans and Specifications not later than thirty (30) days after receipt thereof. In the event the Final Plans and Specifications do not meet the requirements of the CITY's designated project manager, or his or her designee, he or she shall notify the LICENSEE, in writing, of the denial of the Final Plans and Specifications. No construction of any kind shall commence, and the CITY shall not be required to issue any permits for any construction, unless and until the CITY's designated project manager, or his or her designee, approves the Final Plans and Specifications.
- iv. **Resolution of Engineering Disputes:** The CITY and the LICENSEE agree to use their respective best efforts to resolve all engineering issues regarding the Final Plans and Specifications to the mutual satisfaction of both Parties, provided, however, that under no circumstances shall the CITY be obliged or required to revise, amend, modify or waive any of the codes, ordinances, rules or regulations of the CITY.

**b. Coordination of Construction Activities**

- i. The LICENSEE is required to and shall cooperate with the CITY and other licensees.
  - ii. By February 1 of each year, the LICENSEE shall provide the CITY with a schedule of its proposed construction activities in, around or that may affect the public streets and ways.
  - iii. The LICENSEE shall meet with the CITY, other licensees and users of the Public Ways and Public Streets annually or as determined by the CITY to schedule and coordinate construction in the Public Ways and Public Streets.
  - iv. All construction locations, activities and schedules shall be coordinated, as ordered by the CITY's project manager, or his or her designee, to minimize public inconvenience, disruption or damages.
- c. The LICENSEE shall adjust to depth, line, and/or grade at its sole expense all appurtenances related to its telecommunications system in the street or public way at the time the street or public way rehabilitation, repair or reconstruction occurs.

**d. Permits**

- i. **Obligation to Obtain Permits:** The LICENSEE shall, before commencing construction of any kind in the CITY, obtain all permits as may be necessary or required for the use of property in connection with, and for the construction of, the Telecommunication System. The LICENSEE shall submit copies of all permits received by it, with the exception of those issued by the CITY, to the CITY's designated project manager, or his or her designee, prior to the commencement of construction. Each permit application submitted by the LICENSEE to the CITY shall contain plans and specifications sufficiently detailed to demonstrate to the CITY that the Telecommunications System will be constructed in accordance with all applicable codes and ordinances and shall meet the requirements of this Agreement, provided, however, whenever the LICENSEE elects to engage in construction or maintenance of a lateral connection from its Telecommunications System to a customer location which was not included within the Final Plans and Specifications, such permit application and plans and specifications shall demonstrate that such lateral is consistent with the overall concept of the Final Plans and Specifications, presents no threat to the public

health and safety, and meets all other requirements of this Agreement. In each such case, the CITY shall issue the permit within twenty-one (21) days of application. The permit application shall include a drawing depicting the proposed depth of underground burial.

- ii. **Membership in J U L I E:** The LICENSEE shall, before commencing construction, become a member of Joint Utility Locating Information for Excavators ("J U L I E") and shall at all times during the term of this Agreement, comply with all regulations of J U L I E.
- iii. **Construction in Accordance with Permits:** The LICENSEE shall construct the Telecommunications System in strict accordance with all permits issued and all applicable codes, rules and regulations of all Governmental Authorities, and the failure to comply with the permit documents shall constitute a material breach of this Agreement. The LICENSEE shall, as diligently as possible but in no event later than thirty (30) days after delivery of a violation notice by the CITY, correct such violation. Notwithstanding the foregoing, if the violation constitutes a potential threat to the public, the LICENSEE shall correct the violation immediately following notice of the violation or threat.

e. **Construction On And In Public Streets**

- i. **Minimal Interference:** All work performed on, in, under, across or along the Public Streets shall be conducted so as to minimize any interference with all existing utilities and the rights and convenience of the general public, including traffic flow, the LICENSEE shall, at all times, employ reasonable care to avoid damage or interference with existing utilities, and while performing work: (a) employ reasonable care to protect the health and safety of the public, and (b) operate in accordance with the traffic control plan as approved by the project manager, or his or her designee.
- ii. **Barricades:** The LICENSEE shall use suitable barricades, flags, lights, flares or other protective devices at such times and places as are required by its traffic control plan, all applicable ordinances, codes, rules and regulations and at such additional times and places as are required for the safety of all members of the general public, so as to prevent injury to any Person or damage to any vehicle by reason of any



work being performed, as determined by the CITY in its sole Judgment and discretion.

f. **Excavation Work Time Periods**

- i. **Prior Notification:** The LICENSEE shall notify the CITY's project manager, or his or her designee, and the owners of all private property abutting the proposed excavation at least seventy two (72) hours prior to any excavation which comes within ten (10) feet of any existing City utilities or in any Public Street. Nothing herein shall be construed as preventing the LICENSEE from making immediate repairs to any damage caused to any Facilities, provided that the LICENSEE shall notify the CITY's project manager, or his or her designee, as promptly as possible before such repair work or if an emergency, as soon thereafter as possible, and in any event shall notify J U L I E before such repair work.
  - ii. **Excavation Plans:** No excavation on any Public Street or private property shall be conducted more than twenty-four (24) hours prior to the installation therein of any Facilities.
  - iii. **Excavations in Lawns and Parkways:** All excavations in lawns or grassy parkways within any Public Street or Public Way shall be immediately backfilled and tamped. If such excavations are performed between May 1st and October 1st, they shall be restored with sod within fourteen (14) days of completion of such excavation, and if performed between October 1st and May 1st, they shall be restored with sod no later than May 15th, all in accordance with the applicable provisions of this Agreement, provided, however, the time for restoring with sod shall be extended as may be reasonably necessary under the circumstances in the event adverse weather conditions prevent completion of such restoration within the time periods provided herein.
- g. **Trimming Trees Prohibited:** The LICENSEE shall be prohibited from cutting or trimming any tree, shrub or other vegetation, in or on any Public Street prior to receiving the written approval of the CITY's project manager, or his or her designee. The LICENSEE may cut or trim trees on private property as necessary, provided, however, the LICENSEE shall first obtain the permission of the affected property owner. All such trimming shall be in accordance with standard local arboricultural practices, and no trimming shall occur until the wires, cables or other Facilities have first been attached to the poles in order to

ensure trimming to the minimum extent necessary. All trimming debris shall be removed from the work area on a daily basis.

- h. **General Construction Standard:** All work performed on the Telecommunications System shall be performed in a good and workmanlike manner using materials of good and durable quality. If at any time it is determined by the CITY or any other governmental authority, in its sole discretion and judgment, that any part of the Telecommunications System, including, without limitation, any means used to distribute signals over or within the Telecommunications System, is harmful to the health or safety of any Person, then the LICENSEE shall, at its sole cost and expense, promptly correct all such conditions to the reasonable satisfaction of such governmental authority.
- i. **"As-Built" Plans:** The LICENSEE shall furnish to the CITY two (2) complete sets of all "as-built" plans for the Telecommunications System as originally constructed and for all reconstruction, repair, relocation and other work performed thereon within sixty (60) days after completion of such work. The LICENSEE shall also furnish to the CITY one (1) digital copy of the "as-built" plans in "DWG" format for inclusion in the CITY's GIS system. Notwithstanding the foregoing, the LICENSEE shall not be required to provide "as-built" plans for routine maintenance work performed.
- j. **City Right of Inspection:** The CITY shall have the right to inspect all construction to ensure compliance with this Agreement and all applicable codes, laws, ordinances, rules, regulations and Permits. In non-emergency situations, the CITY shall give the LICENSEE not less than 24 hours prior notice of its intention to inspect, and, in such instances, the LICENSEE shall have the right to accompany the CITY during any such inspections provided the CITY shall not be required to delay its inspection to satisfy the LICENSEE's schedule.

## 9. **RESERVATIONS OF PUBLIC STREET RIGHTS AND CONSTRUCTION RESTRICTIONS**

- a. **Interest in Public Ways and Public Streets:** All rights granted herein to the LICENSEE in the Public Ways and Public Streets are granted based on the information and belief of the CITY that it has title or an interest in such Public Ways and Public Streets and the right and power to grant the rights and interests granted to the LICENSEE in this Agreement. This Agreement shall be deemed to grant only such rights to use Public Ways and Public Streets as the CITY may have the right and power to grant in this Agreement. The LICENSEE

has the right to conduct or obtain a title search of the Public Ways and Public Streets to ascertain the status of the CITY's rights and interests in the same, which shall be at the LICENSEE's sole cost and expense.

- b. **Nonexclusive Use:** The LICENSEE's right to use and occupy the Public Ways or Public Streets shall not be exclusive. The CITY hereby reserves the right to grant any right or use of such Public Ways or Public Streets to any Person or at any time during the period of the License and any renewal or extension thereof, provided and subject to this Agreement, that such grant does not obstruct, injure or prevent the use and operation of the Telecommunications System or any Facilities.
- c. **Other Utilities:** The CITY hereby retains the right to lay and permit to be laid, sewer, gas, water, electric, and other pipelines, cables and conduits in any Public Way, to change any curb or sidewalk or the grade or dimension of any street, and to perform and to permit to be performed any other work as the CITY shall deem necessary or proper in its sole judgment and discretion. All such work shall be performed, insofar as practicable, in such manner as not to obstruct, injure or prevent the free use and operation of Facilities. If any such Facilities shall interfere with the construction or repair of any Public Way or public utility or other improvement therein, the LICENSEE shall, at its sole cost and expense, commence and diligently prosecute to completion, the relocation, removal or replacement of such Facilities, within ninety (90) days after the delivery of such written notice by the CITY. Such work shall be performed as reasonably directed by the CITY. In the event the Facilities must be so relocated, the CITY's project manager, or his or her designee, shall use best efforts to identify alternative rights of way for the relocated Facilities. In the event relocation of the Facilities or any part thereof is necessary in order to accommodate improvements or construction performed by or on behalf of a federal, state or county governmental agency from which the CITY receives payment for relocation of existing facilities, the CITY shall reimburse the LICENSEE for its pro-rata share of such relocation payments received from the governmental agency. In the event relocation of the Facilities or any part thereof is necessary in order to accommodate improvements or construction performed by or on behalf of any non-governmental third party, such third party shall pay for the entire cost of relocation of the Facilities.
- d. **Creation or Dedication of Public Street:** The LICENSEE shall discontinue any use of the Public Street, if the CITY reasonably determines that such use is inconsistent with the

Public health or safety or with the purposes for which such Public Street was created or dedicated or is currently being used. The LICENSEE acknowledges and accepts at its own risk that the CITY may make use in the future of the Public Ways and Public Streets in which the LICENSEE's Telecommunications System is located in a manner inconsistent with the LICENSEE's use of such Public Ways and Public Streets for its placement of its Telecommunication System. In the event the Facilities must be relocated, the CITY's project manager, or his or her designee, shall use best efforts to identify alternative Public Ways and Public Streets for the relocated Facilities.

- e. **Improvements or Changes on Public Streets:** If the CITY shall desire to make any improvements or changes on, or to all, or any part of any utilities or Public Ways and Public Streets, over, under or along which any part of the Telecommunications System has been installed, then the LICENSEE shall, at its sole expense after ninety (90) days written notice from the CITY, proceed to alter, change, vacate or remove as directed by the CITY any part of the Telecommunications System necessary to accommodate the CITY's planned improvements or changes. In the event such Facilities shall be required to be removed, the CITY's project manager, or his or her designee, shall use best efforts to identify alternative areas or Public Ways and Public Streets for the relocation of the LICENSEE Facilities and provide the LICENSEE with additional time up to one hundred twenty (120) days total to remove said Facility, provided, however, that nothing in this subsection shall be construed as requiring or obligating the CITY to identify alternative areas or Public Ways and Public Streets.

In the event an emergency should arise wherein the CITY deems it necessary to have the LICENSEE move its Facilities, the CITY's project manager, or his or her designee, shall certify, in writing, the basis of the emergency and shall give the LICENSEE fourteen (14) days to move its Facilities. The CITY shall not have liability for any damages as a result of such movement, unless such damages are caused by or arise from the gross negligence or willful misconduct of the CITY, its employees, agents or contractors. Wherever, in case of fire or other disaster, it becomes necessary in the judgment of the CITY to remove or damage any of the LICENSEE's Facilities, no charge shall be made by the LICENSEE against the CITY for restoration and repair.

- f. **Vacation or Abandonment of a Public Street:** In the event any Public Ways or Public Streets or portion thereof used by the LICENSEE shall be vacated by the CITY, then, upon request

and notice from the CITY, the LICENSEE shall, at its sole cost and expense, remove its Facilities therefrom within one hundred twenty (120) days of the date of such notice. In the event such Facilities shall be required to be removed, the CITY's project manager, or his or her designee, shall use best efforts to identify alternative areas or Public Ways and Public Streets for the relocation of the LICENSEE's Facilities, provided, however, that nothing in this subsection shall be construed as requiring or obligating the CITY to identify alternative areas of Public Ways and Public Streets.

- g. Temporary Removal or Relocation of the Telecommunications System:** In the event it is necessary to temporarily remove or relocate any Facilities in order to move any object, vehicle, building or other structure, the LICENSEE shall, upon sixty (60) days written notice from the CITY and at its sole cost and expense, temporarily remove or relocate such Facilities.

#### **10. RESTORATION**

- a. The LICENSEE's Obligation:** Upon completion of any construction work, the LICENSEE shall, at its sole cost and expense, and in the manner approved by the CITY or the affected property owner, in their sole judgment and discretion, as the case may be, promptly repair the Public Ways and Public Streets, private property, utility or improvement and restore the same to, as nearly as practicable, the condition existing prior to the performance of the work. Each site of completed construction shall be immediately placed in a safe temporary condition and restoration of the same shall be completed within fourteen (14) calendar days after the date of commencement of such restoration work, provided, however, the time for completing restoration work shall be extended as may be reasonably necessary under the circumstances in the event adverse weather conditions prevent completion of restoration within the time period provided herein. In the event that the LICENSEE fails to commence or complete the restoration work in the manner and within the time periods prescribed herein, the CITY may, but shall have no obligation to, perform such work and recover from the Security Fund established pursuant to this Agreement any costs and expenses the CITY may incur. In the event that such Public Street, private property, utility, or improvement cannot be so repaired or restored, the LICENSEE shall pay the CITY or the affected owner of the same, as the case may be, just compensation.

- b. **Continuing Responsibility**: Where any such destruction, damage or disturbance is not immediately discovered, or where any such restoration effort fails or is otherwise inadequate or insufficient, the LICENSEE's obligation for restoration shall survive the termination or expiration of this Agreement for a period of two (2) years after termination of this Agreement.
- c. **Failure, Neglect or Refusal to Repair**: In the event of any failure, neglect or refusal by the LICENSEE, after ten (10) days written notice from the CITY, to repair or provide just compensation for such destruction, damage or disturbance within the timeperiod as provided in this Agreement, the CITY may, but shall be under no obligation to, perform such work, or cause it to be performed, and the actual cost thereof as found and declared by the CITY, shall be paid by the LICENSEE within thirty (30) days after demand therefor. If the LICENSEE fails to so reimburse the CITY, the CITY may collect the amount due from the Security Fund established pursuant to this Agreement or if the Security Fund is insufficient to satisfy the amount due, the CITY may pursue its remedies by court action or otherwise.

## 11. **RECORDS**

- a. **Books and Records**: The LICENSEE shall maintain, at all times during the Term of this Agreement: (1) complete, accurate and properly totaled books and records showing the business conducted by the LICENSEE in the CITY, and (2) complete, accurate and up to date maps of the Telecommunications System. The CITY may require the LICENSEE to keep additional records and maps which it determines are reasonably necessary.
- b. **Inspections and Audits**: All of such books and records and originals of all maps and other documents pertaining to this Agreement shall be maintained in and made available for inspection by the CITY, its agents or employees, at the LICENSEE's office, at reasonable times and intervals. The CITY shall have the right to make or obtain copies, at its expense, of all documents, maps or records (except customer lists) pertaining to this Agreement. The LICENSEE shall fully cooperate in assisting in this regard.
- c. **Inquiries**: The CITY may, at any time, make inquiries pertaining to the License and the operation of the Telecommunications System. The LICENSEE shall respond to such inquires within five (5) business days of such inquiry.
- d. **Duty to Provide Information**

- i. Within ten (10) business days of a written request from the CITY's project manager, or his or her designee, the LICENSEE shall furnish the CITY with information sufficient to demonstrate:
  - 1. That the LICENSEE has complied with all requirements of Section 9-1B of the Naperville Municipal Code.
  - 2. That all Municipal taxes and fees due the CITY in connection with the Services and Facilities provided by the LICENSEE have been properly collected and paid by the LICENSEE.
  - 3. All books, records, maps and other documents, maintained by the LICENSEE with respect to its facilities within the public streets and ways shall be made available for inspection by the CITY at reasonable times and intervals.
- e. **Confidentiality:** If either party provides confidential information to the other in writing and identified as such, the receiving party shall protect the confidential information from disclosure to third parties with the same degree of care afforded its own confidential and propriety information, except that neither party shall be required to hold confidential any information (1) which becomes publicly available other than through the recipient, (2) which is required to be disclosed by a governmental or judicial order (notice of which shall be provided to the original disclosing party prior to such required disclosure), (3) which is required to be disclosed by statute, (4) which is independently developed by the receiving party, or (5) which becomes available to the receiving party without restriction from a third party. These obligations shall survive expiration or termination of this Agreement for a period of three (3) years. In addition, upon termination of this Agreement, the receiving party of any written confidential information shall promptly return to the disclosing party any and all copies of such confidential information.

## **12. PERFORMANCE AND CONSTRUCTION SURETY**

- a. **Amount:** On or before the Effective Date, and as necessary thereafter, the LICENSEE shall establish, provide and deposit with the CITY a construction and performance bond written by a corporate surety acceptable to the CITY equal to at least one hundred ten percent (110%) of the estimated cost of the constructing the LICENSEE's Facilities within the Public Ways and Public Streets (also referred to herein as "Security Fund").

- b. At a minimum, construction and performance bond shall (1) provide that it shall not be canceled without the prior written consent of the CITY, and (2) not require the consent of the LICENSEE prior to the collection by the CITY of any amounts covered by said construction and performance bond.
- c. The construction and performance bond shall guarantee, to the satisfaction of the CITY:
  - i. Timely completion of construction;
  - ii. Construction in compliance with applicable plans, permits, technical codes and standards;
  - iii. Proper location of the facilities as specified by the CITY;
  - iv. Restoration of the Public Ways, Public Streets and other property affected by the construction;
  - v. The submission of "as-built" drawings after completion of the work as required by Section 9-1B of the Naperville Municipal Code; and
  - vi. Timely payment and satisfaction of all claims, demands or liens for labor, material or services provided in connection with the work.
- d. The construction and performance bond shall remain in force until sixty (60) days after substantial completion of the work, as determined by the project manager, or his or her designee, including restoration of Public Ways, Public Streets and other property affected by the construction, provided that on such date there are no claims of any type outstanding at such time asserted against the LICENSEE or the CITY, arising out of any acts or omissions of the LICENSEE relating to the License.
- e. The construction and performance bond shall be maintained at the LICENSEE's sole cost and expense.
- f. **Purpose:** The construction and performance bond shall serve as security for (1) the faithful performance by the LICENSEE of all provisions of this Agreement, (2) any expenditure, damage or loss incurred by the CITY occasioned by the LICENSEE's failure to comply with all codes, ordinance, rules, regulation, orders, permits, the Final Plans and Specifications and other directives of the CITY issued pursuant to this Agreement, (3) the payment by the LICENSEE of all liens and taxes and all damages, claims, costs or expenses that the CITY has paid or incurred by reason of any act or default of the LICENSEE including, without limitation, any restoration work that the CITY must perform itself or have completed as a consequence of the LICENSEE's failure to so perform or complete, and all other



payments due the CITY from the LICENSEE pursuant to this Agreement, (4) any costs, expenses, fees or other payments due under this Agreement and (5) any expenses incurred by the CITY pursuant to this Agreement.

- g. Replenishment:** Within fourteen (14) days after receipt of written notice from the CITY that any amount has been withdrawn from the construction and performance bond, the LICENSEE shall restore the construction and performance bond to the amount specified in this Agreement.
- h. Withdrawals:** If the LICENSEE (1) fails to make any payment required to be made by the LICENSEE hereunder after notice is given pursuant to this Agreement, or (2) repeatedly fails to make timely payment hereunder, or (3) fails to pay any taxes or liens relating to the Telecommunications System that are due and unpaid, or (4) fails to pay to the CITY any damages, claims, costs or expenses which the CITY has been compelled to pay or incur by reason of any act or default of the LICENSEE, or (4) fails to comply with any provision of this Agreement that the CITY determines can be remedied by an expenditure of an amount in the Security Fund, then, after three (3) days advance written notice from the CITY of its intention to exercise its rights under this subsection if not paid by the LICENSEE and the failure of the LICENSEE to pay the monies due, the CITY may withdraw the amount thereof from the construction and performance bond.
- i. Closing and Return of Security Fund:** Upon any termination of this Agreement, the LICENSEE shall be entitled to the return of the construction and performance bond, or portion thereof as remains on deposit at such termination, and after account is taken for all offsets necessary to compensate the CITY for the failure by the LICENSEE to comply with any provision of this Agreement. In the event of any revocation of the License, the construction and performance bond, and any and all accrued interest therein, shall become the property of the CITY to the extent necessary to cover any costs, loss or damage incurred by the CITY as a result of said revocation, provided that any amounts in excess of said costs, loss or damage shall be refunded to the LICENSEE.
- j. Rights Not Limited:** The rights reserved to the CITY with respect to the construction and performance bond are in addition to all other rights of the CITY, whether reserved by this Agreement or authorized by law, and no action, proceeding or exercise of a right with

respect to said construction and performance bond shall affect any other right the CITY may have.

### **13. LIABILITY, INDEMNIFICATION AND INSURANCE**

#### **a. Liability**

- i. The LICENSEE:** The LICENSEE shall be responsible for any damage or loss to any real or personal property of the CITY or of any Person, and for any injury to or death of any individual person, or any officer, employee or agent of the CITY, arising out of or in connection with the LICENSEE's negligence or misconduct in the construction, installation, use, operation, maintenance, repair and/or removal of the Telecommunications System or its failure to act in connection therewith.
- ii. The CITY:** Except as may result from their negligence or misconduct, the CITY, its officers, employees and agents shall not be liable for any loss or damage to any real or personal property of any Person, or for any injury to or death of any individual person, arising out of or in connection with the LICENSEE's negligence or misconduct in the construction, operation, maintenance, repair or removal, or other action or event with respect to, the Telecommunications System.
- iii. Emergency and Other Action:** The CITY may at any time in case of fire, disaster or other emergency as reasonably determined by the CITY, cut or move any Facilities, in which event the CITY shall not be liable therefore to the LICENSEE. When practical, as determined by the CITY, the LICENSEE shall be consulted prior to any such cutting or movement of its Facilities and be given the opportunity to perform such work itself. In the event it is not practical to notify the LICENSEE prior to any such cutting or movement, the CITY shall notify the LICENSEE within a reasonable time after the CITY has actual knowledge of such cutting or movement.
- iv.** Unless directly caused by the gross negligence, malicious or intentional acts, or willful misconduct of the CITY, its agents, employees or contractors, the CITY shall not be liable to the LICENSEE for any damage to or loss of all or any part of the Telecommunications System, or otherwise, as a result of or in connection with the protections, breaking through, movement, removal, alteration or relocation of any part of the Telecommunications System by or on behalf of the LICENSEE or

the CITY in connection with any emergency, public work, public improvement, alteration of any municipal structure, any change in the grade or line of any Public Way, or the elimination, discontinuation and closing of any Public Way, as provided herein. When practical, as determined by the CITY, the LICENSEE shall be consulted prior to any such cutting or movement of its Facilities and be given the opportunity to perform such work on the Telecommunications System itself.

- v. The CITY, its officers, employees and agents shall not be liable to the LICENSEE or any affiliate of the LICENSEE for any special, incidental, consequential, punitive or other damages as a result of the exercise of any right of the CITY pursuant to this Agreement, including, without limitation, the right of the CITY to terminate the License, and to take any action subsequent thereto.

**b. Indemnification**

- i. **Hold Harmless:** The LICENSEE releases and shall, and does hereby agree to save, defend, indemnify and hold the CITY, its officers, employees and agents harmless from and against any and all injury, claim, demand, suit, cause of action, judgment, execution, liability, debt, losses, damages or penalty as a result of bodily injury, sickness, death or property damage or as a result of any other claim or suit of any nature whatsoever, (the "Claims") that may at any time arise out of, result from, or be alleged to arise out of or result from or in any manner connected with, directly or indirectly, the LICENSEE's use of the License, CITY property, CITY Public Ways, CITY Public Streets, or related to any of the LICENSEE's activities related to this Agreement or License, including but not limited to challenges to the LICENSEE's License, and including but not limited to the LICENSEE's negligence, including its failure to act, or misconduct in the construction, operation, maintenance, repair, or removal of the Telecommunications System or the distribution of any Service over the Telecommunications System whether such acts or omissions are authorized, allowed or prohibited by this Agreement.

The LICENSEE shall, and does hereby agree to, pay any and all damages, losses and expenses, including reasonable attorney fees and costs of suit or defense, arising out of, resulting from or alleged to arise out of or result from the negligent, careless or wrongful acts, omissions, failures to act or misconduct of the LICENSEE

or its affiliates, officers, employees, agents, contractors or subcontractors in the construction, operation, maintenance, repair or removal of its Facilities, and in providing or offering Service over the Facilities, Systems or Telecommunications System, whether such acts or omissions are authorized, allowed or prohibited by the Naperville Municipal Code or by this Agreement or any other agreement.

- ii. **Defense Expense:** The LICENSEE shall and does hereby agree to, pay all reasonable and documented expenses incurred by the CITY in defending itself with regard to any and all Claims mentioned in this Agreement. These expenses shall include all reasonable and documented out-of-pocket expenses, such as attorneys' and experts' fees, and shall also include the reasonable value of any services rendered by any employee of the CITY with respect to the CITY's defense of such Claims. The LICENSEE shall have the right to approve counsel selected by the CITY for defense of any Claims. In addition, the CITY shall provide prompt notice to the LICENSEE of any Claims made against the CITY and the LICENSEE shall have the right to approve the compromise or settlement of any Claims made against the CITY for which the LICENSEE is responsible for the defense or payment thereof.
- iii. **Release and Waiver of Claims:** The LICENSEE shall have no recourse against the CITY for any loss, expense or damage resulting from the terms and conditions of this Agreement nor because of the CITY's enforcement thereof. The LICENSEE shall be deemed to expressly agree that it accepts the License relying solely upon its own investigation and understanding of the power and authority of the CITY to grant said License and that, in partial consideration of the grant of said License, the LICENSEE waives and releases the CITY from any and all Claims of damages of any kind whatsoever, either known or unknown, which it may have in connection with any matter specified in this Agreement.
- iv. Nothing contained herein shall be construed as a limitation or waiver of defenses available to the CITY and its agents, including, but not limited to the Illinois Local Government and Local Governmental Employees Tort Immunity Act.
- v. The obligations provided for in this Section shall survive the expiration or termination of this Agreement.

- vi. The LICENSEE shall give the CITY prompt written notice of any claim or cause of action falling within the terms of this Section that is filed against the LICENSEE, and shall fully cooperate with the CITY in the investigation and defense of the claim or cause of action.
- c. **LICENSEE Insurance:** The LICENSEE, as a condition of this License, shall secure and maintain the following liability insurance policies insuring both the LICENSEE and the CITY, and its officers, boards, commissions, elected and appointed officials, agents and employees as coinsureds:
- i. **General Liability:** The Licensee shall maintain, throughout the Term of this Agreement, adequate proof of self-insurance (subject to the prior written approval of the CITY) or commercial comprehensive general liability insurance insuring both the LICENSEE and the CITY, and its officers, boards, commissions, elected and appointed officials, agents and employees, with coverage limits not less than:
    - 1. Five million dollars (\$5,000,000.00) for bodily injury or death to each person;
    - 2. Five million dollars (\$5,000,000.00) for property damage resulting from any one accident; and
    - 3. Five million dollars (\$5,000,000.00) for all other types of liability.
  - ii. **Automobile:** The LICENSEE shall maintain in its own name automobile liability insurance with coverage limits of not less than three million dollars (\$3,000,000) for each person and three million dollars (\$3,000,000) for each accident from property damage with respect to owned, non-owned and hired vehicles for the operations of which the LICENSEE is responsible. Such policy of automobile liability insurance shall name the CITY as an additional insured.
  - iii. **Workers' Compensation and Employer's Liability:** The LICENSEE shall also maintain Workers' Compensation Insurance within the statutory limits and Employer's Liability Insurance with coverage limits of not less than one million dollars (\$1,000,000).
  - iv. **Hazard:** By reason of the LICENSEE's right to use or work in the Public Streets, the LICENSEE's insurance shall cover in comprehensive form, premises operations, explosions and collapse hazard, underground hazard and products completed

hazard with coverage limits of not less than three million dollars (\$3,000,000), or whatever limits are permitted under the applicable statutes of the State of Illinois for bodily injury and property damage combined. Such policy of comprehensive insurance shall name the CITY as an additional insured. All limits of insurance required above may be achieved through a combination of primary and umbrella/excess liability policies.

- v. **Evidence of Insurance Policies:** On or prior to the Effective Date, the LICENSEE shall furnish proof to the CITY's City Manager that the foregoing self-insurance is being maintained or insurance policies have been obtained, along with written evidence of payment of required premiums, in the form of a certificate of insurance or adequate proof of self-insurance approved by the CITY.
- vi. **Maintenance of Insurance Policies:** The liability insurance policies required by this section shall be maintained by the LICENSEE throughout the Term of this Agreement and such other period of time during which the LICENSEE operates or is engaged in the removal of the Telecommunications System as subject to CITY inspection and approval. Each such insurance policy shall contain the following endorsement: "It is hereby understood and agreed that this policy may not be canceled nor the intention not to renew be stated until 90 days after receipt by the City of Naperville, by registered mail, of a written notice addressed to the City Manager of such intent to cancel or not to renew." Within sixty (60) days after receipt by the CITY of said notice, and in no event later than thirty (30) days prior to said cancellation, the LICENSEE shall obtain and furnish to the CITY replacement insurance policies meeting the requirements of this Section in a form acceptable to the City Attorney. The termination or expiration of insurance without replacement insurance as provided herein, shall automatically terminate the LICENSEE's License.
- vii. **Alterations of Minimum Limitations:** The CITY may, following the Effective Date, increase the minimum limitation(s) of the self-insurance or insurance policy or policies required in this Section by a percentage not to exceed the percentage increase in the Consumer Price Index for the Chicago Metropolitan Statistical Area as of the Effective Date.

- viii. **No Limit of Liability:** The legal liability of the LICENSEE to the CITY and any Person for any of the matters that are the subject of the insurance policies required by this Section, shall not be limited by said insurance policies or by the recovery of any amounts thereunder.

#### 14. ASSIGNMENTS, TRANSFERS, LEASES AND SIMILAR ACTIONS

- a. **CITY Approval Required:** Neither the License nor any rights or obligations of the LICENSEE pursuant to this Agreement or the Ordinance nor any of the LICENSEE's interest in the Telecommunications System shall be assigned or transferred, in whole or in part, to any Person, nor shall title thereto, either legal or equitable, or any right or interest therein, or any property or assets relating to the license or the Telecommunications System, pass to or vest in any Person, nor shall any substantial change in control of the LICENSEE occur, either by act of the LICENSEE, by operation of law or otherwise, without the prior written consent of the CITY, which consent shall not be unreasonably withheld or conditioned, nor unduly delayed, as expressed by ordinance duly adopted by the Corporate Authorities and then only on such reasonable conditions as may there be prescribed. Nothing herein shall prevent the LICENSEE from assigning its rights and obligations to a parent, affiliate or subsidiary of the LICENSEE upon notice to the CITY, provided such parent, affiliate or subsidiary shall execute such documents and provide such necessary financial assurances as will reasonably assure performance of all of the LICENSEE's duties and responsibilities under this Agreement. Any such action completed without such prior consent of the CITY shall be a violation of this Agreement and shall, at the option of the CITY, which option may be exercised in the CITY's sole judgment and discretion and without further notice or procedure, render the License void and entitle the CITY to pursue all remedies available to it. The grant or waiver of any one or more of said consents shall not render unnecessary any subsequent consent or consents, nor shall the grant of any said consent constitute a waiver of any other rights of the CITY.
- b. Any transactions which singularly or collectively result in a change of fifty percent (50%) or more of the ownership or working control of the LICENSEE, of the ownership or working control of the License, of the ownership or working control of affiliated entities having ownership or working control of the LICENSEE or of a licensed system, or of control of the capacity or bandwidth of the LICENSEE's Telecommunication System, Systems, Facilities or

substantial parts thereof, shall be considered an assignment or transfer requiring CITY approval pursuant to this Section.

- c. Transactions between affiliated entities are not exempt from CITY approval pursuant to this Section.
- d. **Notice to the CITY:** The LICENSEE shall promptly notify the CITY of any proposed action requiring the consent of the CITY pursuant to this Section, by submitting to the CITY at least sixty (60) days prior to the proposed action a petition requesting the approval of the CITY. The petition shall fully describe the proposed action and shall be accompanied by a justification for the action and such additional supporting information as the CITY may require in order to review and evaluate said action.

#### 15. **FORECLOSURE, CONDEMNATION AND RECEIVERSHIP**

- a. **Foreclosure:** Upon the actual scheduled occurrence of any foreclosure or other judicial sale of all or any material part of the Telecommunications System or the involuntary termination of any lease or mortgage covering all or any material part of the Telecommunications System, the LICENSEE shall immediately notify the CITY of said occurrence. Said notification shall be treated as a notification of a proposed change in control of the LICENSEE, and the provisions of the "ASSIGNMENTS, TRANSFERS, LEASES AND SIMILAR ACTIONS" Section of this Agreement shall apply to any proposed transfer or assignment of this Agreement or the LICENSEE's rights hereunder, but shall not apply to the foreclosure or judicial sale of all or any part of the Telecommunications System itself.
- b. **Condemnation:** In the event that the Telecommunications System or any material part thereof is taken, appropriated, or condemned pursuant to law and the effect of such taking is to materially frustrate or impede the ability of the LICENSEE to carry out its obligations pursuant to, and the purposes of, this Agreement, then the CITY may revoke the License in accordance with the applicable provisions of this Agreement.
- c. **Receivership:**
  - i. **Notification by the LICENSEE:** The LICENSEE shall immediately notify the CITY, in writing, if the LICENSEE files a voluntary petition in bankruptcy, a voluntary petition to reorganize its business, or a voluntary petition to effect a plan or other arrangement with creditors, or



- ii. The LICENSEE files an answer admitting the jurisdiction of the court and the material allegations of an involuntary petition filed pursuant to the Bankruptcy Code, as amended from time to time, or
- iii. The LICENSEE is adjudicated bankrupt, makes an assignment for the benefit of creditors, applies for or consents to the appointment of any receiver or trustee of all or any material part of its property, including all or any material part of the Telecommunications System, or
- iv. The LICENSEE institutes dissolution or liquidation proceedings with respect to its business, or
- v. an order is entered approving an involuntary petition to reorganize the business of the LICENSEE or to effect a plan or other arrangement with creditors or appointing a receiver or trustee for the license of all or a part of its property, including all or any material part of the Telecommunications System, or
- vi. a writ or warrant of attachment, execution, distraint, levy, possession or any similar process shall be issued by any court against all or any material part of the property of the LICENSEE, including all or any material part of the Telecommunications System.

**16. SAFETY**

- a. **Standard of Care:** The LICENSEE shall at all times utilize the standard of care attendant to the risks involved and shall install and maintain in use commonly accepted methods and devices for preventing failures and accidents which are likely to cause damage, injury or nuisance to the public or to employees of the LICENSEE.
- b. **Equipment, Installation and Maintenance:** All installations of the Telecommunications System shall be made so as not to impact the fire integrity of any building or structure. The LICENSEE shall install and maintain its Facilities in accordance with the requirements of all applicable codes, and in such manner that they will not interfere with any installations of the CITY, wherever situated or located, shall at all times be kept and maintained in a safe and stable condition and in good order and repair.

- 17. NO EXTRANEOUS INDUCEMENTS:** The LICENSEE acknowledges that it has not been induced to accept the License created herein by any promise, oral or written, by or on behalf of the CITY or by any third Person regarding any term or condition in this Agreement not expressed herein. The LICENSEE shall further be deemed to warrant that no promise or inducement, oral or written,

has been made to any CITYemployee or official regarding receipt of the License, other than as contained in this Agreement.

**18. COMPLIANCE WITH LAW:** The LICENSEE shall, at all times, comply with the applicable laws, codes, rules and regulations of all Governmental Authorities, regardless of whether such laws, codes, rules or regulations are expressly referenced in this Agreement. The LICENSEE shall, at all times, comply with all applicable laws, ordinances, resolutions, codes, rules and regulations of the CITY, and all applicable memoranda and other directives of the CITY, as such laws, ordinances, resolutions, codes, rules, regulations, memoranda and directives may be modified or amended, provided that such modification or amendment does not impair, conflict with or diminish the rights granted the LICENSEE under the Ordinance or this Agreement. The LICENSEE reserves all rights under current and future preemptive state and federal laws.

**19. REVOCAION OR TERMINATION OF PRIVILEGES**

- a. City Authority to Revoke:** Subject to the provisions of subsection (b) and subsection (c) of this Section of this Agreement, the permission and authority granted by the CITY to the LICENSEE to use the Public Streets set forth in this Agreement for its Telecommunication System pursuant to the Ordinance may be revoked by the City Council (upon referral from the City Manager or on its own motion) whenever any of the following events occur:
- i. The LICENSEE fails to comply with the conditions of occupancy of the Public Ways set forth herein or in the Code or Ordinances of the CITY, or
  - ii. The LICENSEE substantially violates other material terms of this Agreement, or
  - iii. The LICENSEE practices fraud and deceit upon the CITY or its customers, or
  - iv. The LICENSEE fails to provide or pay any material portion of the compensation or fees owed the CITY pursuant to this Agreement when due, or
  - v. The LICENSEE fails to furnish records when due or fails to cooperate with the reasonable requests by CITY officials for information or for inspection, or
  - vi. THE LICENSEE becomes insolvent, or unable or unwilling to pay its unprotested debts, or is adjudged bankrupt or seeks relief under the bankruptcy laws.
- b. Notice:** In the event that the City Manager believes that grounds for revocation exist or have existed, the City Manager shall notify the LICENSEE in writing, setting forth the nature and general facts of such noncompliance. If, within thirty (30) days following the CITY's mailing of such written notification, the LICENSEE has not furnished reasonably satisfactory

evidence that corrective action has been taken or is being actively and expeditiously pursued, or that the alleged violations did not occur, or that the alleged violations were beyond the LICENSEE's control pursuant to the "FORCE MAJEURE" Section of this Agreement, the City Manager shall thereupon refer the matter to the City Council. Upon good cause, the thirty (30) day correction period shall be extended for such reasonable time as the parties shall mutually determine is necessary to complete such cure. Such good cause must be detailed in writing to the City Manager within five (5) days prior to the lapse of the thirty (30) day correction period. Mailing of such notice as and when above provided shall be equivalent to personal notice and shall be deemed to have been given on the date of mailing.

- c. **Hearing:** The City Council shall not repeal the Ordinance and revoke or terminate the License and the rights granted herein until prior written notice is given to the LICENSEE that City Council proposes to take such action and the grounds therefore. Further, the City Council shall not repeal the Ordinance and revoke or terminate the License and the rights granted herein until the LICENSEE has had a reasonable opportunity to be heard before the City Council.

**20. RIGHTS AND REMEDIES:** In the event of a material breach of this Agreement by the LICENSEE, as determined in the sole judgment and discretion of the CITY, the CITY may terminate the License and the rights granted to the LICENSEE hereunder. In the event of a breach or an alleged breach of this Agreement by either Party, either Party may, by suit, action, mandamus or other proceeding, in law or in equity, enforce or compel the performance of this Agreement. In the event of a judicial proceeding by any Party to this Agreement against the other Party, the prevailing Party shall be entitled to reimbursement from the unsuccessful Party of all costs and expenses, including reasonable attorneys' fees, incurred in connection with such judicial proceeding.

**21. DEFAULT:** Neither Party shall be in default under this Agreement or in breach of any provisions hereof unless and until it has been given written notice of such default by the other Party and shall have failed to cure such default within a reasonable period of time after receipt of such notice, except for default in any payment by the LICENSEE in which case the LICENSEE shall cure such default in payment within thirty (30) days after the LICENSEE's receipt of written notice by the CITY. Where a default other than for payment cannot reasonably be cured within a thirty (30) day period, if the defaulting Party shall proceed promptly to cure the same and prosecute such cure

with due diligence, the time for curing such default shall be extended for such period of time as may be necessary to complete such cure. Upon the failure to cure any such default within thirty (30) days after notice thereof or within thirty (30) days plus the extension for curing with due diligence as set forth above, the Party giving notice of the default may thereupon terminate by providing written notice to the defaulting Party. Upon default by either Party, the non-defaulting Party shall have the right to pursue any and all remedies available at law or equity.

**22. AMENDMENTS:**

- a. This Agreement may be modified or amended from time to time, provided, however, that no such amendment or modification shall be effective unless reduced to writing and duly authorized and executed by the Parties by the same procedure as required by Illinois Statutes for its original execution and approval.
- b. A new Right-Of-Way Use License Application and Right-Of-Way Use License Agreement shall be required if the LICENSEE desires to extend its license area, or extend or locate its Facilities in Public Ways and Public Streets which are not included in this Agreement.
- c. Notwithstanding subsection "a" and subsection "b" above, the LICENSEE may be permitted by the CITY to use specific Public Ways and Public Streets other than or in addition to the specific Public Ways and Public Streets listed in this Agreement upon approval by the CITY's project manager, or his or her designee, of an amended application pursuant to the Naperville Municipal Code.
- d. Notwithstanding subsection "a" and subsection "b" above, if the LICENSEE is ordered by the CITY to locate or relocate its facilities in Public Ways and Public Streets not included in this Agreement, the CITY shall grant an amendment to the License without further application.
- e. The CITY's project manager, or his or her designee, may approve in writing appropriate field changes requested by the LICENSEE in the plans and specifications approved by the CITY, without requiring an amendment to this Agreement. Decisions on requests by the LICENSEE for field changes shall be made not more than ten (10) business days after the LICENSEE provides all information and/or documentation requested by the CITY's project manager, or his or her designee.

- 23. TIME ESSENCE OF AGREEMENT:** Whenever this Agreement sets forth anytime for any act to be performed by either Party, said time shall be deemed to be of the essence.

- 24. TIME FOR NOTICE:** In the event of an emergency involving life or property, as determined by the CITY in its reasonable judgment and discretion, the CITY may reduce or eliminate the notice requirements set forth in this Agreement, and any such reduction or elimination shall be deemed to be reasonable under the circumstances, provided, however, that the CITY shall notify the LICENSEE as soon thereafter as possible in accordance with this Agreement.
- 25. FORCE MAJEURE:** Whenever a period of time is provided for in this Agreement for either the CITY or the LICENSEE to do or perform any act or obligation, neither Party shall be liable for any delays or inability to perform due to causes beyond the control of said Party such as war, riot, insurrection, rebellion, terrorism, strike, lockout, unavoidable casualty or damage to personnel, materials or equipment, fire, flood, storm, earthquake, tornado or any act of God, provided, however, that said time period shall be extended for only the actual amount of time said Party is so delayed. An act or omission shall not be deemed to be "beyond a party's control" if committed, omitted or caused by a party, its employees, officers or agents.
- 26. TERMINATION:** The LICENSEE shall have the right to terminate this Agreement at any time during the term of this Agreement upon one hundred eighty (180) days prior written notice to the CITY without any additional cost or obligation to the LICENSEE. Upon the expiration or termination of this Agreement, the LICENSEE shall have the option to, without expense to the CITY and within such time as the CITY may reasonably require, remove its Facilities located in the Public Streets and Public Ways and restore such Public Streets and Public Ways herein authorized to be used and occupied to a condition reasonably satisfactory to the CITY, or to abandon said Facilities. In the event the LICENSEE elects to abandon its Facilities located in the Public Streets or Public Ways, the CITY, after thirty (30) days prior written notice from the LICENSEE, shall be allowed to take control over said Facilities as property of the CITY, without compensation to the LICENSEE, and in no event shall the LICENSEE have any obligation to the CITY for abandonment of said Facilities unless the Facilities pose a public hazard or threat to public health or safety.
- 27. SEVERABILITY SAVINGS CLAUSE:** If any part of this Agreement including any section, subsection, sentence, clause, phrase, or other portion of this Agreement or its application to any person is, for any reason, rendered or declared invalid in whole or in part by any court, agency, commission, legislative body, or other authority of competent jurisdiction, said decision shall not affect the validity of the remaining parts or portions of this Agreement which shall remain in full force and effect.

**28. GENERAL**

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- a. **Non-Waiver Of Rights:** No failure of either Party to exercise any power given to it hereunder or to insist upon strict compliance by the other Party with its obligations hereunder, and no custom or practice of the Parties at variance with the terms hereof, shall constitute a waiver of either Party's right to demand exact compliance with the terms hereof.
- b. **Governing Law, Venue And Waiver Of Trial By Jury**
- i. **Governing Law:** This Agreement and the rights of the parties hereunder shall be subject to, construed, interpreted and enforced in accordance with and governed by the laws of the State of Illinois.
  - ii. **Venue:** Venue for any action arising out of the terms or conditions of this Agreement shall be proper only in the Circuit Court for the Eighteenth Judicial Circuit, DuPage County, Illinois or, when applicable, in the Federal District court for the Northern District of Illinois.
  - iii. **Waiver of Trial by Jury:** The Parties hereto waive trial by jury in any action, proceeding or counterclaim brought by either of the Parties hereto against the other on any matters whatsoever arising out of or in any way connected with this Agreement, or for the enforcement of any remedy under any statute.
- c. **Notices:** All notices and other communication or writings which any Party is required, permitted or may wish to serve in connection with or under this Agreement shall be in writing, and shall be deemed delivered to the addressee thereof when sent by certified mail, return receipt requested, or personal service to the Persons and addresses indicated below or to such addresses and Persons as either Party hereto shall notify the other Party of in writing pursuant to the provisions of this subsection. Mailing of such notice as and when above provided shall be equivalent to personal notice and shall be deemed to have been given on the date of mailing.

**TO THE CITY:**

City Manager

City of Naperville

400 Eagle St.

Naperville, Illinois 60540

**WITH COPY TO:**

City Attorney  
City of Naperville  
400 Eagle St.  
Naperville, Illinois 60540

**TO THE LICENSEE:**

**WITH COPY TO:**

- d. **Binding Effect**: Each of the terms, conditions and provisions of this Agreement shall be binding upon and shall inure to the benefit of the Parties hereto, and their respective successors, assigns and grantees. Nothing herein shall be deemed to permit a transfer of the License by the LICENSEE.
  - e. **Authority to Execute**: The LICENSEE hereby warrants and represents to the CITY that (1) it has the right, power and authority to enter into this Agreement and to accept to the License granted to it in this Agreement, (2) the individuals executing this Agreement on behalf of the LICENSEE have the power and authority to bind the LICENSEE to this Agreement, and (3) neither the execution of this Agreement nor the performance of the obligations contemplated hereby will (i) result in a breach or default under any agreement to which it is a party or (ii) violate any restriction, court order or agreement to which it is subject.
  - f. **Joint Work Product**: This Agreement is the joint work product of both Parties hereto, accordingly, in the event of any ambiguity, no presumption shall be imposed against or in favor of either Party by reason of document preparation.
  - g. **Counterparts**: This Agreement may be executed in any number of counterparts, each of which shall be considered an original and all of which together shall constitute one and the same Agreement.
29. **ENTIRE AGREEMENT**: This Agreement sets forth all the covenants, conditions and promises and contains the entire agreement between the Parties. All negotiations between the Parties are merged in this Agreement, and there are no covenants, promises, agreements, conditions or

understandings between the Parties, either verbal or written, other than those contained in this Agreement. In no event, shall prior drafts of this Agreement or the Ordinance be used, considered or relied upon in interpreting or construing any provision of this Agreement.

**IN WITNESS WHEREOF**, the Parties to this Agreement have caused this Agreement to be signed by their duly authorized representatives on the day and date first written above and by their signatures acknowledge they have read and understand this agreement and intend to be bound by its terms.

**CITY OF NAPERVILLE**

By: \_\_\_\_\_

Douglas A. Krieger

City Manager

By: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**ATTEST**

By: \_\_\_\_\_

Pam Gallahue, Ph.D.

Naperville City Clerk

**ATTEST**

By: \_\_\_\_\_