



Memorandum

CAPA COUNCIL MEMO NO. 25

DATE: October 23, 2007

TO: MAYOR AND CITY COUNCIL

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

FROM: MARGARET COULTER, COMMUNICATIONS MANAGER

SUBJECT: Approval of Ordinance 3944 by Emergency, a restatement of the Contract between Sprint Communications and the City of Chandler for Use of Public Property.

Recommendation: Staff recommends approval and adoption of Ordinance 3944, a restatement and amendment of Resolution No. 3502, which establishes an Agreement for the Use of Public Property (Right-of-Way) between Sprint Communications Company L.P. (Sprint) and the City of Chandler.

Background: Sprint, and its predecessor companies, has had a Use Fee Agreement with the City since 1986 for its long haul, Interstate Telecommunications fiber communication system. There is no new construction planned at this time. Council last approved this Agreement in 2002 by Resolution 3502, which expires November 7, 2007. Ordinance 3944 renews this agreement for an additional five years and sets the new annual footage fee rates for this time period by amending Section 4. It also restates the agreement as an Ordinance instead of by a Resolution, which is a more appropriate action. An emergency clause is required due to the immediate expiration date of the current contract.

Financial implications: It is estimated that there will be 58,799 linear feet in place in Public Property. The right of way use fee will amount to \$104,367.04 owed on November 5, 2007, which will be increased by 2.6 percent each year thereafter for the term of the Agreement resulting in fees of \$107,080.58 due on November 5, 2008; \$109,864.67 on November 5, 2009; \$112,721.15 on November 5, 2010 and \$115,651.89 on November 5, 2011.

Proposed Motion: Move to approve and adopt Ordinance 3944 as an emergency measure, as recommended by Staff.

Attachment-Ordinance 3944

ORDINANCE NO. 3944

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF CHANDLER, MARICOPA COUNTY, ARIZONA, APPROVING AN AGREEMENT BETWEEN SPRINT COMMUNICATIONS COMPANY L.P. AND THE CITY OF CHANDLER FOR THE USE OF CITY RIGHT-OF-WAY AND DECLARING AN EMERGENCY

WHEREAS, Sprint Communications Company L.P. 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 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, the City Council has reviewed the terms and conditions of the Agreement with Sprint Communications Company L.P. 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 1. That the City Council of the City of Chandler, Arizona, approves the granting of an Encroachment Permit for the use of public property to Sprint Communications Company L.P.

Section 2. That the Mayor of the City of Chandler is herewith authorized to execute the *Encroachment Permit and Agreement For The Use Of Public Property between Sprint Communications Company L.P. and the City of Chandler*, attached hereto as Exhibit A on behalf of the City, and by approval and execution hereof, does hereby grant a Permit to Sprint Communications Company L.P.

Section 3. Whereas, the immediate operation of the provisions of this Ordinance is necessary for the preservation of the public peace, health, life and property of the City of Chandler, an emergency is hereby declared to exist, to wit: the existing contract with Sprint Communications Company L.P. expires on November 7, 2007, and the Agreement with Sprint Communications Company L.P. authorized pursuant to this Ordinance will take effect immediately upon execution, and this Ordinance shall be in force and effect from and after passage, adoption and approval of the Mayor and City Council of the City of Chandler, and

is hereby exempt from the referendum provisions of the Constitution of the State of Arizona.

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

ATTEST:

CITY CLERK

MAYOR

CERTIFICATION

I HEREBY CERTIFY that the above and foregoing Ordinance No. 3944 was duly passed and adopted by the City Council of the City of Chandler, Arizona, at a regular meeting held on the _____ day of _____, _____, and that the vote was _____ Ayes, _____ Nays.

CITY CLERK

PUBLISHED:

APPROVED AS TO FORM:

CITY ATTORNEY



ORDINANCE 3944
Restatement of Contract and Amendment

**ENCROACHMENT PERMIT AND AGREEMENT FOR THE USE
OF PUBLIC PROPERTY BETWEEN SPRINT COMMUNICATIONS
COMPANY L.P. AND THE CITY OF CHANDLER**

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, an Arizona municipal corporation (hereafter "CITY"), and Sprint Communications Company L.P., a Delaware limited partnership (hereinafter "COMPANY").

WHEREAS, COMPANY is a provider of interstate telecommunications services that uses City right-of-way for fiber optic cable as part of the COMPANY's trunk line between Los Angeles, California and El Paso, Texas; and

WHEREAS, the City of Chandler is authorized to grant, renew, deny, and terminate agreements for operation and maintenance of such telecommunications services within the City boundaries, pursuant to the Charter and City Code of Chandler, and by virtue of federal and state statutes, by the City's police powers, by its authority over its public rights-of-way and highways as defined in Chapter 46 of the Chandler City Code, and by other City powers and authority; and

WHEREAS, COMPANY has applied to CITY for permission to extend its permit and agreement to operate and maintain its communications System in the City; and

WHEREAS, COMPANY has agreed to provide and maintain accurate maps showing the location of all its facilities in the City, and other facilities it will use 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 has agreed to comply with Public Property use requirements that CITY may establish from time to time, and

NOW, THEREFORE, CITY hereby grants COMPANY an extension of its encroachment permit and a use agreement to operate and maintain its system on 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 License shall have the meanings given in Chapter 46 of the Chandler City Code, as amended.

SECTION 2. PERMISSION GRANTED

2.1 Grant.

2.1.1. Subject to the provisions of this Agreement, and to the Chandler City Code, CITY grants to COMPANY an encroachment permit and the nonexclusive, revocable license, right and

privilege to operate and maintain its established Telecommunications System (as defined below) within the City of Chandler and on public right-of-way. Any extension to this System is subject to the encroachment permit requirements of City Code Chapter 46. The construction of a Cable Television System is not authorized by the License.

2.1.2. No component or part of COMPANY'S System shall be installed, constructed, located on, or attached to any property within the CITY by COMPANY until COMPANY has, for those facilities to be located on Public Property obtained additional encroachment permit(s), pursuant to Chapter 46 of the Chandler City Code. Additionally, COMPANY shall comply with all other provisions of the Chandler City Code, including Chapter 35 regarding zoning and other relevant City regulations.

2.1.3. Any privilege claimed under this License by COMPANY in 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 License.

2.2. Description of the System.

COMPANY'S System consists of improvements, personal property and facilities necessary to operate its communications system, including, without limitation fiber optic cable and related equipment. If COMPANY desires to change the components of any of the System in a manner that changes its primary purpose, as opposed to technological advancement, written approval of such change must be obtained by the City Manager who at his or her reasonable discretion can refer the matter to the City Council, provided that such consent by either shall not be unreasonably withheld or delayed.

2.3 Location of the System.

COMPANY'S System is located as shown on the maps attached hereto as Exhibit A and incorporated herein by reference. If COMPANY intends to construct or install any additional facilities or improvements on Public Property, 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. Such Encroachment Permit(s) shall be identified by CITY log number, made a part hereof and referenced as a summary of its System location as Exhibit A and updated yearly.

SECTION 3. SCOPE

3.1 License.

This Agreement satisfies the encroachment permit and licensing requirements of and is in accordance with the provisions of Chapter 46 of the Chandler City Code for COMPANY'S facilities already located in the City of Chandler.

3.2 Compliance with Laws.

3.2.1. COMPANY shall comply with all applicable Laws, including but not limited to, the Chandler City Code, in the exercise and performance of its rights and obligations under this Agreement. There is hereby reserved to CITY the power to amend any section of the City Code so as to require additional or greater standards of construction, operation, maintenance or otherwise pursuant to the City's lawful police powers or as provided in the License.

3.2.2 COMPANY is subject to and shall comply with the general requirements for encroachment permits set forth in Section 46-2 of the Chandler City Code including, but not limited to, those provisions regarding relocation (46-2.6 F), abandonment or removal (46-2.7), and revocation (46-2.11).

3.2.3. 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.

3.2.4. Upon request COMPANY shall provide to CITY copies of any communications and reports submitted by COMPANY to the Federal Communications Commission (FCC) or any other federal or state regulatory commission or agency having jurisdiction in respect to any matters directly affecting enforcement of this License.

3.2.5 Upon request COMPANY shall provide CITY with regular reports, as reasonably needed, to establish COMPANY'S compliance with the various requirements and other provisions of this License.

3.4. Interference and Emergency.

3.4.1. COMPANY agrees that all communications equipment it operates within the CITY shall be governed in strict accordance with the Federal Communications Commission's regulations. In the event CITY incurs interference presumably caused by COMPANY'S operations, then CITY shall immediately notify COMPANY in writing. Within ten (10) days following COMPANY'S receipt of such notice, COMPANY shall conduct engineering field tests to determine if such interference is being caused by communications equipment operated by COMPANY. CITY shall also have the right to conduct engineering field tests using their own engineer to determine if such interference is being caused by communications equipment. CITY's engineer and COMPANY'S engineer shall use their best efforts to determine the cause of said interference, but if the two cannot agree on the cause thereof, then a neutral third party engineer shall be appointed by CITY and COMPANY to determine the cause of the interference. If it is determined that such interference results from any such equipment, then COMPANY shall promptly take such actions to remedy such interference. If it is determined that the interference is from another source, then COMPANY shall cooperate with CITY in identifying the source of the interference.

3.4.2. Such interference, as described in subparagraph 3.4.1 above, shall be deemed a material breach by the party causing the interference. In the event interference occurs, the party

causing the interference shall take all reasonable steps necessary to eliminate such interference, in a reasonable time period.

3.4.3. Subject to the applicable provisions of the Chandler City Charter, City Code and Arizona Revised Statutes, CITY shall have the right, because of a public emergency, to sever, disrupt, dig-up or otherwise destroy facilities of COMPANY if the action is deemed reasonably necessary by the City Manager, Fire Chief, Police Chief, Municipal Utilities Director, Public Works Director, or any Assistant Public Works Director. No such work shall be performed without notice to COMPANY at 1-866-688-6058. 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, 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.

3.5. Reservation to CITY.

There is hereby reserved to CITY every right and power which is required 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 reasonable exercise of such rights or power, heretofore or hereafter enacted or established. Neither the granting of any license nor any provision hereof shall constitute a waiver or bar to the exercise of any governmental right or power of CITY.

SECTION 4. FEES AND CHARGES

A. The right of way use fee will amount to \$104,367.04 owed on November 5, 2007, which will be increased by 2.6 percent each year thereafter for the term of the Agreement resulting in fees of \$107,080.58 due on November 5, 2008; \$109,864.67 on November 5, 2009; \$112,721.15 on November 5, 2010 and \$115,651.89 on November 5, 2011.

B. Invoices will be sent to Sprint Communications Company, Attention: Lease Administration, P.O. Box 12908, Shawnee Mission, KS 66282-2908.

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. This Agreement may be renewed for successive five (5) year terms, upon mutual agreement of the parties.

SECTION 6. ACCEPTANCE AND EFFECTIVE DATE

6.1 Written Acceptance.

COMPANY'S 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'S signature shall be acknowledged by COMPANY before a notary public. This agreement is effective upon execution by both parties.

6.2. Validity of License.

COMPANY shall acknowledge, as a condition of acceptance of this Agreement and License, that COMPANY was represented throughout the negotiations of the Agreement by its own attorneys and had opportunity to consult with its own attorneys about its rights and obligations regarding same. 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 License 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.

SECTION 7. INSURANCE AND INDEMNITY

7.1 Insurance.

COMPANY shall maintain all insurance as required by law. COMPANY shall also maintain Commercial Liability insurance with a limit of not less than \$1,000,000 and shall name the City, its agents, representatives, officers, director, officials and employees as Additional Insured. Before any new construction occurs, the duties and responsibilities of COMPANY regarding indemnity, insurance and liability shall be set forth in any additional encroachment permits in accordance with the standard provisions therein.

7.2 Indemnity.

COMPANY and all other persons using, acting, working or claiming through this Agreement, shall and hereby agree to jointly and severally pay, indemnify, defend, protect, and hold harmless CITY, its council members, officers, agents and employees from and against any and all costs, expenses, claims, demands, losses, damages, liabilities, fines, charges, penalties, administrative and judicial proceedings and orders, judgments, remedial actions of any kind, all costs and cleanup actions of any kind, and all costs and expenses incurred in connection therewith, including without limitation, reasonable attorney's fees and costs of defense arising or alleged to have arisen directly or indirectly, in whole or in part, out of or in connection with COMPANY'S activities undertaken pursuant to this Agreement or any use of Public Property, including without limitation any injury or damages or cause claimed or caused by any employees, contractor, subcontractor, tenants, subtenants, agents or other person upon or using the area where COMPANY'S facilities are located or surrounding areas related to this License and Agreement.

SECTION 8. TRANSFERABILITY

8.1. City Consent Required.

The right, privileges, and license granted hereunder 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 passed by the City Council, which consent shall not be unreasonably withheld or delayed. The new Licensee, as approved by CITY, shall be equally subject to all the obligations and privileges of the original Agreement, including any amendments, which will remain in full effect, as if the new licensee was the original licensee. Prior to any proposed assignment becoming final, COMPANY shall seek the consent of CITY to such proposed assignment.

8.1.1. The approval of any change shall include an Assignment Agreement form to be signed by Assignee, Assignor and CITY. 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.

8.1.2. The 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 License; and

8.1.2.2. The proposed transferee assumes all obligations, liabilities and responsibility under the License 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.

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, which shall be exercised at COMPANY'S sole cost and expense, 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. REVOCATION OF AGREEMENT

10.1. Revocation.

In addition to the provisions of Chapter 46 of the Chandler City Code, this Agreement shall be subject to revocation, subject to notice and hearing as set forth herein, for the following reasons:

A. The COMPANY fails to comply with the terms and conditions of the License or other applicable law.

B. The COMPANY fails to make the payments in the amounts and at the times specified in this License.

- C. The COMPANY ceases to be a telecommunications services provider in the CITY.
- D. The COMPANY fails to provide current, accurate as built plans and maps showing the location of all facilities installed or constructed in the CITY.
- E. False representations made in the application process, or any other information provided to CITY;
- F. Attempt to evade any material provisions of this Agreement or practice any fraud or deceit upon CITY.

10.2. Notice and Hearing Prior to Revocation.

Revocation pursuant to this section may occur only if COMPANY is given written notice of the defect in performance and the defect in performance is not cured within sixty days of the notice, unless CITY finds that the defect in performance is due to intentional misconduct, is a violation of criminal law or is part of a pattern of violations if COMPANY has already had notice and an opportunity to cure. CITY shall hold a hearing before revoking this License if requested by COMPANY.

10.3. Cancellation by COMPANY.

This Agreement may be canceled prior to its date of expiration by COMPANY upon express written notice to CITY.

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 shall 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 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. mail, by means or private delivery systems, or by facsimile

transmission, if a hard copy of the same is followed by delivery through the U.S. mail or by private delivery systems, 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:
SPRINT COMMUNICATIONS COMPANY L.P.
KSOPHT0101-Z2040
6391 Sprint Parkway
Overland Park, KS 66251-2040
Attention: Manager, Right of Way
Phone: (913) 315-4433

With a Copy to:
SPRINT COMMUNICATIONS COMPANY L.P.
KSOPHT0101-Z2020
6391 Sprint Parkway
Overland Park, KS 66251-2020
Attention: Real Estate Attorney

12.2. On-Call Assistance.

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 telephone number 1-800-521-0579 (Richard Linebarger) 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 LICENSE NO WAIVER

COMPANY shall not be excused from complying with any of the terms and conditions of this License 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 License, 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 similar 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:

MAYOR

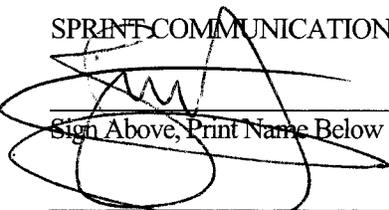
APPROVED AS TO FORM:

City Attorney

ATTEST

City Clerk

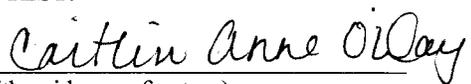
~~SPRINT~~ COMMUNICATIONS COMPANY L.P.



Sign Above, Print Name Below

Manager, Network Real Estate-West

ATTEST:



(with evidence of notary)

