

ORDINANCE NO. O-2021-31

**AN ORDINANCE AUTHORIZING THE CITY MANAGER TO SIGN AND DIRECTING THE CITY CLERK
TO ATTEST TO A MASTER LICENSE AGREEMENT
FOR UNDERGROUND AND AERIAL FIBER OPTIC INSTALLATIONS**

WHEREAS, the City is the exclusive owner, of certain public rights-of-way, and has approved official standards for the construction of facilities on the public right-of-way; and

WHEREAS, the City has the right and power to regulate and permit the installation, attachment, operation and maintenance of telecommunications facilities upon public property and in the public rights-of-way within its municipal boundaries; and

WHEREAS, this Master License Agreement is not applicable to small cell wireless facilities, which will require a different license agreement; and

WHEREAS, the Licensee desires to construct, install, attach, operate, repair, maintain and remove fiber optic telecommunication facilities in and/or upon the City's public rights-of-way or property (the "ROW") within the City's boundaries subject to the provisions of this agreement; and

WHEREAS, the City's ability to impose fees for the Licensee's occupation of City Property is limited under state and federal law; and

WHEREAS, the Corporate Authorities of the City have determined that the establishment of a template Master License Agreement for fiber optic telecommunications use of the public right-of-way will properly facilitate and manage the deployment of the fiber optic telecommunications facilities without requiring the telecommunication company to come before the City Council each time it seeks approval of a site-specific permit for a facility within the ROW; and

WHEREAS, regulation and deployment of fiber optic telecommunication facilities within City rights-of-way can be accomplished through the use of site-specific right-of-way permits managed and controlled by the City through this agreement and City ordinances; and

WHEREAS, Section 253 of the Federal Communications Act of 1934, as amended, and 220 ILCS 5/21-1001, provides that the City has the authority, subject to certain limitations, to control access to and the use of rights-of-way within the City; and

WHEREAS, the City has the authority to enter into this license agreement pursuant to the powers granted by Article VII, Section 10(a) of the Illinois Constitution of 1970 and finds that entering into this agreement is in the best interests of the City, its residents and the public, to maintain control of construction in its rights-of-way and on City property where not preempted by federal and state law.

NOW, THEREFORE, BE IT ORDAINED by the Mayor and City Council of the City of Wheaton, DuPage County, Illinois, pursuant to its home rule authority, as follows:

SECTION 1: The template agreement attached hereto and incorporated herein as if fully set forth as Master License Agreement for Fiber Optic Installation (hereinafter “MLAFOI”) is hereby approved for fiber optic installations within the rights-of-way and property of the City of Wheaton; and

SECTION 2: No fiber optic company or telecommunications company or their contractors or subcontractors shall install fiber optic facilities in or on rights-of-way or property of City of Wheaton without entering into an executed MLAFOI with the City; and

SECTION 3: That the City Manager is hereby authorized to sign, and the City Clerk is hereby directed to attest to licensee specific MLAFOIs that are consistent with the template master license agreement attached hereto and incorporated herein as if fully set forth as EXHIBIT 1 subject to review and approval of engineering requirements by the City Engineer; and

SECTION 4: Site-specific permits for Licensees having entered into a MLAFOI with the City shall be subject to the review and approval of the City Engineer; and

SECTION 5: Neither the City Engineer, nor the City Manager, will have the authority to negotiate changes, make modifications or revisions to the terms and conditions set forth in the template MLAFOI; and

SECTION 6: If a Licensee seeks to change, modify or revise a MLAFOI agreement for its use, the Licensee will be required to submit a written petition to revise, modify or amend the MLAFOI which shall be reviewed by the City Engineer, and subsequently submitted to the Corporate Authorities of the City of Wheaton for their consideration; and

SECTION 7: If a court of competent jurisdiction sets aside any portion of this Ordinance as unconstitutional or unlawful, it shall not affect the validity of the remainder of the Ordinance; and

SECTION 8: Any ordinance which is inconsistent with this Ordinance is repealed to the extent of such inconsistency; and

SECTION 9: This Ordinance shall become effective upon passage, execution by the Mayor and publication as required by law.


Mayor

ATTEST:


City Clerk

Roll Call Vote:

Ayes: Councilwoman Fitch
Councilwoman Robbins
Councilman Weller
Councilman Barbier
Councilwoman Bray-Parker
Councilman Brown
Mayor Sues

Nays: None

Absent: None

Motion Carried Unanimously

Passed: June 7, 2021

Published: June 8, 2021



MASTER LICENSE AGREEMENT FOR FIBER OPTIC INSTALLATION

This MASTER LICENSE AGREEMENT ("Agreement" or "License Agreement") made this _____ day of _____, 20____, between the City of Wheaton, with its principal offices located at 303 West Wesley Street, Wheaton, Illinois, hereinafter designated "Licensor" or "City" _____ with its principal offices at _____, hereinafter designated "Licensee." City and Licensee are at times collectively referred to hereinafter as the "Parties" or individually as the "Party."

WITNESSETH

WHEREAS, the City is the exclusive owner, of certain public rights-of-way, and has approved official standards for the construction of facilities on the public right-of-way; and

WHEREAS, the City has the right and power to regulate and permit the installation, attachment, operation and maintenance of telecommunications facilities upon public property and in the public rights-of-way within its municipal boundaries; and

WHEREAS, the Licensee desires to construct, install, attach, operate, repair, maintain and remove fiber telecommunications facilities in and/or upon the City's public rights-of-way (the "ROWS") within the City's boundaries, subject to the provisions of this Agreement; and

WHEREAS, in consideration of the foregoing and promises contained herein, the City desires to allow Licensee to utilize the ROWs for such purposes, subject to the provisions of this Agreement; and

WHEREAS, the City Council has determined that the establishment of a Master License Agreement for telecommunications use of public ways will properly facilitate and manage the deployment of telecommunications facilities without requiring a telecommunications company to come before the City Council each time it seeks approval of a site-specific permit for a facility within the ROW; and

WHEREAS, regulation of the deployment of telecommunication facilities within City ROWs can be accomplished through the use of site-specific permitting, managed and controlled by the City, but only after a telecommunications company agrees to the terms of this Agreement; and

WHEREAS, Section 253 of the Federal Communications Act of 1934, as amended, including 47 U.S.C. Section 253, and Illinois 220 ILCS 5/21-1001, provides that the City has the authority, subject to certain limitations, to control access to and use of the ROWs within the City; and

WHEREAS, the City has the authority to enter into this License Agreement pursuant to the powers granted it by Article VII, Section 10(a) of the Illinois Constitution of 1970, and finds that entering into this Agreement is in the best interests of the City, its residents, and the public; and

WHEREAS, the Licensee is authorized and empowered to enter into this Agreement and to perform the covenants and promises herein made and undertaken.

NOW THEREFORE, in consideration of the mutual covenants contained herein and intending to be legally bound hereby, the Parties hereto agree as follows:

- 1) **RECITALS**: The foregoing recitals are incorporated herein as definitions, substantive provisions and as representing the intent of the Parties

- 2) GRANT OF LICENSE: For and in consideration of the mutual covenants herein, and subject to the terms and conditions set forth herein and in compliance with all Federal, State and local laws and regulations, the City grants a non-exclusive revocable license (“License”) to the Licensee for the use of the ROWs to construct, install, operate, use, own, repair, maintain and remove underground and aerial fiber telecommunications facilities (“Facilities”).

The License granted by this Agreement shall not convey any right, title, or interest (including leasehold interest) in the ROWs, but shall be deemed to be a license only to use and occupy the ROWs for the limited purposes stated herein. In the event of default by the Licensee, the City shall not be obligated to bring a forcible entry and detainer action to terminate the Licensee’s rights hereunder. The rights granted to the Licensee by the City are and shall be at all times subordinate to the City’s right to ingress and egress and use the public ROWs. All rights and obligations to the Licensee under this Agreement shall be exercised by the Licensee at its sole cost and expense.

This Agreement and the right it grants to use and occupy the ROWs shall not be exclusive and does not, explicitly or implicitly, preclude the issuance of other licenses to operate telecommunications facilities within the City’s municipal boundaries.

- 3) TERM AND FEES: The term of this Agreement shall be for a period of five (5) years, beginning on the date approved by the City Council and ending five (5) years thereafter, unless otherwise sooner terminated as provided for herein. This License Agreement shall automatically renew for an additional five (5) year term provided that the Licensee is in full compliance with this Agreement.

Following the first renewal term, this Agreement may be renewed by mutual agreement of the Parties for successive five (5) year terms provided that the Licensee is in full compliance with the terms and conditions of this License Agreement at the time of renewal. The Licensee shall make written request for renewal of this License Agreement at least sixty (60) days prior to the expiration of the current term.

In the event the Licensee chooses not to renew this Agreement or the Parties cannot agree upon renewal terms, the License Agreement shall terminate and the Licensee shall remove its Facilities from all City ROWs and restore all ROWs as required herein.

Pursuant to Chapter 66, Article XII of Code of Ordinances, City of Wheaton, Illinois, the Licensee shall not pay any taxes to the City under this Agreement, so long as Licensee maintains its status as a Telecommunications Retailer under the Telecommunications Infrastructure Maintenance Fee Act (TIMFA) (35 ILCS 635/10(d)) and timely pays the taxes imposed by the Simplified Municipal Telecommunications Tax Act (SMTT) (35 ILCS 636/5) to the State of Illinois.

Licensee shall not be required to pay any additional fees to the City under this Agreement for site-specific permits, so long as (a) Licensee maintains its status as a Telecommunications Retailer under the Telecommunications Infrastructure Maintenance Fee Act (TIMFA) (35 ILCS 635/10(d)) and (b) timely pays the taxes imposed by the Simplified Municipal Telecommunications Tax Act (SMTT) (35 ILCS 636/5) to the State of Illinois.

- 4) REPRESENTATIONS AND WARRANTIES BY LICENSEE: Licensee represents and warrants to the City that: (a) Licensee has and will maintain all approvals, authorizations, certifications, licenses, and franchises required by the State of Illinois, the Federal Communications Commission and/or any other agency to provide the communications Facilities and (b) all work performed by Licensee pursuant to this Agreement shall be performed in a good and workmanlike manner, consistent with any permit specifications, City standards, and applicable regulations, specifically all applicable provisions of Chapter 58 of the City’s Code of Ordinances.

- 5) TITLE AND CONDITION OF ROWs: It is understood and agreed that the City makes no representations, warranties or assurances with respect to the following: the condition of the title or boundaries of the ROWs; the condition of the underground duct or conduit; other utilities or facilities in the ROWs; any other improvements or soils located on the ROWs; or the suitability of the ROWs for the Licensee's intended use. The Licensee assumes all risks associated with the placement, operation and maintenance of the Facilities within the ROWs and suitability of the ROWs for its Facilities. The Licensee accepts the ROWs in an "As Is, Where Is" condition, including any environmental conditions, and accordingly, the City shall not be held liable for any damages or liabilities resulting from any actions that arise because of any claims concerning the title, boundaries or condition of the ROWs.
- 6) LOCATION: The location of the Facilities shall be as approved by the City Engineer (or designee). The Licensee shall provide the City with an accurate map "as built" certifying the proposed locations of the Facilities within the ROWs each time it submits a permit application. The Licensee shall provide an updated map "As built" each time any location changes are made to the Facilities. Unless otherwise stated on a permit issued by the City, the Licensee shall not locate the Facilities so as to unreasonably interfere with the use of the ROWs by the City, by any utility, by the general public or by other persons authorized to use or be present in or upon the public ROWs. The Licensee shall relocate, at its sole cost and expense, any part of its Facilities that is not located in compliance with the permit requirements.
- 7) USE OF ROWs: In its use of the ROWs and any work to be performed thereon, the Licensee shall comply with all applicable laws, ordinances, regulations and requirements of federal, state, county, and local regulatory authorities, including the applicable provisions of the City of Wheaton City Code Chapter 58, Section 58 - 1 (58 - 246) as may be amended from time to time ("City ROW Standards"). In the event of a conflict between this License Agreement and the City ROW Standards, the more specific terms and conditions shall control.

The Licensee shall use and occupy the ROWs to construct, install, operate, use, repair, maintain, and remove the Facilities, which shall be limited to underground conduit and fiber telecommunications cable where existing similar utilities are underground, and aerial fiber optic telecommunications cable where existing similar utilities are located aerially, and related equipment and facilities only, such "related equipment and facilities" shall not include Small Wireless Facilities controlled by the Small Wireless Facilities Deployment Act (50 ILCS 840/1 *et seq*) and Chapter 58, "Streets Sidewalks and Other Public Places, Article IX Small Wireless Facilities in the Right of Way", Section 58 -250 *et seq* of the Code or Ordinances of the City of Wheaton, it also being specifically understood that the ROWs shall not be used for the burning of refuse, the accumulation and/or storage of debris or other material, or for any unsanitary or unhealthful purposes. All parts of the Licensee's Facilities shall be underground where feasible, where required by the City's Municipal Code, and as determined by existing conditions. Any unauthorized or impermissible use of the ROWs shall be deemed to be a material breach of this License Agreement.

The Licensee warrants that the installation of the Facilities will be performed without any trenching or open trenching, but rather by directional boring. If directional boring is not possible for installation of the required Facilities, the Licensee agrees to work with the City's Director of Public Works, or designee, to determine the method of installation to be used, and to obtain the permission of the City. The Licensee shall not disturb any pavement for the installation, operation, maintenance, or removal of its Facilities. All movement and storage of equipment and materials shall be confined to the area designated by the City. All surplus excavated material shall be removed from the ROWs and disposed of in accordance with any applicable laws or regulations. All tree stumps, and other debris resulting from construction operations shall be removed from the ROWs.

If a utility pole or wireless support structure is within the right-of-way of another agency, documentation that a permit has been applied for from the other agency such as IDOT or DuPage County, or other state or county permits may be required.

- 8) **INSTALLATION, OPERATION AND MAINTENANCE:** As a condition precedent to its right to access, use or attach any of its Facilities, the Licensee shall, prior to occupying any area, submit a site-specific permit application for each location, including all siting, design, construction methodology, manufacturer's specifications, and structural engineering reports as necessary, and receive from the City Engineer (or designee) a site-specific permit for each location. The City Engineer (or designee) may request additional information if necessary to process the application.

Unless otherwise provided by law, the City reserves the right to refuse to approve or authorize any permit application when it determines that space in a ROW is inadequate to accommodate the Licensee's Facilities. All terms and conditions contained in this Agreement shall be incorporated into each individual permit obtained for each location. The installation, operation and maintenance of the Facilities shall comply with all applicable ordinances, statutes, laws or regulations.

The Licensee, in the performance and exercise of any of its authorizations and obligations under this Agreement shall not obstruct or interfere in any manner with the City ROWs, existing utility easements, private rights of way, sanitary sewers, sewer laterals, watermains, storm drains, gas mains, poles, aerial and other existing telecommunications facilities without the express written approval of the City or the other owners, including franchisees, of the affected property. If the Licensee proposes to install its Facilities on a non-City owned utility pole in the ROW, the Licensee shall submit its written agreement with the franchisee or licensee which owns the existing utility pole as part of its site-specific permit application.

Maintenance of the Facilities within the ROWs shall be the responsibility of the Licensee. The Facilities shall be maintained in good and safe condition and in a manner that complies with all applicable federal, state and local laws, regulations and policies. The Licensee shall use due care to insure that no damage, beyond reasonable wear and tear, is caused to the ROWs. The Licensee shall report any damage it causes to any affected party in writing within twenty-four (24) hours of the damage. The Licensee shall reimburse the other party for any damage caused by its employees, contractors, subcontractors, agents, representatives, or its Facilities.

Notwithstanding any provisions to the contrary herein, in the event of an unexpected repair or emergency ("Emergency Maintenance"), the Licensee may access the ROWs and commence such Emergency Maintenance work as required under the circumstances, provided the Licensee shall comply with the requirements for Emergency Maintenance set forth in the Code.

- 9) **MARKING:** Prior to and during any installation or relocation of any underground cables or utility lines, the Licensee shall contact J.U.L.I.E. to ascertain the presence and location of existing aboveground and underground facilities within the ROWs to be occupied by the Licensee's Facilities and install route markers in accordance with the Illinois Underground Facilities Damage Prevention Act.

The City shall have no obligation to mark the location of the Licensee's Facilities. The Licensee agrees that it will become a member of J.U.L.I.E. as a requirement of this Agreement and that such a system is designed to alert the Licensee to planned work in the rights-of-way, so that the Licensee can mark the location of its facilities to avoid damage. The City shall have no obligation to alert the Licensee to proposed work by itself or others, other than as a participating member of the J.U.L.I.E. system.

- 10) **PUBLIC SAFETY:** The Licensee or other persons acting on its behalf, at its own expense, shall use suitable barricades, flags, flagmen, lights, flares and other measures as required for the safety of all members of the general public and to prevent injury or damage to any person, vehicle, or property by reason of any work in or affecting the ROWs or other property.

If the City, in its reasonable discretion, determines that a particular use of the ROWs by the Licensee is, or will be, hazardous to the public or the property, the Licensee, upon written notice from the City, shall install commercially reasonable safety devices or make commercially reasonable modifications at the Licensee's sole expense to render the ROWs safe for, and compatible with, public use. In the event the Licensee fails to install such safety devices or make required modifications within twenty-four (24) hours, or, if such modifications cannot be completed expeditiously to render the ROWs safe for the public, the City may install such safety devices. In the event the City installs such safety devices, the Licensee agrees to pay the actual costs of such improvements upon written demand, or the City may terminate this Agreement, with all rights of the Licensee hereunder being forfeited, and the Licensee waives all rights and claims of any kind against the City arising out of this Agreement and its termination.

- 11) **RESTORATION OF ROWS:** Within ten (10) days after initial construction operations have been completed or after repair, relocation or removal of the Facilities, the Licensee shall grade and restore all areas disturbed by construction operations to a condition substantially similar to that which existed prior to the work. This time period may be extended for good cause shown. If weather or other conditions do not permit the complete restoration required by this Section, the Licensee shall temporarily restore any disturbed property. Such temporary restoration shall be at the Licensee's sole expense and the Licensee shall promptly undertake and complete the required permanent restoration when the weather or other conditions permit such permanent restoration.

For a period of twelve (12) months following any work in the ROWs by the Licensee or any person acting on the Licensee's behalf, except for backfilling which shall be a five (5) year period, the Licensee shall, at its sole expense, be responsible for all costs of restoring any disturbances or damage to the ROWs or any other City property and for all repairs or damage to City property caused by the Licensee, its officers, agents, employees, contractors, subcontractors, successors, and assigns, except to the extent any of the foregoing are caused by the negligence of the City. All such restoration shall be performed in accordance with the City ROW Policy and to the reasonable satisfaction of the City.

Disturbed grass areas shall be restored with sod. All open excavations necessary for the installation, repair, relocation, maintenance or removal of the Facilities shall be properly backfilled, and any asphalt pavement or PCC concrete pavement or sidewalk shall be replaced with like-kind and quality of materials. The backfill settlement repair period shall be for five (5) years from the date of placing said backfill, during which time the affected areas shall be maintained by the Licensee at its sole expense in a condition satisfactory to the City. Under hard surface areas, such as roadways, sidewalks and drives, trench backfill shall be compacted and certified by the City to comply with the City construction standards. All restoration work shall be completed in accordance with the City ROW Policy or other City zoning or construction standards, whichever is more stringent and/or comprehensive.

In the event the Licensee fails, in a timely manner, to restore any disturbances or make any and all repairs to the ROWs or other City property as set forth above, the City may make or cause to be made such restoration or repairs and either demand payment from the Licensee, who agrees to pay the reasonable costs of such restoration or repairs upon written demand and receipt by the Licensee of all invoices and documentation supporting the actual costs incurred by the City, or demand payment from the security posted by the Licensee, which payment must be received by the City within thirty (30) days

of demand and receipt by the Licensee of all invoices and documentation supporting the actual costs incurred by the City.

- 12) ENVIRONMENTAL: The Licensee shall not trim or cut any trees or shrubs, alter or impede water flowage, apply chemicals or disturb the topography of the ROWs in any manner without prior written approval of the City. The Licensee will take all reasonable steps to assure that the Licensee will not release any regulated material in violation of any federal or state environmental law on the ROWs. The Licensee, at its sole cost and expense, shall remediate, remove, clean up or abate in accordance with federal or state law, or directives of the appropriate oversight agency, a release of a regulated material in violation of a federal or state law occurring on the ROWs, to the extent such a release was caused by the Licensee. In the event of a release of a regulated material in violation of a state or federal law on the ROWs by the Licensee, or any claim or cause of action brought against the City regarding such release, the indemnification provided for in Section 16 shall apply.
- 13) DAMAGE TO THE LICENSEE'S FACILITIES: The City shall not be liable for and the Licensee expressly waives all claims for any damage to or loss of the Licensee's Facilities within the ROWs as a result of or in connection with any public works, public improvements, construction, excavation, grading, filling or work of any kind in the ROWs by or on behalf of the City.
- 14) NO TRANSFER OR ASSIGNMENT: This License Agreement shall be binding upon and shall inure to benefit the parties and their successors and assigns. During the term of this License Agreement, the Licensee acknowledges and agrees that it does not have the right or authority to transfer or assign his License Agreement or any interest herein without the prior written consent of the City; provided however, that the Licensee shall have the right, without the City's prior written consent, to assign or otherwise transfer this License Agreement to any successor entity or affiliate or subsidiary of the Licensee, or to any entity into which the Licensee may be merged or consolidated or which purchases all or substantially all of the assets of the Licensee. Any such written consent required under this Section may not be unreasonably withheld. Any transferee or assignee must, at a minimum, show satisfactory evidence that it meets the insurance requirements and other terms, conditions, and provisions contained herein. In the event the License herein granted is terminated or the Licensee transfers title to the Facilities or vacates or ceases to use the Facilities, the Licensee shall, nevertheless, remain liable to the City under the provisions hereof, until said Facilities herein authorized is removed, and the public ROWs are restored as herein required. Acceptance of payment from an entity or person other than the Licensee shall not constitute a waiver of this provision. In all instances a successor Licensee shall, within five (5) business days of substitution, notify the City Engineer of its legal identity, address, e-mail address, phone numbers and the identity of its responsible representative to the City.
- 15) INSURANCE:
 - a) Required coverage and limits. The Licensee shall secure and maintain the liability insurance policies specified by the City insuring it as named insured and including the City and its elected and appointed officers, elected officials and employees as additional insureds as their interest may appear under this Agreement. The Licensee shall provide the City with a certificate of insurance and blanket additional insured endorsement. The Licensee's insurance shall be primary, and any City policies of insurance shall be deemed non-contributory. Such insurance shall be issued by companies authorized to do business in the State of Illinois and reasonably approved by the City. The insurance coverages shall include, but not necessarily limited to, the following:
 - i) Worker's Compensation Insurance with limits as required by the applicable statutes of the State of Illinois. The Employer's Liability coverage under the Worker's Compensation policy shall

have limits of \$500,000 each accident/injury; \$500,000 each employee/disease; \$500,000 disease - policy limits.

- ii) Commercial General Liability Insurance protecting the Licensee against any liability claims which may result from or arise out of the Licensee's use and occupancy of the premises and the operations conducted thereon in the course of the license period. The limits of liability shall be \$1,000,000 per occurrence for bodily injury and property damage and \$3,000,000 general aggregate, including contractual liability. The City and its elected and appointed officers, elected officials, and employees shall be included as additional insureds as their interest may appear under this Agreement.
 - iii) Commercial Automobile Liability Insurance covering the Licensee's owned, non-owned and leased vehicles with coverage limits of \$1,000,000 combined single limit each accident for bodily injury and property damage, including contractual liability. The City and its elected and appointed officers, elected officials, and employees shall be included as additional insureds as their interest may appear under this Agreement.
 - iv) Umbrellas or Excess Liability Insurance with limits of not less than \$1,000,000 per occurrence bodily injury/property damage combined single limit. The Umbrella or Excess coverage shall apply in excess of the limits stated in subparagraphs (ii) and (iii) above and shall either include an endorsement naming the City as an additional insured or provide "following form" coverage for the primary insurance.
 - v) The foregoing insurance coverages shall be increased upon written request by the City to the Licensee but no more frequently than every three years and only when increases in coverage in a category become routine in the insurance industry in Illinois for the specified coverage. Written notice of a routine increase in coverage provided by the City's Pool Insurance manager IRMA, or any successor manager, shall be prima facie evidence of a required increase. If the Licensee disagrees with the proposed increase it shall do so in writing no later than 21 Days after it receives notice of an increase which writing shall explain the basis of the objection. If the parties are unable to reach agreement with regard to the amount of an increase the City and the Licensee's insurance companies shall select a qualified third person insurance manager who shall designate the amount of the coverage. Such designation shall be final, non-appealable and binding for the next three years.
- b) Copies required. The Licensee shall provide certificates of insurance reflecting the requirements of this section to the City within thirty (30) days following notification that its application is complete.
 - c) Upon receipt of notice from its insurer(s) the Licensee shall provide the City with thirty (30) days' prior written notice of cancellation of any required coverage, the Licensee shall obtain and furnish to the City evidence of replacement insurance policies meeting the requirements of this section. In the event that the Licensee fails to obtain or produce evidence of said replacement insurance, any permits issued pursuant to this Article shall, without any further notice, be null and void.
 - d) Self-insurance. The Licensee may self-insure all or a portion of the insurance coverage and limit requirements required by subsection (a) of this section. The Licensee that self-insures is not required, to the extent of such self-insurance, to comply with the requirement for the naming of additional insureds under subsection (a) of this section or the requirements of subsections (b), (c) and (d) of this section. The Licensee that elects to self-insure shall provide the City evidence sufficient to demonstrate its financial ability to self-insure the insurance coverage and limit required under subsection (a) of this section, such as evidence that the Licensee is a "private self-insurer"

under the workers' compensation act. Self-insurance shall be primary, and any City policies of insurance shall be deemed non-contributory. Self-insurance shall only be allowed with the City's written approval which shall not be unreasonably withheld.

- e) Effect of insurance and self-insurance on utility's 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 or self-insurance required by this section shall not be limited by such insurance policies, self-insurance or by the recovery of any amounts thereunder.
 - f) The Licensee shall make certain that all Supplements are covered by the insurance required by this Paragraph 15.
- 16) INDEMNIFICATION: To the fullest extent permitted by Illinois law and without regard to the availability or unavailability of any insurance, the Licensee shall defend, indemnify and hold harmless the City, its officers, agents, employees and elected officials, from any loss, damage, demand, liability, cause of action, fine, judgement or settlement, together with all costs and expenses related thereto (including reasonable expert witness and attorney fees), that may be incurred 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 arising from or in any manner connected with Licensee's use or occupancy of the City's improvements or right-of-way associated with such improvements by the Licensee or its employees, agents, or contractors arising out of the rights and privileges granted under this Agreement, and other applicable law. The Licensee has no obligation to indemnify or hold harmless against any liabilities and losses as may be due to or caused by the sole negligence or willful misconduct of the City or its employees or agents. Neither party will be liable for consequential, indirect, punitive, incidental, or special damages (including lost revenues, loss of equipment, interruption or loss of service, or loss of data) for any cause of action, whether in contract, tort or otherwise, even if the party was or should have been aware of the possibility of these damages, whether under theory of contract, tort (including negligence), strict liability or otherwise., however caused, based on any theory of liability. The indemnification provisions set forth in this Paragraph 16 of this Agreement shall remain in effect for any claims based on occurrences during a license period.
- 17) RESERVATION OF IMMUNITIES: Nothing in this Agreement shall be interpreted or constitute a waiver, release or to otherwise compromise the City's common law or statutory privileges or immunities which are fully reserved.
- 18) EXCLUSIVE REMEDY: The Licensee's exclusive remedy for the Licensor's breach of all or any portion of this Agreement shall be specific performance or termination of the Agreement including termination as it pertains to a specific site.
- 19) THIRD-PERSON BENEFICIARIES: There are no third-person beneficiaries or parties of this Agreement.
- 20) SECURITY: Prior to performing any work in the ROWs, the Licensee shall establish a security fund in the amount of Twenty-Five Thousand Dollars (\$25,000), which shall be provided to the City, at the Licensee's election, in the form of cash, unconditional letter of credit, or surety bond, in a form acceptable to the City. This security fund shall serve as security for those purposes set forth in the City ROW Policy, including, but not limited to the installation of the Facilities in compliance with applicable plans, permits, technical codes and standards, the proper location of the Facilities as specified by the City, restoration of the ROWs and other property affected by the construction or to satisfy any claims or damages. The City may draw on the letter of credit or withdraw cash for the reasons set forth in the City ROW Policy and require replenishment by the Licensee in accordance with said Policy.

- 21) DUTY TO PROVIDE INFORMATION: Within fifteen (15) days of a written request from the City, the Licensee shall furnish any information requested that is reasonably related to this Agreement, the License granted hereunder, and any business activities related to the License or business operations of the Licensee in the City.
- 22) NO ENCUMBRANCES: The Licensee shall not place or allow any liens, mortgages, security interests, pledges, claims of others, equitable interests, or other encumbrances to attach to be filed against title to the ROWs.
- 23) TAXES: Subject to Section 3 of this Agreement, nothing contained in this License Agreement shall be construed to exempt the Licensee from any fee, tax, property tax levy or assessment, which is or may be hereinafter lawfully imposed on it relative to its use of the ROWs or its operation of the Facilities, except as limited by the Telecommunications Infrastructure Maintenance Fee Act (TIMFA) (35 ILCS 635/10(d)) and timely pays the taxes imposed by the Simplified Municipal Telecommunications Tax Act (SMTT) (35 ILCS 636/5).
- 24) VIDEO PROGRAMMING: The Licensee shall notify the City if it intends on providing cable television content over the Facilities to subscribers within the City. If required by law, the Licensee will enter into a cable franchise or an open video system franchise agreement with the City in the event the Licensee does provide cable television content over its Facilities.
- 25) REMOVAL, RELOCATION, OR MODIFICATIONS OF UTILITY FACILITIES: Within thirty (30) days following written notice from the City, the Licensee shall, at its own expense, protect, support, temporarily or permanently disconnect, remove, relocate, change or alter the position of any part of its Facilities within the ROWs whenever the City has determined, in the exercise of its governmental proprietary rights and powers, that such temporary or permanent removal, relocation, change or alteration, is reasonably necessary for the construction, repair, maintenance, or installation of any City improvement in or upon, or the operations of the City in or upon, the ROWs. In the event that relocation of any or all of the Facilities is required and the City and the Licensee are unable to identify a feasible alternative to relocation within the thirty (30) day period, then the City may terminate this Agreement, without penalty or payment to the Licensee, solely with respect to the portion of the ROWs required by the City for the above reasons or other public purposes.

In the event the Licensee is required to disconnect, relocate, remove, change, or alter the position of part of all of its Facilities from the ROWs and fails to do so within the time required by the City, the City may make or cause to be made such disconnection, relocation, removal, change, or alteration, and the Licensee shall be liable to the City for all costs regarding same. The City may either demand payment from the Licensee, who agrees to pay the reasonable costs of such relocation or removal upon written demand and receipt by the Licensee of all invoices and documentation supporting the actual costs incurred by the City, or demand payment from the security posted by the Licensee, which payment must be received by the City within thirty (30) days of demand and receipt by the Licensee of all invoices and documentation supporting the actual costs incurred by the City.

- (a) Removal of Unauthorized Facilities: Within thirty (30) days following written notice from the City, the Licensee shall, at its own expense, remove all or any part of any unauthorized facilities or appurtenances from the ROWs. A facility is unauthorized and subject to removal in the following circumstances:
 - 1) Upon expiration or termination of this License Agreement or permit obtained by the Licensee, unless otherwise permitted by applicable law;

- 2) If the facility was constructed or installed without the prior grant of a license or permit;
- 3) If the facility was constructed, installed or maintained in violation of this License Agreement or the City ROW Standards; or
- 4) If the facility was constructed or installed at a location not permitted by any permit obtained by the Licensee.

If the Licensee installs its Facilities in a ROW without a permit for that location, the Licensee agrees to pay a penalty payable to the City of Wheaton in the sum of One Thousand Dollars (\$1,000,000) per month due on the first day of each month regardless of the amount of time the Licensee's Facilities remain in the ROW during that month until removed or permitted. Payment of the penalty shall not authorize the presence of the Facilities in the specific site without a permit. No action or inaction by the City with respect to unauthorized use of any City ROW shall be deemed a ratification or an unauthorized use. If Licensee fails to comply with the other requirements of Article III of Chapter 58 of the Wheaton City Code, Licensee shall be subject to penalties pursuant to Section 58-245 of the Wheaton City Code.

- (b) Emergency Removal or Relocation of Facilities: The City retains the right and privilege to disconnect, cut, move or remove any part of the Licensee's Facilities located within the ROWs of the City, as the City may determine to be necessary, appropriate or useful in response to any public health or safety emergency. If circumstances permit, the City shall attempt to notify the Licensee, if known, prior to cutting or removing any part of the Facilities and shall notify the Licensee after cutting or removing any part of the Facilities.

26) TERMINATION: The City may terminate this License Agreement and the License granted herein for any of the following reasons:

- (1) The Licensee made fraudulent, false, misrepresenting, or materially incomplete statements in the permit application; or
- (2) Failure to cure a breach of this License Agreement or noncompliance with the City ROW Policy after receipt of written notice and a thirty (30) day cure period; or
- (3) The Licensee's physical presence or presence of the Licensee's Facilities on, over, above, along, upon, under, across, or within the ROWs presents a direct or imminent threat to the public health, safety, or welfare; or
- (4) The Licensee's failure to construct the Facilities substantially in accordance with the permit and approved plans; or
- (5) Failure to provide the required traffic control; and to respond to requests from the City to correct such deficiencies within a reasonable time frame.

Upon termination of this Agreement for any reason, the Licensee shall, within sixty (60) days of written notice from the City, remove its Facilities from all City ROWs and restore all ROWs as required herein.

The Licensee may terminate one or more of the Facilities locations pursuant to this Agreement by giving at least thirty (30) days written notice. The Licensee will not be subject to any penalty or fee for terminating such Facilities location prior to the end of the term of this Agreement.

- 27) NO WAIVER: The waiver by one party of any breach of this Agreement or the failure of one party to enforce at any time, or for any period of time, any of the provisions hereof will be limited to the particular instance and will not operate or be deemed to waive any future breaches of this Agreement and will not be construed to be a waiver of any provision except for the particular instance.
- 28) NOTICES: All notices hereunder shall be in writing and shall be deemed validly given if sent by certified mail, return receipt requested or by commercial courier, provided the courier's regular business is delivery service and provided further that it guarantees delivery to the addressee by the end of the next business day following the courier's receipt from the sender, addressed as follows (or any other address that the Party to be notified may have designated to the sender by like notice):

LICENSOR:

City Manager
City of Wheaton
303 West Wesley Street, Wheaton, Illinois 60187

Copy to:

Walsh, Knippen and Cetina, Chartered
2150 Manchester Road, Suite 200
Wheaton, Illinois 60187

LICENSEE:

Either Party may change the addressee and/or location for the giving of notice to it by providing a thirty (30) days' prior written notice to the other Party.

Notice shall be effective upon actual receipt or refusal as shown on the receipt obtained pursuant to the foregoing.

- 29) SEVERABILITY: In the event that any provision of this Agreement shall be held invalid or unenforceable by a court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other provisions hereto.
- 30) LAW AND VENUE: This Agreement shall be governed, interpreted and construed in accordance with the laws of the State of Illinois. The forum for any legal disputes between the City and Licensee shall be DuPage County, Illinois.
- 31) PARAGRAPH HEADINGS: The paragraph headings and references are for the convenience of the parties and are not intended to limit, vary, define or expand the terms and provisions contained in this Agreement and shall not be used to interpret or construe the terms and provisions of this Agreement.
- 32) INTEGRATION: This Agreement constitutes the entire understanding and agreement of the parties. This Agreement integrates all of the terms and conditions mentioned herein or incidental hereto, and supersedes all negotiations or previous agreements between the parties with respect to all or any part

of the subject matter hereof. All waivers of the provisions of this Agreement must be in writing and signed by the appropriate authorities of the City or the Licensee, and all amendments hereto must be in writing and signed by the appropriate authorities of the City and the Licensee.

- 33) **AMENDMENT:** No oral changes or modifications of this Agreement shall be permitted or allowed. This Agreement may be amended only by written instrument properly executed by the Parties or their successors in interest except in the limited instances where this Agreement allows minor modifications. Execution of any amendment by the City shall first have been authorized by the ordinance or resolution duly adopted by the Corporate Authorities of the City of Wheaton.
- 34) **SUCCESSORS AND ASSIGNEES:** The terms and conditions of this Agreement shall apply to and bind and inure to the benefit of the City, the Licensee and City-approved successors and assignees.
- 35) **CHANGE OF LAW; RIGHTS UNDER LAWS:** If any federal, state, or local laws or regulations (including, but not limited to, those issued by the FCC or its successor agency) and any binding judicial interpretations thereof (collectively, "Laws") that govern any aspect of the rights or obligations of the Parties under this Agreement shall change after the effective date of this Agreement and such change makes any aspect of such rights or obligations inconsistent with the then effective Laws, then the Parties agree to promptly amend this Agreement as reasonably required to accommodate and/or ensure compliance with any such legal or regulatory change. Changes in federal, state, or local laws or regulations effecting the placement of a Facility under this Agreement shall become effective for each new Facility installation, subject to a supplement application, from the legally effective date of the change, so long as the permit for the supplement has not been granted as of that effective date and shall not require an amendment to this Agreement to be enforceable by the Licensor. This Agreement is not intended to in any way limit or waive either Party's present or future rights under applicable state and federal law.

IN WITNESS WHEREOF, the Parties hereto have set their hands and affixed their respective seals the day and year first above written.

LICENSOR:

City of Wheaton, an Illinois Municipal Corporation

BY: _____

Name: _____

Title: _____

Date: _____

LICENSEE:

By: _____