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JUN 14 2007



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*Where Values Make The Difference*

**Memorandum**

**CAPA COUNCIL MEMO NO. 12**

**DATE:** June 5, 2007

**TO:** MAYOR AND CITY COUNCIL

**THRU:** W. MARK PENTZ, CITY MANAGER *WP*  
PAT MCDERMOTT, ASSISTANT CITY MANAGER *PM*  
NACHIE MARQUEZ, CAPA DIRECTOR *NM*

**FROM:** MARGARET COULTER, COMMUNICATIONS MANAGER *MC*

**SUBJECT:** Introduction of Ordinance No. 3936, authorizing an agreement between AboveNet Communications, Inc. and the City of Chandler for Use of City Right-of-Way and Public Places to Establish a Communications System

**RECOMMENDATION:** Staff recommends approval of Ordinance No. 3936, authorizing the Mayor to execute and approve an Agreement with AboveNet Communications, Inc. for the Use Of City Right-of-Way and Public Places to Establish a Communications System.

**BACKGROUND:** AboveNet Communications, Inc. has filed for an application with the City to install, operate and maintain a communications system that will provide both telecommunications and non-telecommunications services. This agreement provides terms and fees for both service deliveries. The company also holds agreements in the cities of Phoenix and Tempe to provide a similar system. This is a five-year nonexclusive agreement for three renewable five-year terms under specified conditions as outlined in the agreement.

**FINANCIAL IMPLICATIONS:** The City has received a \$2,000 application fee, which should cover the City's cost for processing of this application, and 2.75% privilege tax will be paid on any non-interstate telecommunication services. As dictated by federal and state law, there will be no right-of-way use fee for the telecommunications portions of the System and its operation, but there is a detailed fee structure established in Section 4.2 of the Agreement for any services that are not exempted by federal or state law. The

company will also pay permit, inspection and pavement damage fees, as well as pay for additional plan review/inspection staff to accommodate this project.

PROPOSED MOTION: Move to approve Ordinance 3936, authorizing the Mayor to execute and approve an Agreement between AboveNet Communications, Inc. and the City of Chandler for Use of City Right-of-Way and Public Places to Establish a Communications System

Attachments: Ordinance 3936; Agreement for Use of City Right-of-Way and Public Places to Establish a Communications System

ORDINANCE NO. 3936

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF CHANDLER, MARICOPA COUNTY, ARIZONA, APPROVING AN AGREEMENT BETWEEN ABOVE NET COMMUNICATIONS, INC. AND THE CITY OF CHANDLER FOR THE USE OF CITY RIGHT-OF-WAY AND PUBLIC PLACES TO ESTABLISH A COMMUNICATION SYSTEM.

WHEREAS, the Chandler City Council has determined that it is in the best interest of, and consistent with, the convenience and necessity of the City of Chandler to grant such authorization to companies desiring to provide communications infrastructure within the City of Chandler; and

WHEREAS, AboveNet Communications, Inc. has negotiated with the City of Chandler to enter into an Agreement to place communication infrastructure in City of Chandler right-of-way for its use as detailed in the Agreement; and

WHEREAS, the City Council has reviewed the terms and conditions of the Agreement with AboveNet Communications, Inc. and believes it to be in the best interests of the citizens of the City of Chandler;

NOW THEREFORE BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF CHANDLER, ARIZONA, AS FOLLOWS:

SECTION I: That the Mayor of the City of Chandler is herewith authorized to execute the *Agreement Between AboveNet Communications, Inc. And The City Of Chandler For The Use Of Facilities In The City's Rights-Of-Way And Public Places For the Placement and Operation of Communications Infrastructure.*

SECTION II: That the various City officers and employees be and they are hereby authorized and directed to perform all acts necessary to give effect to this Ordinance.

SECTION III: This Ordinance shall become effective thirty days from and after its final adoption: provided, however, that the agreement hereby granted shall not become effective unless and until AboveNet Communications, Inc. has accepted said agreement as provided herein and has carried out such other terms and conditions as may be required before said agreement shall become effective.

INTRODUCED AND TENTATIVELY ADOPTED by the City Council of the City of Chandler, Maricopa County, Arizona, this \_\_\_ day of \_\_\_\_\_, 2007.

ATTEST:

MAYOR:

\_\_\_\_\_  
CITY CLERK

\_\_\_\_\_

PASSED AND ADOPTED by the City Council of the City of Chandler, Arizona this \_\_\_ day of \_\_\_\_\_, 2007.

ATTEST:

MAYOR

\_\_\_\_\_

\_\_\_\_\_

CERTIFICATION

I HEREBY CERTIFY that the above and foregoing Ordinance No. 3936 was duly passed and adopted by the City Council of the City of Chandler, at a regular meeting held on the \_\_\_ day of \_\_\_\_\_, 2007 and that a quorum was present thereat.

\_\_\_\_\_  
City Clerk

Published:

APPROVED AS TO FORM:

*plm*  
\_\_\_\_\_

**AGREEMENT BETWEEN ABOVE NET COMMUNICATIONS, INC. AND  
THE CITY OF CHANDLER FOR THE USE OF FACILITIES  
IN THE CITY'S RIGHTS-OF-WAY AND PUBLIC PLACES  
TO ESTABLISH A COMMUNICATION SYSTEM**

This Agreement for the Use of Public Property (hereinafter "Agreement") is entered into this day of \_\_\_\_\_, 2007, by and between the City of Chandler, Arizona, a political subdivision of the State of Arizona (hereinafter "CITY"), and AboveNet Communications, Inc. (hereinafter "COMPANY"), a Delaware corporation.

WHEREAS, COMPANY is licensed by the Arizona Corporation Commission for the provision of intra-state telecommunications services and also provides non-telecommunications services and other related business activities; and

WHEREAS, pursuant to the Charter and City Code of Chandler, and by virtue of federal and state law, by the CITY'S police powers, by its authority over its public rights-of-way, and by other CITY powers and authority, the City of Chandler is authorized to enter into, renew, deny, and terminate agreements for use of the public rights-of-way for the installation, operation and maintenance of communications services within the CITY boundaries, and

WHEREAS, COMPANY has applied to CITY for permission to use certain CITY property, including but not limited to CITY streets and easements, ("Public Property") for the placement of its infrastructure and communications system including conduit, fiber optic cables, splice cases, manholes and handholes (hereinafter referred to as its "System") under, in, along, over and across certain Public Property in the CITY; and

WHEREAS, COMPANY has agreed to provide and maintain accurate maps showing the location of all facilities owned or used by COMPANY in the CITY on both public and private property within the CITY, and to comply with such other mapping requirements as CITY may establish from time to time; and

WHEREAS, COMPANY is requesting permission to install and construct its System along the route generally depicted in Exhibit "A" to this Agreement; and

WHEREAS, COMPANY has agreed to comply with Public Property use requirements that CITY has established and may establish from time to time.

NOW, THEREFORE, CITY hereby grants COMPANY permission to use certain Public Property in the CITY under the following terms and conditions:

**SECTION 1. DEFINITIONS**

The terms, phrases, words and their derivatives used in this Agreement shall have the meanings given in Chapter 46 of the Chandler City Code as amended.

## **SECTION 2. PERMISSION GRANTED**

### **2.1. Grant.**

Subject to the provisions of this Agreement, the Chandler City Code, the Chandler City Charter, and Arizona and federal law, CITY grants to COMPANY nonexclusive and revocable rights and nonexclusive and revocable privileges as set forth in this Agreement to construct, install, operate, and maintain its System on certain Public Property subject to mutually agreed upon terms and conditions at a time in the future when COMPANY submits applications for Encroachment Permits.

2.1.1. At any time during the term of this Agreement, COMPANY may apply to the CITY for Encroachment Permits which will set forth the specific location of COMPANY'S System, fees, if any, for that location and other terms and conditions. CITY will approve, deny or conditionally approve such applications based on the availability of space at the location sought by COMPANY, safety and other considerations in accordance with the City Code, applicable Rights-of-Way construction regulations and other applicable law.

2.1.2. Subject to obtaining the permission of the affected property owner, this Agreement also authorizes COMPANY to place its System on property owned by third parties, such as an electric utility company or other private property owners, provided, however, the System installed or constructed by COMPANY shall meet conditions set by applicable Rights-of-Way Construction regulations, and, if applicable, be placed underground in accordance with Section 47-4 of the Chandler City Code. Upon request, COMPANY shall promptly furnish to CITY documentation of such permission from such other affected property owner. By executing this Agreement, CITY does not waive any rights that it may have against any public utility or other property owner to require that such owners obtain prior approval from the CITY for such uses of their property or facilities, or that revenues received by any public utility or other property owner from COMPANY, by virtue of COMPANY use of their property or facilities be included in the computation of the use Agreement fees owed by such parties to CITY.

2.1.3. No component or part of COMPANY System shall be installed, constructed, located on, or attached to any property within the CITY until COMPANY has applied for and received approval for Encroachment Permits pursuant to Chapter 46 of the Chandler City Code. Additionally, COMPANY shall comply with all other provisions of the Chandler City Code, including but not limited to Chapter 35 regarding zoning, Chapter 47 regarding off-site construction and other applicable City regulations.

2.1.4. Any right or privilege claimed pursuant to this Agreement by COMPANY for any use of any public street or other public property shall be subordinate to any prior or subsequent lawful occupancy or use thereof by the CITY or any other governmental entity shall be subordinate to any prior lawful occupancy or use thereof by any other person, and shall be subordinate to any prior easements therein, provided however, that nothing herein shall extinguish or otherwise interfere with property rights established independently of this Agreement.

## 2.2. Description of the System and its Construction.

2.2.1 COMPANY plans to install two (2) one and one quarter inch (1.25”), one and one half inch (1.5”) or two inch (2”) HDPE, Sch 40 conduits along an approved route of approximately 8 miles, together with concrete 4’x4’x4’ manholes, 2’x5’x3’ and 2’x3’x3’ pull-boxes/handholes, HDPE couplings and elbows, fiber optic cable, splice cases, tracer wire, grounding material, mule tape, jet string and conduit plugs. COMPANY will install conduit and access points (manholes/pull-boxes) using trenchless technology over approximately eighty percent (80%) of the project utilizing directional drills. The remainder of the work will be complete using milling machines, steel plats, jack hammers, saw cuts, backhoes and laborers. To install the jet string, mule tape and fiber optic cable COMPANY will be using air compressors and assist wheels. Per City specifications, all conduit will be placed outside of paved ROW wherever possible. Company will, nonetheless, build the System in accordance with plans approved by the City of Chandler.

2.2.2 If COMPANY desires to change the components of any of the System, written approval of such change must be obtained from a representative of the City Engineer, which approval shall not be unreasonably withheld or delayed. Prior to commencement of installation of the System, Company shall submit specifications for proposed manholes and pull-boxes to the City for approval, which approval shall not be unreasonably delayed or withheld. All work on the System will be performed substantially in compliance with the Uniform Standard Specifications for Public Works Construction sponsored and distributed by the Maricopa Association of Governments as amended (hereinafter referred to as “MAG”), the City supplements to MAG and the City Utility manual, and will follow good practices for the industry.

2.2.3 COMPANY shall retain an independent testing company, subject to approval by CITY in its reasonable discretion, to test all materials outlined by MAG and the CITY’S supplements to MAG that will be used in construction of the System. The testing results will be sent to CITY directly and within three (3) business days of obtaining results.

2.2.4 COMPANY’S installation of the System shall be reasonably coordinated with other utilities and CITY to accommodate opportunities for common installation along with COMPANY’S project as set forth in this Agreement. All installations shall be in conduit or innerduct as reasonably approved by the City Engineer. Provided, however, nothing herein shall require COMPANY to incur any material additional expense to accommodate common installations.

## 2.3. Location of the System.

2.3.1 COMPANY shall submit an Encroachment Permit Application(s) together with the details, plans and specifications for CITY review and approval, and pay all applicable application, review and inspection fees prior to any and all construction work performed pursuant to the rights granted under this Agreement including the installation, operation, maintenance, location and attachment of any and all of the System. The proposed locations of COMPANY’S planned initial installation of its System including related facilities or equipment is generally depicted on the map attached and made a part of this Agreement as Exhibit A

("Initial Routes") and shall be depicted more specifically on engineering drawings provided to the CITY with the submittal of the plans and specifications during the permitting process. If COMPANY desires to change the location of any of the System, including any related facilities or equipment, from that set forth in the initial Encroachment Permit Application(s), COMPANY shall apply for and obtain approval for an amendment to the Encroachment Permit prior to installation or construction. Such Encroachment Permit(s) shall be identified by CITY log number and made a part hereof and referenced as a summary of its System location as Exhibit A and updated yearly.

2.3.2. Although the exact placement and location of COMPANY's System shall be determined by CITY through the Encroachment Permit process, COMPANY has expressed its intent and CITY has expressed its desire to have the System installed outside of the paved street areas whenever such location is feasible and reasonable. Further, it is the intent and desire of both parties that when it is necessary for the System to intersect CITY streets or be placed under paved areas, COMPANY shall use directional boring under such streets when feasible and reasonable.

### **SECTION 3. SCOPE**

#### **3.1. Licensing Requirements.**

This Agreement satisfies the licensing requirements of and is in accordance with the provisions of Chapter 46 of the Chandler City Code.

#### **3.2. Specific Authorization.**

This Agreement authorizes COMPANY to use the public Rights-of-Way to build infrastructure for a System as noted in Section 2.2 of this Agreement. The authority granted pursuant to this Agreement to use Public Property does not authorize COMPANY use of the facilities for operating a cable television system, a cable system or authorize COMPANY to operate as a cable operator, as those terms are defined in the Communications Act of 1934, as amended, state law, or the City Code. The authority granted by this Agreement does not authorize the use of public Rights-of-Way for an open video system as defined in the Communications Act of 1996 or as defined or authorized by the Federal Communications Commission (hereinafter "FCC"). The authority to install and construct its system on CITY property granted herein authorizes COMPANY only to install and construct such components or system as is necessary to construct the infrastructure described in this Agreement and does not authorize COMPANY to install or construct any COMPANY equipment, materials or other facilities not expressly provided for in this Agreement.

#### **3.3. Use of COMPANY's Facilities by Third Parties**

3.3.1 This Agreement authorizes COMPANY, in its ordinary course of business and without prior consent of CITY, to lease or contract with third parties for the provisioning of communications services, including without limitation the right to lease dark fiber and grants of to third parties rights to use COMPANY's Facilities, and for the maintenance of COMPANY's facilities provided that such transactions do not provide to third parties rights to access COMPANY's facilities in, on, under or along Public Property.

3.3.2 Notwithstanding anything contained in the preceding paragraph or elsewhere in this Agreement to the contrary, in the event that COMPANY proposes to provide to third parties rights of access to COMPANY's facilities in, on, under or along Public Property, COMPANY shall first provide written notice thereof to CITY, including the identity of such party and specifying the nature of the intended agreement, and such arrangement shall be subject to the CITY's prior written consent, which consent shall not be unreasonably withheld, conditioned or delayed. Further, CITY and COMPANY agree that, if COMPANY is granting to a third party rights to access COMPANY's facilities in, on, under or along Public Property, CITY may require such third party to enter into an agreement similar in nature to this Agreement prior to such third party having any rights to access such COMPANY's facilities in, on, under or along the Public Property, and in which case this Agreement may be amended to eliminate that portion of COMPANY's facilities.

#### 3.4. Compliance with Laws.

COMPANY and CITY shall comply with all applicable laws as amended from time to time, including but not limited to, the Chandler City Code and the Chandler Charter and Arizona and federal law in the exercise and performance of its rights and obligations under this Agreement. If it is necessary for COMPANY to comply with any law or regulation of the FCC or the Arizona Corporation Commission ("ACC") to engage in the business activities anticipated by this Agreement, COMPANY shall comply with such laws or regulations as a condition precedent to exercising any rights granted by this Agreement. Provided, however, no such law or regulation of the FCC or ACC shall enlarge or modify any of the rights or duties granted by this Agreement without a written modification to this Agreement.

#### 3.5. Reports.

3.5.1. Upon request, COMPANY shall provide to CITY copies of any communications and reports submitted by COMPANY to the FCC or any other federal or state regulatory commission or agency having jurisdiction in respect to any matters directly affecting enforcement of this Agreement.

3.5.2. Upon request, COMPANY shall provide CITY with regular reports, as needed, to establish COMPANY's compliance with the various requirements and other provisions of this Agreement.

#### 3.6. Non-Interference.

3.6.1. The System to be constructed, installed, operated and maintained under this Agreement shall be located or relocated so as to interfere as little as possible with traffic or other authorized uses over, under or through said streets and public ways. Those phases of construction relating to traffic control, backfilling, compaction and paving, and the location or relocation of the System shall be subject to regulation by the CITY. COMPANY shall keep accurate construction and installation records of the location of all its System and facilities, both aboveground and underground within the CITY and furnish them to CITY within thirty (30) days

of installation. COMPANY shall furnish such information in an electronic format compatible with the then current CITY electronic format.

3.6.2. COMPANY shall relocate, at no cost to the CITY, any facilities, equipment or other encroachment installed or maintained in, on or under any public place, Right-of-Way or highway, as may be necessary to facilitate any public purpose or any CITY project whenever directed to do so by CITY. Such relocations shall be accomplished in accordance with the directions from CITY and shall be pursuant to the same terms and conditions as the initial installation allowed pursuant to this Agreement and an Encroachment Permit.

3.6.3 COMPANY agrees to obtain a permit as required by this Agreement prior to removing, abandoning, relocating or necessary reconstructing of any portion of its System Public Property. Notwithstanding the foregoing, CITY understands and acknowledges there may be instances when COMPANY is required to make repairs that are of an emergency nature or in connection with an unscheduled disruption of the System. COMPANY will maintain any annual permits required by the CITY for such repairs. COMPANY will notify CITY, if practicable, before the repairs and will apply for and obtain the necessary permits in a reasonable time after notification.

3.7. Reservation to CITY.

There is hereby reserved to CITY every right and power required pursuant to this Agreement to be herein reserved or provided by any ordinance or the Charter of the City, and COMPANY by its execution of this Agreement agrees to be bound thereby and to comply with any action or requirements of CITY in its exercise of such rights or power, heretofore or hereinafter enacted or established. Neither the granting of any Agreement nor any provision hereof shall constitute a waiver or bar to the exercise of any governmental right or power of CITY.

**SECTION 4. FEES, COSTS, SECURITY, DAMAGE TO PUBLIC PROPERTY AND LIQUIDATED DAMAGES.**

COMPANY shall be solely responsible for the payment of all fees and charges in connection with COMPANY's performance under this Agreement, including those set forth below.

4.1 Application Fee.

COMPANY shall pay CITY for the administrative costs of processing this Application, an Application fee in the amount of Two Thousand Dollars (\$2,000.00) prior to submittal for approval of this Agreement to the City Council, receipt of which is hereby acknowledged.

4.2 Use Fee.

4.2.1 Construction of the System shall not result in a Use Fee being due the CITY from COMPANY. Further, for the portion of COMPANY's use of Public Property that conforms to the definition of Telecommunications Services, as defined in the Arizona State Statutes and the Chandler City Code, there will be no Use Fee due the CITY from COMPANY.

4.2.2 However, for the portion of COMPANY's use of Public Property that does not fall under subsection 4.2.1 above, if any, COMPANY shall pay CITY a Use Fee in consideration of permission to make such use of such portion of Public Property, which Use Fee will be the greater of either:

(a) \$6,000, or

(b) an amount equal to five percent (5%) of COMPANY's Gross Revenues derived from the portion of Public Property used by COMPANY for a use other than one that conforms to the definition of Telecommunications Services, as defined in the Arizona State Statutes and the Chandler City Code; except that

(c) if COMPANY exclusively uses Public Property for Telecommunications Services, as defined in the Arizona State Statutes and the Chandler City Code, then no Use Fee will be due the CITY from COMPANY pursuant to this subsection 4.2.2.

4.2.3 In order to establish the Use Fee, if any, due CITY pursuant to subsection 4.2.2 above, COMPANY shall submit a written report to the offices of the City Manager, or his/her designee, no later than April 30<sup>th</sup> of each year, which written report shall pertain to that portion of the prior calendar year which fell within the Term of this Agreement and such report shall state (i) the number of COMPANY's customers receiving services on the System during the prior calendar year, (ii) the type(s) of service each customer received during the prior calendar year, (iii) the Gross Revenues received from such customers during the prior calendar year for each service not defined in the Arizona State Statutes and the Chandler City Code as Telecommunications Services, which Gross Revenues shall be prorated based on the portion of such service rendered over the System as compared to the entire route over which such service is provided, and (iv) COMPANY's calculation, in accordance with subsection 4.2.2 above, of the Use Fee, if any, due to the CITY from COMPANY; provided further that in the event a Use Fee is due CITY from COMPANY, COMPANY shall include such payment with the foregoing report and, in such event, the Use Fee will not be in an amount less than \$6,000. The foregoing report will be verified as being correct by an officer of COMPANY. Further, COMPANY shall provide such additional information in support of the foregoing report as may reasonably be requested by CITY.

4.2.3 Freeway Crossing Fee. In the event COMPANY determines that it will occupy a one (1) four inch (4") conduit owned by the CITY within the duct bank underneath the freeway crossing at the Santan Freeway (Loop 202) at Dobson Road, COMPANY shall pay to CITY Eighteen Thousand Dollars (\$18,000) per year for the term of the Agreement for such use. COMPANY is limited to using the conduit solely for installation and operation of the System as described in and in accordance with the terms of this Agreement. Payment shall be due on or before the first day of each year of the Term. CITY agrees that upon any extension, renewal or replacement of this Agreement, COMPANY shall be granted the right to occupy and use the afore-described conduit without any fee or charge for freeway access ("Freeway Crossing Fee") whatsoever. The provisions of the preceding sentence shall survive any expiration or termination of this Agreement.

4.2.4 Invoices for any amounts due CITY from COMPANY under this Agreement will be sent to:

AboveNet Communications, Inc.  
360 Hamilton Avenue  
White Plains, New York 10601

ATTN: Accounts Payable  
Phone: (914) 421-6700  
Fax: (914) 421-6793

4.3. Taxes.

COMPANY shall pay any applicable City, county and state transaction privilege and use tax. The Use Fee shall not be an offset to the transaction privilege tax, which COMPANY is obligated to pay.

4.4. Permit Fees and Construction Costs.

In addition to the fees and taxes set forth herein above, COMPANY shall pay those fees and charges for Encroachment Permit applications, inspection, testing, plan review and any other fees adopted by CITY and applicable to persons doing work in CITY Right-of-Way. Additionally, if the CITY elects to retain outside inspectors or other persons to review and inspect COMPANY's plans, specifications and construction of the System, COMPANY shall reimburse the CITY for its actual costs incurred in connection therewith.

4.5. Security.

4.5.1. To insure the faithful performance by COMPANY of its obligations hereunder, COMPANY shall file and maintain until the termination of this Agreement either a bond, letter of credit or other form of security acceptable to the CITY's Risk Manager ("Security") in the amount of One Hundred Fifty Thousand Dollars (\$150,000) during the construction of COMPANY's Facilities, which amount may be reduced by COMPANY to Fifty Thousand Dollars (\$50,000) after CITY has inspected such construction and found same to be acceptable to CITY. COMPANY hereby agrees that CITY may draw any amount of the sum in the Security, up to the whole thereof, as provided below.

4.5.2. For any breach of this Agreement by COMPANY of any city code or state or federal law relating to construction, the City may draw upon the Security in the sum of up to One Hundred Fifty Thousand Dollars (\$150,000) to guarantee that COMPANY shall well and truly observe, fulfill and perform each and every term of this Agreement relating to construction, any amount of the sum in the Security, up to the whole thereof, may be forfeited to compensate CITY for any damages it may suffer by reason of such Breach. COMPANY hereby agrees that CITY may draw any amount of the sum in the Security, up to the whole thereof, as provided below.

4.5.3. Of the One Hundred Fifty Thousand Dollars (\$150,000) Security referred to in subsection 4.5.1 above, Fifty Thousand Dollars (\$50,000) of the Security shall remain in effect for the existence of the Agreement as security for the faithful performance by COMPANY of all the provisions of this Agreement, and compliance with all orders, permits and directions of any

agency of the CITY having jurisdiction over its acts or defaults under this Agreement and any Encroachment Permit issued pursuant thereto, and the payments by COMPANY of any fees, claims, liens and taxes due the CITY which arise by reason of the operation or maintenance of COMPANY's facilities. No withdrawals shall be made from the Security without the prior written approval of the City Manager and prior written notice of intent to withdraw to COMPANY. The form of the Security shall be either a bond, letter of credit or other form of security acceptable to the City's Risk Manager.

4.5.4. If, within ten (10) business days of receipt of a notice from CITY of its intent to withdraw from the Security, COMPANY fails to (i) pay CITY any taxes or fees due and unpaid, (ii) fails to repay to CITY any damages, costs or expenses which CITY shall be compelled to pay by reason of any act or default of COMPANY in connection with this Agreement, or (iii) fails, within thirty (30) days of such notice of failure by CITY to comply with any provision of this Agreement which CITY reasonably determines can be remedied by an expenditure of Security, then in any such case(s) CITY may immediately withdraw the amount thereof, with interest, from the Security. Upon such withdrawal, CITY shall notify COMPANY of the amounts and date of same and, no later than thirty (30) days after written notice (by fax, email or letter) from the CITY to COMPANY of depletion of Security below Fifty Thousand Dollars (\$50,000), COMPANY shall restore Security to its then required amount.

4.5.5. COMPANY shall be entitled to the return of Security, or portion thereof, as remains on deposit upon termination of this Agreement, provided that there is then no outstanding default on the part of COMPANY. Further, COMPANY may substitute the form of Security with CITY, provided such substitute is acceptable to CITY's Risk Manager.

4.5.6. In the event additional construction on non-contiguous Public Property is applied for, COMPANY may be required to provide security for that project separately and apart from any Security provided for as part of this Agreement.

4.6.7 The rights reserved to CITY in this section are in addition to all other rights of CITY whether reserved by this Agreement or authorized or required by law, and no action, proceeding or exercise of a right with respect to such security fund shall affect any other right CITY may have.

#### 4.6. Damage to Public Property.

4.6.1. Damage to Public Property. Whenever the installation, removal, or relocation of any of COMPANY's System is required or permitted under this Agreement, and such installation, removal or relocation shall cause Public Property to be damaged, COMPANY, at no cost to City, shall promptly repair and return Public Property in which the System components are located to a safe and satisfactory condition in accordance with applicable laws, normal wear and tear excepted, reasonably satisfactory to the City Engineer. If COMPANY does not repair the site as just described, then CITY shall have the option, upon fifteen (15) days prior written notice to COMPANY, to perform or cause to be performed such reasonable and necessary work on behalf of COMPANY and to charge COMPANY for the proposed costs to be incurred or the actual costs incurred by the CITY at CITY's standard rates, plus an administrative fee of fifteen

percent (15%). Upon the receipt of a demand for payment by CITY, COMPANY shall, within thirty (30) days, reimburse CITY for such costs. For any pavement cuts by COMPANY, COMPANY agrees to restore the pavement and to reimburse the CITY for all costs arising from the reduction in the service life of any public road, in accordance with the provisions of Chapter 46 of the Chandler City Code and the fees established by the CITY pursuant thereto. COMPANY agrees to pay within thirty (30) days from the date of issuance of an invoice from CITY.

4.6.2. Public Emergency. CITY shall have the right, because of a public emergency, to sever, disrupt, dig-up or otherwise destroy facilities of COMPANY without any prior notice to COMPANY, if the action is deemed reasonably necessary by the City Manager, Fire Chief, Police Chief, City Street Transportation Director, Public Works Director or Water Services Director. A public emergency shall be any condition which, in the opinion of any of the officials named, poses an immediate threat to the lives or property of the citizens of the CITY or others caused by any natural or man-made disaster, including but not limited to, storms, floods, fire, accidents, explosions, major water main breaks, hazardous material spills, etc. COMPANY shall be responsible for repair at its sole expense of any of its facilities damaged pursuant to any such action taken by CITY.

4.6.3. Blue Stake. COMPANY shall comply with A.R.S. §§ 40-360.21 through 40-360.32 by participating as a member of the Arizona Blue Stake Center with the necessary records and persons to provide location service of COMPANY's facilities upon receipt of a locate call or as promptly as possible, but in no event later than two (2) working days. A copy of the Agreement or proof of membership shall be filed with the CITY.

4.7. Liquidated Damages.

4.7.1 COMPANY understands and agrees that failure to comply with any time and performance requirements in this Agreement or the requirements of Chapter 46 of the Chandler City Code will result in damage to the CITY, and that it is and will be impracticable to determine the actual amount of such damage in the event of delay or nonperformance; therefore, the parties hereby agree to the liquidated damages specified below. The following amounts per day may be chargeable to the COMPANY for the following concerns:

(a) Each failure to properly restore the public Right-of-Way or to correct related violations of specifications, code ordinance or standards within seven (7) working days of having been notified in writing (by fax, letter or email) by the CITY to correct such failure or defects – two hundred dollars (\$200) per day;

(b) Each failure (not covered by subsection (a)) to comply with the provisions of this Agreement or applicable City Code provision or law or to correct related violations of same within seven (7) working days of having been notified in writing (by fax, letter or email) by the CITY to correct such failure or violation– one hundred dollars (\$100) per day.

4.7.2. If the City Manager concludes that COMPANY may be liable for liquidated damages, the City Manager shall issue to COMPANY by certified mail a Notice of Intention to

Assess Liquidated Damages. The Notice shall set forth the nature of the violation and the amount of the proposed assessment. COMPANY shall within thirty (30) days of receipt of such notice:

(a) Respond to the CITY in writing, contesting the CITY's assertion of violation and providing such information or documentation as may be necessary to support COMPANY position; or

(b) Cure any such violation (and provide written evidence of the same), or, in the event that, by the nature of the violation, such violation cannot be cured within such thirty (30) day period, take reasonable steps to cure said violation and diligently continue such efforts until said violation is cured. COMPANY shall report to the CITY, in writing, at thirty (30) day intervals as to COMPANY's efforts, indicating the steps taken by COMPANY to cure said violation and reporting COMPANY's progress until such violation is cured.

4.7.3. In the event that COMPANY contests the CITY'S assertion of violation or fails to respond to the CITY's notice of intent to assess liquidated damages, within fifteen (15) days the CITY shall schedule a hearing in accordance with the procedures set forth in Sections 1-7, 46-2.12 and 46-2.13 of the Chandler City Code.

#### 4.7.4. Other Municipal Agreements.

If COMPANY enters into any agreement for use of Public Property subsequent to May 1, 2007, with another similarly situated municipality in Arizona that grants to the other municipality rights or financial benefits that are more beneficial to such municipality than what is provided by this Agreement, the CITY shall have the right to amend this Agreement to reflect the same or substantially similar terms of such other agreement.

### **SECTION 5. TERM OF AGREEMENT**

The term of this Agreement and duration of the rights, privileges and authorizations granted hereunder shall be for five (5) years from the effective date of the Agreement and the term of this Agreement shall thereafter automatically extend for up to three (3) additional terms of five (5) years each, except that same will not be automatic if substantive changes are requested by either party, in which event City Council approval will be required; provided further that either party shall have the right to provide the other party not less than 12 months prior written notice of its intention to terminate this Agreement at the expiration of the then current term.

### **SECTION 6. ACCEPTANCE AND EFFECTIVE DATE**

#### 6.1 Written Acceptance.

COMPANY execution of this Agreement shall constitute its acceptance of the Agreement as granted and its agreement to be bound by and to comply with and to do everything, which is required of the COMPANY by this Agreement. Within twenty (20) days after the approval of this Agreement by CITY, or within such extended period of time as the City Council in its discretion may authorize, COMPANY shall file with the City Clerk the executed original of this

Agreement evidencing its acceptance of this Agreement. COMPANY signature shall be acknowledged by COMPANY before a notary public. This Agreement is effective upon execution by both parties.

6.2. Validity of Agreement.

COMPANY shall acknowledge that as a condition of acceptance of this Agreement, COMPANY was required to be represented throughout the negotiations of the Agreement by its own attorneys and COMPANY had the opportunity to consult with its own attorneys about its rights and obligations regarding the Agreement. COMPANY has reviewed CITY's authority to execute and enforce this Agreement and has reviewed all applicable law, both federal and state, and, after considering same, COMPANY acknowledges and accepts the right and authority of CITY to execute this Agreement, to issue this Agreement and to enforce the terms herein, and COMPANY agrees it shall not now or at any time hereafter contest or challenge CITY's authority under applicable federal, state and local law to enter into and enforce this Agreement in any city, state or federal court or regulatory or administrative agency.

**SECTION 7. INSURANCE AND INDEMNITY**

7.1. General Requirements. COMPANY, at its own expense, shall purchase and maintain insurance of the types and amounts required in this section, with companies possessing a current A.M. Best, Inc. rating of B++6, or better and legally authorized to do business in the State of Arizona.

7.1.1. All insurance required herein shall be maintained in full force and effect until all work or services required to be performed under the terms of this Agreement is satisfactorily completed and formally accepted. Failure to do so may, at the sole discretion of CITY, constitute a material breach of this Agreement and may result in termination of this Agreement.

7.1.2. If any of the insurance policies are not renewed prior to expiration, payments to the COMPANY may be withheld until these requirements have been met, or at the option of the CITY, the CITY may pay the Renewal Premium and withhold such payments from any monies due the COMPANY.

7.1.3. All insurance policies, except Workers' Compensation and Professional Liability required by this Agreement, and self-insured retention or deductible portions, shall name, to the fullest extent permitted by law for claims arising out of the performance of this Agreement, CITY, its agents, representatives, officers, directors, officials and employees as Additional Insureds.

7.1.4. COMPANY insurance shall be primary insurance over any insurance available to the CITY and as to any claims resulting from this Agreement, it being the intention of the parties that the insurance policies so effected shall protect both parties as their interests may appear and be primary coverage for any and all losses covered by the described insurance.

7.1.5. The insurance policies, except Workers' Compensation, shall contain a waiver of transfer rights of recovery (subrogation) against CITY, its agents, representatives, officers, directors, officials and employees for any claims arising out of COMPANY's acts, errors,

mistakes, omissions, work or service, except that the foregoing shall not be construed as limiting COMPANY's rights as set forth to the contrary elsewhere in this Agreement.

7.1.6. The insurance policies may provide coverage, which contain deductibles or self-insured retentions. Such deductible and/or self-insured retention shall be assumed by and be for the account of, and at the sole risk of COMPANY. The amounts of any self-insured retentions shall be noted on the Certificate of Insurance. To the extent COMPANY maintains self-insured retentions in excess of \$100,000, CITY, at its option, may require COMPANY to secure payment of such deductibles or self-insured retentions by a Surety Bond or an irrevocable and unconditional letter of credit.

7.1.7. All policies and certificates shall contain language whereby the insurers will endeavor to provide the CITY with at least thirty (30) days prior written notice of any reduction, cancellation or expiration of same.

7.1.8. Information concerning reduction of coverage on account of revised limits or claims paid under the General Aggregate, or both, shall be furnished by the COMPANY with reasonable promptness in accordance with the COMPANY's information and belief.

7.1.9. In the event that claims in excess of the insured amounts provided herein are filed by reason of any operations under this Agreement, the amount of excess of such claims, or any portion thereof, may be withheld from payment due or to become due the COMPANY until such time as the COMPANY shall furnish such additional security covering such claims as may be determined by the CITY.

## 7.2. Proof of Insurance-Certificates of Insurance.

7.2.1. Prior to commencing work or services under this Agreement, COMPANY shall furnish to CITY Certificates of Insurance issued by COMPANY insurer(s), as evidence that policies providing the required coverages, conditions and limits required by this Agreement are in full force and effect and obtain from the CITY'S Risk Management Division approval of such Certificates.

7.2.2. If a policy does expire during the life of this Agreement, a renewal certificate must be sent to the CITY no later than 10 working days after renewal.

7.2.3. All Certificates of Insurance shall identify the types and limits of coverage set forth in Section 7.3 below. Information required to be on the certificate of Insurance may be typed on the reverse of the Certificate and countersigned by an authorized representative of the insurance company.

7.2.4. CITY reserves the right to request and, to the extent same are in the possession of COMPANY, to receive, within ten (10) working days, certified copies of any or all of the herein required insurance policies and/or endorsements. CITY shall not be obligated, however, to review same or to advise COMPANY of any deficiencies in such policies and endorsements, and such receipt shall not relieve COMPANY from, or be deemed a waiver of CITY's right to insist on, strict fulfillment of COMPANY's obligations under this Agreement.

### 7.3 Required Coverage.

7.3.1. Such insurance shall protect COMPANY from claims set forth below which may arise out of or result from the operations of COMPANY under this Agreement and for which COMPANY may be legally liable, whether such operations be by the COMPANY or by a sub-consultant or subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable. Coverage under the policy will be at least as broad as Insurance Services Office, Inc., policy form CG00011093 or equivalent thereof, including but not limited to severability of interest and waiver of subrogation clauses.

7.3.1.1. Claims for damages because of bodily injury, sickness or disease, or death of any person other than the COMPANY's employees;

7.3.1.2. Claims for damages insured by usual personal injury liability coverage;

7.3.1.3. Claims for damages, because of injury to or destruction of tangible property, including loss of use resulting therefrom;

7.3.1.4. Claims involving contractual liability.

### 7.4. Commercial General Liability - Minimum Coverage Limits.

The Commercial General Liability insurance required herein shall be written for not less than five million dollars (\$5,000,000) limits of liability. Any combination between general liability and excess general liability alone amounting to a minimum of five million dollars (\$5,000,000) per occurrence and an aggregate of \$10,000,000 in coverage will be acceptable. The Commercial General Liability additional insured endorsement shall be as broad as the Insurance Services, Inc.'s (ISO) Additional Insured, Form B, CG 20101001, and shall include coverage for COMPANY's operations and products, and completed operations.

### 7.5. Worker's Compensation and Employer's Liability.

COMPANY shall maintain Worker's Compensation insurance to cover obligations imposed by federal and state statutes having jurisdiction over COMPANY's employees engaged in the performance of the work or services; and, Employer's Liability insurance of not less than one million dollars (\$1,000,000) for each accident, one million dollars (\$1,000,000) disease coverage for each employee, and one million dollars (\$1,000,000) disease policy limit. In case any work is subcontracted, COMPANY will require the sub-company to provide Worker's Compensation and Employer's Liability to at least the same extent as required of COMPANY.

### 7.6. Automobile Liability.

COMPANY shall maintain Commercial/Business Automobile Liability insurance with a combined single limit for bodily injury and property damage of not less than one million dollars (\$1,000,000) each occurrence with respect to any owned, hired, and non-owned vehicles assigned to or used in performance of the Company's work. Coverage shall be at least as broad as coverage code 1, "any auto", (Insurance Service Office, Inc Policy Form CA 0011293, or any replacements thereof). Such insurance shall include coverage for loading and off loading

hazards if hazardous substances, materials or wastes are to be transported and a MCS 90 endorsement shall be included with coverage limits of five million dollars (\$5,000,000) per accident for bodily injury and property damage.

7.7. Indemnity.

7.7.1 To the fullest extent permitted by law, COMPANY shall defend, indemnify and hold harmless the CITY, its agents, representatives, officers, directors, officials and employees, individually and collectively, CITY from and against all losses, claims, damages, suits, actions, payments, judgments, demands, expenses and costs, including, but not limited to, attorney's fees, defense costs, court costs, and the cost of appellate proceedings, or actions of any kind and nature, wages or overtime compensation due employees in rendering service under this Agreement and whether to any person or property, including natural resources and any claim made under the Fair Labor Standards Act or any other federal or state laws, related to, arising out of, or alleged to have resulted from acts, errors, mistakes, omissions, work or services of COMPANY, its employees, agents, or any tier of subcontractors in the performance of this Agreement or of any other person for whose acts, errors, mistakes or omissions COMPANY may be legally liable, and from any claims or amounts arising or recovered under Workers' Compensation laws or any other law, bylaw, or ordinance, order or decree related to any failure on the part of COMPANY, its agents, employees or representatives to fulfill COMPANY's obligations under this Agreement. This indemnity shall not be construed to include losses, claims, damages, suits, or actions of any kind and nature, to the extent arising from or alleged to have resulted from willful misconduct, errors, mistakes or omissions of CITY. The provisions of this paragraph shall survive termination of this Agreement.

The amount and type of insurance coverage requirements set forth herein will in no way be construed as limiting the scope of the indemnity in this paragraph.

7.7.2 COMPANY further agrees to indemnify CITY, its officers and employees from and against all costs, damages, and expenses incurred by CITY, its officers and employees in the defense of any litigation brought by third parties challenging the right of CITY to issue this Agreement to COMPANY under CITY, Arizona or other applicable law. In the event that litigation is commenced, CITY may, but is not required to, tender the defense of the litigation to COMPANY, which shall then defend the litigation; provided, however, that if the CITY tenders the defense to COMPANY, COMPANY shall have the right to retain counsel of its own choice, to settle all or any part of the litigation on terms acceptable to COMPANY (and, where such terms directly obligate or affect CITY, acceptable to CITY), or, at any time of its election, to terminate this Agreement under the termination terms provided herein and withdraw from any litigation.

7.7.3 It is the purpose of this subsection to provide maximum indemnification to CITY under the terms and conditions expressed and, in the event of a dispute, this section shall be construed (to the greatest extent permitted by law) to provide for the indemnification of the CITY by COMPANY.

7.7.4 The provisions of this subsection shall not be dependent or conditioned upon the validity of this Agreement and shall be and remain a binding right and obligation of the CITY and COMPANY even if part of all of this Agreement is declared null and void in a legal or

administrative proceeding. It is the intent of COMPANY and CITY upon the effective date of this Agreement that the provision of this subsection serve as any such declaration and shall be a binding obligation of and inure to the benefit of COMPANY and CITY and their respective successors and assigns, if any.

7.7.5. The amount and type of insurance coverage requirements set forth herein will in no way be construed as limiting the scope of the indemnity in this subsection.

## **SECTION 8. TRANSFERABILITY**

### **8.1. CITY Consent Required.**

Except as otherwise permitted in subsection 3.3 of this Agreement or elsewhere in this Agreement, the rights and privileges granted pursuant to this Agreement shall not be leased, assigned, sublet, sold or otherwise transferred, either in whole or in part, nor shall title thereof, either legal or equitable, or any right, interest or property therein, pass to or vest in any person, except COMPANY, either by act of COMPANY or operation of law, without the express written consent of CITY by resolution or ordinance passed by the City Council which consent shall not be unreasonably withheld or delayed.

8.1.1. COMPANY shall provide CITY a copy of the deed, agreement, mortgage, lease, or other written instrument evidencing such sale, transfer or lease, certified and sworn to as correct by COMPANY. COMPANY shall notify CITY within sixty (60) days of any change in mailing address. Prior to concluding any transaction identified in the preceding sentence, COMPANY shall provide notice to the CITY and such transaction shall be subject to the consent of CITY, which consent shall not be unreasonably withheld, conditioned or delayed.

8.1.2. The approval of any change shall be subject to (i) an Assignment Agreement in a form acceptable to the CITY and signed by Assignee, Assignor and CITY, (ii) CITY requiring an agreement with the lessee, assignee, subtenant, purchaser, or other third party, and/or (iii) an amendment of this Agreement. Any assignment of this Agreement, including any amendments, shall be binding on the Assignee as upon the Assignor of the Agreement as if Assignee had originally executed the Agreement for the full term of the Agreement, and shall include the following:

8.1.2.1. The proposed transferee has read, accepts, and agrees to be bound by the terms of this Agreement; and

8.1.2.2. The proposed transferee assumes all obligations, liabilities and responsibility under the Agreement for the acts and omissions of COMPANY, known and unknown, for all purposes, and agrees that the transfer shall not permit it to take any position or exercise any right which COMPANY could not have exercised; and

8.1.2.3. COMPANY and the proposed transferee shall submit to CITY a description of the nature of the transfer.

8.1.3 Notwithstanding anything contained in this Agreement to the contrary, COMPANY may, on notice to CITY but without the CITY's consent, transfer or assign this

Agreement and its rights hereunder to any entity which shall control, be under the control of, or be under common control with COMPANY, or to any person, firm or corporation into or with which COMPANY may merge or which purchases all or substantially all of the assets or stock of COMPANY and this Agreement shall remain in full force and effect.

## **SECTION 9. NON-EXCLUSIVE RIGHTS**

### 9.1. Non-Exclusive Rights.

This grant is not exclusive and nothing herein contained shall be construed to prevent CITY from granting other like or similar grants or privileges to any other person, firm or corporation, or to deny to or lessen the powers and privileges granted CITY under the Constitution and laws of the State of Arizona.

### 9.2. Priority Rights.

Any and all rights granted to COMPANY under this Agreement shall be exercised at COMPANY's sole cost and expense and shall be subject to the prior and continuing right of CITY to use all Public Property exclusively or concurrently, with any other person or persons, and further shall be subject to all deeds, easements, dedications, conditions, covenants, restrictions, encumbrances, and claims of title which may affect Public Property. Nothing in this Agreement shall be construed to grant, convey, create, or vest a perpetual real property interest in land to COMPANY, including any fee or leasehold interest, easement, or any franchise rights.

## **SECTION 10. TERMINATION OF AGREEMENT FOR CAUSE AND BY MUTUAL AGREEMENT**

### 10.1 Termination for Cause.

10.1.1 This Agreement is subject to termination for violations of the terms of this Agreement or for violation of applicable law pursuant to the provisions of Section 46-2.12 of the Chandler City Code and other applicable city, state or federal law.

10.1.2. The termination of this Agreement for cause is subject to the Appeal Procedure set forth in Sections 1.7, 46-2.12 and 46-2.13 of the Chandler City Code.

### 10.2. Termination By Mutual Agreement.

This Agreement may be canceled prior to its date of expiration by COMPANY by providing the CITY with ninety (90) days written notice and only upon making arrangements satisfactory with the CITY Engineer to remove all COMPANY facilities and equipment from Public Property and Right-of-Way unless the City Engineer agrees in writing to allow COMPANY to abandon part or all of its facilities in place. If the CITY Engineer agrees to allow COMPANY to abandon its facilities in place, the ownership of such System including everything permitted by CITY to be abandoned in place shall transfer to CITY and COMPANY shall cooperate to execute any documents necessary to accomplish such transfer.

10.3. Cancellation for Conflict of Interest.

Pursuant to A.R.S. § 38-511, CITY may cancel this Agreement within three (3) years after Agreement execution, without penalty or further obligation, if any person significantly involved in initiating, negotiating, securing, drafting or creating the Agreement on behalf of CITY is or becomes at any time while the Agreement or an extension of the Agreement is in effect an employee of or a consultant to any other party to this Agreement with respect to the subject matter of the Agreement. The cancellation shall be effective when the COMPANY receives written notice of the cancellation unless the notice specifies a later time.

10.4. Gratuities.

CITY may, by written notice, terminate this Agreement, in whole or in part, if CITY determines that employment or a Gratuity was offered or made by COMPANY or a representative of the COMPANY to any officer or employee of CITY for the purpose of influencing the outcome of the procurement or securing the Agreement, an amendment to the Agreement, or favorable treatment concerning the Agreement, including the making of any determination or decision about Agreement performance. CITY, in addition to any other rights or remedies, shall be entitled to recover exemplary damages in the amount of three times the value of the Gratuity offered by the COMPANY.

**SECTION 11. PROPRIETARY INFORMATION**

Proprietary information disclosed by COMPANY for the purposes hereunder shall mean any document or material clearly identified by COMPANY, as confidential (hereinafter "Proprietary Information"). Such Proprietary Information may include, but not be limited to, any customer lists, financial information, technical information, or other information clearly identified as confidential by COMPANY, and pertaining to services provided to its customers.

11.1. Notice to Company.

Proprietary Information disclosed by COMPANY hereunder to CITY or its constituent departments shall be regarded as proprietary as to third parties. If CITY receives a request to disclose such information, CITY shall notify COMPANY of such request and allow COMPANY a reasonable opportunity, but in no event more than 7 days following notice, to defend its information from disclosure. The foregoing shall not apply to any information which is already in the public domain; however, if public domain information is included with Proprietary Information on the same document, CITY shall only disclose those portions within the public domain without providing COMPANY notice as provided hereinabove.

11.2. Public Records Law.

Notwithstanding any provision in this Agreement, COMPANY acknowledges and understands that CITY is a political subdivision of the State of Arizona and is subject to the disclosure requirements of Arizona's Public Records Laws (A.R.S. § 39-121 et. seq.).

## **SECTION 12. NOTICE**

### 12.1. Written.

All notices which shall or may be given pursuant to this Agreement shall be in writing and transmitted through the U.S. certified or registered mail, postage prepaid, by means of prepaid private delivery systems, or by facsimile or email transmission if a hard copy of the same is followed by delivery through the U.S. mail or by private delivery systems, addressed as follows:

CITY OF CHANDLER:  
Attention: Margaret Coulter  
P.O. Box 4008, Mail Stop 604  
Chandler, Arizona 85244-4008  
Phone: (480) 782-2221  
Fax: (480) 782-2209

COMPANY:  
AboveNet Communications, Inc.  
360 Hamilton Avenue  
White Plains, New York 10601

ATTN: General Counsel  
Phone: (914) 421-6700  
Fax: (914) 421-6793

Notices shall be deemed sufficiently given and served upon the other party if delivered personally or by facsimile or email transmission (provided with respect to facsimile or email that such transmissions are received on a business day during normal business hours), the first business day after deposit if sent by private delivery systems and the third business day after deposit in U.S. Mail.

### 12.2. On-Call Assistance.

12.3. COMPANY shall be available to staff employees of any City department having jurisdiction over COMPANY's activities twenty-four (24) hours a day, seven (7) days a week, regarding problems or complaints resulting from the installation, operation, maintenance, or removal of its System. CITY may contact by telephone the control center operator at the following phone number (888) 676-2778 regarding such problems or complaints.

## **SECTION 13. EXHIBITS**

All Exhibits referred to in this Agreement and any addenda, attachments, and schedules which may, from time to time, be referred to in any duly executed amendment to this Agreement are by such reference incorporated in this Agreement and shall be deemed a part of this Agreement.

**SECTION 14. FAILURE OF CITY TO ENFORCE AGREEMENT NO WAIVER**

COMPANY shall not be excused from complying with any of the terms and conditions of this Agreement by any failure of CITY upon any one or more occasions to insist upon or to seek compliance with any such terms or conditions.

**SECTION 15. FORCE MAJEURE**

With respect to any provision of this Agreement, the violation or non-compliance of which could result in the imposition of a financial penalty, liquidated damages, forfeiture or other sanction upon COMPANY, such violation or non-compliance shall be excused where such violation or non-compliance is the result of acts of God, war, civil disturbance, strike or other labor unrest, or other events, the occurrence of which was not reasonably foreseeable by COMPANY and is beyond its reasonable control.

This Agreement executed this \_\_\_\_\_ day of \_\_\_\_\_, 2007.

CITY OF CHANDLER,  
an Arizona municipal corporation

\_\_\_\_\_  
Mayor

Attest:

\_\_\_\_\_  
City Clerk

ABOVENET COMMUNICATIONS, INC.  
a Delaware corporation

By: *Douglas M. Jundras*  
Title: Douglas M. Jundras  
Senior Vice President

Attest:

*[Signature]*  
Title: Assistant Secretary

APPROVED AS TO FORM:

\_\_\_\_\_  
City Attorney  
*phm*

## **EXHIBIT “A”**

### **Proposed Route**

**[see attached map]**

Please note that where, on the attached map, the route is red, AboveNet proposes to construct for AboveNet only, and where the route is blue, AboveNet's intention is to construct jointly with AGL.

# AboveNet Chandler Route Proposal

