

**CONDUIT EXCHANGE AGREEMENT
BETWEEN ABOVENET COMMUNICATIONS, INC.
AND THE CITY OF TEMPE**

C2011-

THIS CONDUIT EXCHANGE AGREEMENT (hereinafter referred to as the "Agreement") is made and entered into as of this ____ day of February, 2011 (the "Effective Date"), between the CITY OF TEMPE ("CITY"), an Arizona municipal corporation, having a principal place of business at 31 E. 5th St., Tempe, AZ 85281 and ABOVENET COMMUNICATIONS, INC ("ABOVENET"), a Delaware corporation, having a principal place of business at 360 Hamilton Avenue, White Plains, NY 10601. CITY and ABOVENET are collectively referred to as the "Parties" or individually as a "Party."

WHEREAS, CITY and ABOVENET each owns or has rights in a Conduit system within Tempe, Arizona and (i) ABOVENET wishes to obtain from CITY the right to use certain Conduit(s) owned by the CITY in exchange for granting the CITY the right to use certain Conduits owned by ABOVENET; and (ii) CITY also wishes to use certain Conduit(s) owned by ABOVENET in exchange for granting ABOVENET the right to use certain Conduits owned by the CITY and to connect between CITY infrastructure and ABOVENET vaults; and (iii) the particular Conduits within the Parties' system routes to be exchanged and the connection locations are identified in Exhibit A attached hereto and incorporated herein, upon the terms and conditions set forth herein,

NOW, THEREFORE, in consideration of the mutual covenants and agreements set forth in this Agreement, the Parties hereby agree as follows:

ARTICLE 1: DEFINITIONS

The following terms, whether in the singular or in the plural, when used in this Agreement and initially capitalized, shall have the meaning specified:

Acceptance Date: The date the Accepting Party accepts or is deemed to have accepted the Conduits after the acceptance tests, as described in Article 3, if applicable.

Acceptance Notice: A written notice to the Delivering Party evidencing the Accepting Party's acceptance of Conduits and acknowledgement that they have met the Specifications.

Accepting Party: The Party (either CITY or ABOVENET as the context requires) intended to receive delivery of Conduits from the Delivering Party.

Agreement: This Conduit Exchange Agreement.

Authorizations: all legally required governmental or municipal approvals and authorizations; all legally required right-of-way, easement and pole attachment agreements; and all lawful leases, licenses, consents or other agreements necessary for the Delivering Party to construct, install, maintain and repair its Conduits exchanged with the Accepting Party.

Conduits: The Parties' Conduits or inner ducts or inter ducts collectively, or separately, as the context requires, to be exchanged pursuant to this Agreement and identified in Exhibit A.

Delivering Party: The Party (either CITY or ABOVENET as the context requires) delivering Conduits to the other Party.

Effective Date: The date of this Agreement set forth in the opening paragraph.

Expiration Date: The day prior to the fifth (5th) anniversary of the Effective Date, or the end of any term extensions which have been exercised as defined in Article 5 of this Agreement.

Specifications: Those minimum specifications identified on Exhibit A that the Conduits must meet at delivery and exchange to the Accepting Party and during the term of this Agreement.

ARTICLE 2: EXCHANGE OF CONDUITS/CONNECTION AND ACCESS RIGHTS

- 2.1 CITY hereby agrees to exchange and deliver to ABOVENET, and ABOVENET hereby agrees to exchange and deliver to CITY, the Conduits as identified on Exhibit A in accordance with the terms and conditions of this Agreement.
- 2.2 ABOVENET agrees to allow CITY the right to install connection conduits in the locations also identified on Exhibit A.
- 2.3 Each Party will have the right to access all necessary vaults, manholes, and handholes for the purposes of installation, maintenance, removal or repair of the facilities in the Conduits that have been exchanged, subject to the provisions of Article 4 below.

ARTICLE 3: ACCEPTANCE AND DELIVERY

- 3.1 The Accepting Party may elect to conduct and complete acceptance tests on the Conduits delivered to such party, within ten (10) days after such delivery. If the acceptance tests show that the delivered Conduits failed to meet the Specifications set forth in Exhibit "A" (#4) then the Delivering Party shall, upon receiving a notice of deficiencies, be responsible for the timely completion of any work or installation required in order to cure such deficiencies and place the Accepting Party Conduit into operation. Subject to the foregoing, both Parties acknowledge that the Conduits are being delivered 'as-is' and there are no expectations that, during the exchange of the Conduits, neither Party is expected to upgrade the particular Conduit or inner ducts being utilized by the other Party, but for required maintenance as set forth in Article 7.
- 3.2 If the acceptance tests show that the Conduit meets the Specifications, then within ten (10) business days after the Accepting Party completes such acceptance tests, the Accepting Party shall execute an Acceptance Notice for the Conduit and distribute it to the Delivering Party. Failure to deliver an Acceptance Notice within such ten (10) business day time period shall constitute acceptance of the Conduits as of such tenth (10th) business day from delivery date.

- 3.3 As of the Acceptance Date, the Delivering Party shall be deemed to have delivered, and the Accepting Party shall be deemed to have accepted, the Conduit. Thereafter the Delivering Party shall have no further obligations or liability with respect to such Conduit, except as expressly provided herein.

ARTICLE 4: SCHEDULE, ACCESS AND ESCORT

4.1 Each Party shall use commercially reasonable efforts to exchange the Conduits no later than ten (10) business days after the Effective Date of this Agreement. If for any reason, including without limitation condemnation or Force Majeure events (defined in Article 14), either Party fails to exchange the Conduit and have the same accepted by the other Party then the Party who has not received the Conduit may terminate this Agreement and all of the rights and obligations of both Parties effective upon notice to the non-performing Party given within ten (10) business days after such date.

4.2 Delivering Party shall allow Accepting Party to gain access to the Conduits at the locations identified in Exhibits A by installing handholes and/or manholes as a means of accessing the Conduits. All costs associated with Accepting Party's access to the Conduit will be borne by the Accepting Party. It is the responsibility of Accepting Party to obtain any related governmental or other authority necessary to access and use the Conduit. Except as expressly provided herein, Accepting Party shall be responsible for obtaining any necessary optical amplifier, regeneration, junction and terminal sites along the Conduit route.

4.3 If Accepting Party's activities will be performed within four (4) feet of Delivering Party's Conduit system, Accepting Party must notify Delivering Party to schedule the activity at a mutually agreed time allowing for Delivering Party to provide an escort, at Delivering Party's discretion and at Accepting Party's cost. Under this section 4.3, the parties will provide each other escort services at no cost.

4.4 Escort services will be requested through contacting the other Party's network operations center at the coordinates referenced in Section 7.5 hereof. Accepting Party must obtain Delivering Party's prior approval of any contractor that will be installing fiber in the Conduit or that will be installing Accepting Party's access manholes or handholes to the Conduit. Delivering Party will permit Accepting Party reasonable access to Delivering Party's manholes and handholes to the extent necessary to install Accepting Party's fiber in the Conduits.

ARTICLE 5: TERM

- 5.1 The term of this Agreement shall be five (5) years from the Effective Date of this Agreement.
- 5.2 This Agreement shall automatically renew for up to two (2) successive five (5) year terms unless terminated by either Party by giving written notice no later than one hundred and eighty (180) days prior to expiration of the then-current term, in which event this Agreement shall expire at the end of such term.

- 5.3 Notwithstanding the foregoing provisions to the contrary, in the event that ABOVE NET's license agreement with CITY expires or is terminated, effective upon the date of such expiration or termination, this Agreement shall terminate, and neither Accepting Party shall thereafter have a continuing right to occupy or use the Conduit provided by the Delivering Party, unless the parties have agreed otherwise in writing.

ARTICLE 6: TAXES

- 6.1 Accepting Party and Delivering Party acknowledge and agree that it is their mutual objective and intent to minimize, to the extent feasible and legal, all impositions and taxes and that they will cooperate with each other and coordinate their mutual efforts to achieve such objective in accordance with the provisions of this Section 6.
- 6.2 Delivering Party will be responsible for and will timely pay any and all taxes, fees or surcharges ("Impositions") with respect to any construction or operation of the Delivering Party's Conduits that are imposed or assessed prior to the beginning of the Term of this Agreement. The Delivering Party will have the right to challenge any such Impositions, provided that the challenge of such Impositions does not increase Accepting Party's costs or materially, adversely affect the rights to be delivered to Accepting Party hereunder.
- 6.3 Except for taxes based on Delivering Party's net income, Accepting Party will be responsible for payment of all applicable taxes that arise in any jurisdiction as a result of the transactions contemplated herein, including without limitation all sales, use, value added, consumption, gross receipts (other than in lieu of net income tax), excise, stamp or transfer taxes applicable to the Conduits that it receives during the Term (collectively, "Transaction Taxes"), however designated. Delivering Party represents to Accepting Party that it has paid all applicable sales or use tax with respect to the construction of the Conduits consistent with the principle that such Conduits were incorporated in real property at the time they were installed in the Delivering Party Conduit system, and Delivering Party further undertakes to provide Accepting Party with evidence of such payment of tax satisfactory to a tax auditor of Accepting Party if requested in the course of any tax audit of Accepting Party. If any taxing authority asserts that Delivering Party should have collected any Transaction Tax from Accepting Party which Delivering Party did not collect, Accepting Party hereby agrees to indemnify Delivering Party for such Transaction Taxes and hold Delivering Party harmless on an after-tax basis from and against any taxes, interest or penalties levied or asserted in connection therewith, and to bear a proportionate share of Delivering Party's contest expenses to the extent such expenses have been pre-approved by the Accepting Party; provided, however, Accepting Party shall not be responsible for any Transaction Taxes, interest, penalties or contest expenses that result from the inaccuracy of Delivering Party's representation, or the failure of Delivering Party to provide evidence of satisfactory payment of such taxes, as set forth in the preceding sentence.
- 6.4 Delivering Party shall be responsible for filing returns and paying all *ad valorem* property taxes imposed on, related to or assessed against the Conduits.
- 6.5 If either Party is audited by a taxing authority or other governmental authority, the other Party agrees to reasonably cooperate with the Party being audited in order to respond to any audit inquiries in a proper and timely manner so that the audit and/or any resulting controversy may be resolved expeditiously.

ARTICLE 7: REPAIR, MAINTENANCE AND CONTINUITY

- 7.1 The Delivering Party shall use commercially reasonable efforts to cause the Conduit exchanged with the Accepting Party to continue to meet the Specifications during the term of this Agreement (including extensions). The Delivering Party shall perform all routine and emergency maintenance and repairs, all “one-call” responses and all cable locate services for the Conduit.
- 7.2 Routine Maintenance. Routine Maintenance and repair of the Delivering Party Conduit system (including the Conduit) shall be performed by or under the direction of the Delivering Party. Routine Maintenance will include a “Call Before You Dig” program for all related cable and Conduit locates and the Delivering Party shall perform other reasonable routine maintenance in accordance with its written procedures and common industry practices. Any maintenance or repair function performed by the Delivering Party on its Conduit which will or could affect service provided in the Conduit will be coordinated and scheduled with the Accepting Party’s surveillance system operations as practical and feasible for the Delivering Party.
- 7.3 Emergency Maintenance. Within two (2) hours after a Delivering Party receives a trouble report of imminent or actual failure, interruption or impairment of its Conduit exchanged with the Accepting Party, the Delivering Party shall commence all commercially reasonable efforts to repair such failure, interruption or impairment to cause the Conduits to meet the Specifications. At a minimum, such commercially reasonable efforts shall include dispatching at least one service technician (or more if commercially reasonably prudent to do so) to the source of the reported trouble.
- A. If the Delivering Party fails to (i) so commence efforts within two (2) hours, or (ii) restore the Conduits to the Specifications within six (6) hours after the trouble report, then the Accepting Party may, but shall not be obligated to, effect reasonable repair or replacement to restore the Conduit to the Specifications. The Delivering Party shall reimburse the Accepting Party for all reasonable costs and expenses so incurred within forty-five (45) days after receipt of an invoice.
 - B. Notices of interruption arising from relocation, condemnations and Force Majeure events (defined in Article 14) shall be treated as trouble reports for purposes of this Article 7.
- 7.4 The Accepting Party shall allow the Delivering Party, following appropriate notification to Accepting Party’s Network Operations Center, access to the Accepting Party’s handholes and manholes to the extent reasonably necessary for the maintenance and restoration services required hereunder; provided however, that the Delivering Party in all cases shall use commercially reasonable efforts to minimize disruption of the Accepting Party’s business operation and shall adhere to the Accepting Party’s security procedures.
- 7.5 ABOVENET agrees to operate and maintain a maintenance control center, staffed twenty-four (24) hours a day, seven (7) days a week, by trained and qualified personnel. CITY’s NOC is available from 7 a.m. to 4 p.m. M-F and shall provide an after hours

emergency response call back generally within 20 minutes. The Parties shall maintain a number to contact personnel with their respective contractors for maintenance and repair activities. The Parties shall dispatch maintenance and repair personnel along the Conduit system to handle and repair problems detected through the Parties remote surveillance equipment, or otherwise.

- A. ABOVENET shall coordinate all maintenance and repair activities with CITY as follows: (in order of preference)

CITY NOC: 480-350-2900

- B. CITY shall coordinate all maintenance and repair activities with ABOVENET as follows:

ABOVENET NOC: 888-636-2778

7.6 All of the Delivering Party's obligations under this Article shall be at the Delivering Party's sole cost expense, except for exclusions pursuant to Article 11.

ARTICLE 8: REPRESENTATIONS REGARDING AUTHORIZATIONS

8.1 CITY and ABOVENET each hereby represents, warrants and covenants to the other that:

- A. The Delivering Party has obtained, and will use commercially reasonable efforts to maintain throughout the Agreement's term (including extensions) all Authorizations; and
- B. The Delivering Party has no actual knowledge of any defect in the normal operating condition of the Conduit that would have a material and adverse effect on the ability of the Accepting Party to utilize the Conduit to provide communications services to its customers and/or users; and
- C. It has the full right and authority under the Authorizations to enter into this Agreement and perform its obligations hereunder and the same will not violate the Authorizations (with or without the giving of notice or the lapse of time or both) or require any consent, approval, filing or notice under the Authorizations or under any provision of any law, rule or regulation, court order, judgment or decree applicable to the Delivering Party; and
- D. It will exercise its rights and perform its obligations hereunder only in accordance with all applicable laws, rules and regulations, as well as industry standards. The standard of care afforded the Conduit will be that required for each Party to maintain the integrity of its network.

- 8.2 Neither Party shall cause or permit any part of the Conduit to become subject to any mechanic's, material man's, or vendor's lien, or any similar lien. If a Party breaches its obligations under this Section, it shall immediately notify the other Party in writing, shall promptly cause such lien to be bonded over, discharged and released of record without cost to the other Party, and shall indemnify the other Party against all costs and expenses (including reasonable attorneys' fees and court costs at trial and on appeal) incurred in discharging and releasing such lien.

ARTICLE 9: RELOCATION OF THE FACILITIES

- 9.1 Each Accepting Party recognizes that, from time to time, the Delivering Party may elect or be required to relocate the Conduit including any manholes and handholes owned by the Delivering Party, or a portion thereof. In any such event, the Delivering Party shall be solely responsible for all costs incurred in relocating the Conduits and shall use commercially reasonable efforts to do so in a manner that will minimize the duration of any interruption in the Accepting Party's use of its Conduit, such interruption shall be handled in accordance with Article 7, Repair, Maintenance and Continuity. Provided however, that unless the relocation was ordered by a governmental authority, the Accepting Party will be responsible for the cost of relocating its own facilities, including the fiber optic cable and splicing within the Conduits and any Accepting Party owned manholes and handholes.
- 9.2 The Delivering Party shall give the Accepting Party at least six (6) months' prior written notice of any relocation or of any government proceeding that might result in a relocation, or such lesser amount of notice as the Delivering Party receives from such governmental authority or is otherwise required by the relevant circumstances, and the Delivering Party shall keep the Accepting Party informed about any such proceedings.

ARTICLE 10: CONDEMNATION

- 10.1 If at any time during this Agreement, all or any significant portion of the Conduit shall be taken for any public or quasi public purpose by any lawful power or authority by exercise of the right of condemnation or eminent domain, the parties will consult in good faith to determine whether and to what extent the Conduit may feasibly be relocated or rebuilt.
- 10.2 Each Party shall notify the other Party immediately upon learning of any taking or threatened taking affecting the Conduit. Delivering Party agrees not to sell the Conduit(s) to any acquiring agency, authority or other party in lieu of condemnation without prior notice to the Accepting Party.

ARTICLE 11: INDEMNIFICATION AND EXCLUSION OF CERTAIN DAMAGES

- 11.1 Neither Party shall be liable to the other Party for any indirect, consequential, special, incidental, reliance, or punitive damages of any kind or nature whatsoever arising out of this Agreement (including but not limited to any lost profits, lost revenues, lost savings, or harm to business), regardless of the foreseeability thereof. For purposes of this Agreement, a Party's out-of-pocket costs for damages of the kinds specified in the preceding sentence which are recovered from such Party by a third party shall be deemed to be indirect damages

to such Party and each Party hereby releases the other Party, its subsidiaries and affiliates, and their respective officers, directors, managers, employees, and agents, from damages from such claim(s).

- 11.2 ABOVENET acknowledges it has sole liability for any of its Conduits installed in the public right-of-way and for the activities ABOVENET performs within the public right-of-way. To the fullest extent permitted by law, ABOVENET shall defend, indemnify and hold harmless the CITY, its agents, representatives, officers, directors, officials and employees, individually and collectively, from and against all losses, claims, damages, suits, actions, payments, judgments, demands, expenses and costs, including, but not limited to, attorney's fees arising out of or resulting from the acts, errors, mistakes, omissions of ABOVENET, its employees, agents, or any tier of ABOVENET's subcontractors whether resolution proceeds to judgment or not, except to the extent of the gross negligence or willful misconduct of CITY, its agents, representatives, officers, directors, officials and/or employees.
- 11.3 ABOVENET 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 enter into this Agreement to ABOVENET under City or other applicable law. In the event that such litigation is commenced, CITY may, but is not required to, tender the defense of the litigation to ABOVENET, which shall then notify the CITY of ABOVENET'S acceptance of the tender and shall then defend the litigation. If the CITY tenders the defense to ABOVENET, ABOVENET shall have the right to retain counsel of its own choice, to settle all or any part of the litigation on terms acceptable to ABOVENET (and, where such terms directly obligate or affect CITY, acceptable to CITY, in CITY's reasonable judgment). ABOVENET agrees to keep the Tempe City Attorney's Office informed of the status and progress of all litigation involving the CITY that has been tendered to ABOVENET or its insurance carrier.
- 11.4 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 ABOVENET.
- 11.5 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.

ARTICLE 12: INSURANCE

12.1. General Requirements. ABOVENET, 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 A-VII, or better and legally authorized to do business in the State of Arizona.

12.1.1. All insurance required herein shall be maintained in full force and effect until any work or services required to be performed under the terms of this Agreement are 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.

12.1.2. 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, the CITY of Tempe, its agents, representatives, officers, directors, officials and employees as Additional Insureds.

12.1.3. ABOVENET's 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 affected shall protect both parties and be primary coverage for any and all losses covered by the described insurance.

12.1.4. 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 ABOVENET's acts, errors, mistakes, omissions, work or service.

12.1.5. The ABOVENET 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 ABOVENET who shall be solely responsible for the deductible and/or self-insured retention. The amounts of any self-insured retentions shall be noted on the Certificate of Insurance. . Self-insured retentions of up to \$ 1,000,000 (One Million Dollars) shall be accepted.

12.1.6. All policies and certificates shall contain an endorsement providing that the coverage afforded under such policies shall not be reduced, canceled or allowed to expire until at least thirty (30) days prior written notice has been given to CITY.

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

12.1.8. ABOVENET, at its option, shall include all subcontractors as insureds under its policies or shall furnish separate certificates and endorsements for each subcontractor. All coverages for subcontractors shall be subject to all the requirements stated herein for ABOVENET.

12.1.9. CITY reserves the right to periodically review said insurance limits to ensure coverage based on market and risk requirements throughout the effective term of this Agreement.

12.1.10 All amounts of coverage required under this Agreement may be provided by a combination of primary and excess (umbrella) policies of insurance.

12.2. Proof of Insurance-Certificates of Insurance.

12.2.1. Prior to or upon execution of this Agreement, ABOVENET shall furnish to CITY Certificates of Insurance issued by ABOVENET's 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. Such certificate(s) shall include the endorsement listing the CITY as an Additional Insured pursuant to Section 12.1.3 and shall be attached as Exhibit B to this Agreement.

12.2.2. If a policy does expire during the life of this Agreement, a renewal certificate must be sent to the CITY as soon as practicable upon renewal of the policy, but no later than 30 days after such renewal.

12.2.3. All Certificates of Insurance shall identify the policies in effect on behalf of ABOVENET, their policy period(s), and limits of liability. Coverage shown on the Certificate of Insurance must coincide with the requirements in the text of the Agreement documents. 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 carrier or agent. Copies of the initial Certificate of Insurance and any and all subsequent renewals that are required under this Agreement shall be sent to:

City of Tempe
Attn: Risk Manager
20 E. 6th St., 2nd Floor
Tempe, AZ 85281

with copies to:
City of Tempe
Attn: City Engineer
31 E. 5th St.
Tempe, AZ 85281

City of Tempe
Attn: ITD Telecom Policy Administrator
120 E. 5th St.
Tempe, AZ 85281

12.2.4. CITY reserves the right to request and to receive, within ten (10) business 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 ABOVENET of any deficiencies in such policies and endorsements, and such receipt shall not relieve ABOVENET from, or be deemed a waiver of CITY's right to insist on, strict fulfillment of ABOVENET's obligations under this Agreement.

12.3 Required Coverage.

12.3.1. Such insurance shall protect ABOVENET from claims set forth below that may arise out of or result from the operations of ABOVENET under this Agreement and for which ABOVENET may be legally liable, whether such operations be by ABOVENET or by a consultant or subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts 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.

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

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

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

12.3.5. Claims involving contractual liability insurance applicable to the ABOVENET's obligations under the Indemnification Agreement.

12.4. Commercial General Liability - Minimum Coverage Limits.

The Commercial General Liability insurance required herein shall be written for not less than \$5,000,000 limits of liability. Any combination between general liability and excess general liability alone amounting to a minimum of \$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 ABOVENET's operations and products, and completed operations.

12.5. Worker's Compensation and Employer's Liability.

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

12.6. Automobile Liability.

If ABOVENET owns and/or operates vehicles in Arizona, ABOVENET shall maintain Commercial/Business Automobile Liability insurance with a combined single limit for bodily injury and property damage of not less than \$5 million each occurrence with respect to any owned, hired, and non-owned vehicles assigned to or used in performance of the ABOVENET'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 \$5 million per accident for bodily injury and property damage.

ARTICLE 13: DEFAULT AND TERMINATION

13.1 An Event of Default for a Party occurs when such Party fails to observe and perform obligations, covenant, or other condition as set forth in this Agreement and such failure continues for a period of thirty (30) days after receipt of written notice from the non-defaulting Party (or if such failure cannot be cured within such thirty (30) day period, cure has not been commenced and diligently pursued thereafter to completion within ninety (90) days.

13.2 Upon an Event of Default, the non-defaulting Party may cancel the defaulting Party's right to use the exchanged Conduit effective upon notice thereof to the defaulting Party. The non-defaulting Party shall have the right to continue to use the exchanged Conduits of the defaulting Party without any additional payment for the balance of the initial term or any then effective renewal term, but without further renewal rights.

ARTICLE 14: FORCE MAJEURE

In no event shall a Party have any claim or right against the other Party for any failure of performance due to causes beyond its control, including but not limited to: acts of God, fire, explosion, vandalism, terrorism, flood or other similar occurrences; any future changes to laws, orders, regulations, directions, actions or requests of any instrumentality of any federal, state, or local government, or of any civil or military authority; national emergencies; insurrections; riots, or wars (collectively, "Force Majeure events"). A Force Majeure event will excuse performance only for so long as the Force Majeure event prevents a Party's performance and each Party must use every commercially reasonable means to mitigate the impact of a Force Majeure event.

ARTICLE 15: ASSIGNMENT

15.1 Except as set forth below, this Agreement may not be assigned, nor may a Party lease, license or otherwise transfer any of the Conduits to a third party (whether such

transaction is denominated as a grant of an "indefeasible right of use" or otherwise), without the prior written consent of the other party, which consent may not be unreasonably withheld; provided that either Party may, in connection with an internal restructuring, assign the Agreement to another party controlling, controlled by or under common control with the Party, or to the purchaser of all or substantially all of the assets of the Party or to a successor by merger; however, the assignor must agree in writing to remain liable for the assignee's performance hereunder. Any subsequent purchaser or acquirer must also agree in writing to the other Party to assume the obligations of this Agreement.

15.2 A sale of dark or lit fiber optic communications service or capacity on the Conduit shall not be considered an assignment for purposes of this Article.

ARTICLE 16: NOTICES

Notices under this Agreement shall be in writing and delivered by certified mail, return receipt requested, to the persons whose names and business addresses appear below and such notice shall be effective on the date of receipt or refusal thereof by the receiving Party:

CITY: CITY OF TEMPE
City Engineer
31 E. 5th St.
Tempe, AZ 85281

With copies to: City of Tempe
ITD: Telecom Policy Administrator
120 E. 5th St.
Tempe, AZ 85281

Tempe City Attorney's Office
21 E. 6th St., Suite # 201
Tempe, AZ 85281

ABOVENET:
AboveNet Communications, Inc.
360 Hamilton Avenue
White Plains, NY 10601
Attn: Senior Vice President and General Counsel

Any Party may change its address and point of contact by notifying the other Party in accordance with this Article.

ARTICLE 17: USE OF THE CONDUIT

CITY and ABOVENET each shall have exclusive control over its provisioning of telecommunications services and other services provided in the Conduit, and may use same for any lawful purposes.

Exhibit A: Conduit Exchanged and Specifications

Exhibit B: Certificate of Insurance

EXHIBIT A

CONDUIT EXCHANGED AND SPECIFICATIONS

1. ABOVENET Conduit to be provided to the CITY:

- One 1 ¼” conduit from the City of Tempe owned fiber cabinet located on the Southeast corner of Washington Street/Lake View Drive running east on Curry to the ABOVENET vault located on the southwest corner of Curry Road/North College Avenue. Approx length of .771 miles
- One 1 1/2” conduit from the City of Tempe vault located on the east side of Mill Avenue (201 South Mill) across Mill Avenue to the ABOVENET manhole on South side of 2nd Street, West of Mill Avenue. Approx length of 341 feet.

2. CITY Conduit to be provided to ABOVENET :

One 1 ¼” interduct located inside of an existing 4” conduit from the pull box located on the east side of Mill Avenue (201 South Mill) to the City of Tempe owned fiber cabinet located on the southeast corner of Washington Street/Lake View Drive. Approx length of .653 miles

3. ABOVENET further grants to the CITY the right to install a 1 1/2” connection conduit between the CITY’S conduit infrastructure and ABOVENET vaults located at 2nd St./Mill Avenue and Curry Road/College Avenue.

Specifications:

4. All Conduits shall be in “ready to occupy” condition. The ducts shall test to be continuous and in good order. Fiber tags shall be placed at every handhole and manhole location, indicating the owner of any cable within the Conduit. No splice enclosures shall be placed by either Party within any of the other party’s handholes or manholes. One Party’s innerduct and fiber shall pass directly through the other Party’s structure, minimizing clutter and waste of space. Each party shall have 30 to-60 feet of slack loop in the handhold or manholes.



CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY)
03/30/2010

Page 1 of 2

PRODUCER 212-915-8888 Willis of New York, Inc. One World Financial Ct. Two Hundred Liberty St. New York, NY 10281	THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.
INSURED Abovenet Communications, Inc. 360 Hamilton Avenue 7th Floor White Plains, NY 10601	INSURERS AFFORDING COVERAGE INSURER A: Travelers Indemnity Company of Connecticut 25682-001 INSURER B: The Travelers Indemnity Company of America 25666-001 INSURER C: National Union Fire Insurance Company of 19445-005 INSURER D: Charter Oak Fire Insurance Company 25615-001 INSURER E:

COVERAGES

THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. AGGREGATE LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSR ADD'L LTR	INSRD	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YYYY)	POLICY EXPIRATION DATE (MM/DD/YYYY)	LIMITS
A	X	GENERAL LIABILITY <input checked="" type="checkbox"/> COMMERCIAL GENERAL LIABILITY CLAIMS MADE <input checked="" type="checkbox"/> OCCUR GEN'L AGGREGATE LIMIT APPLIES PER: <input checked="" type="checkbox"/> POLICY <input type="checkbox"/> PRO-JECT <input type="checkbox"/> LOC.	6303298N692	3/31/2010	3/31/2011	EACH OCCURRENCE \$ 1,000,000 DAMAGE TO RENTED PREMISES (Ea occurrence) \$ 1,000,000 MED EXP (Any one person) \$ 10,000 PERSONAL & ADV INJURY \$ 1,000,000 GENERAL AGGREGATE \$ 2,000,000 PRODUCTS - COMP/OP AGG \$ 2,000,000
B	X	AUTOMOBILE LIABILITY <input checked="" type="checkbox"/> ANY AUTO ALL OWNED AUTOS SCHEDULED AUTOS HIRED AUTOS NON-OWNED AUTOS	AOS BA3298N692 MA BA7919P647	3/31/2010 3/31/2010	3/31/2011 3/31/2011	COMBINED SINGLE LIMIT (Ea accident) \$ 1,000,000 BODILY INJURY (Per person) \$ BODILY INJURY (Per accident) \$ PROPERTY DAMAGE (Per accident) \$ AUTO ONLY - EA ACCIDENT \$ OTHER THAN AUTO ONLY: EA ACC \$ AGG \$
C	X	EXCESS / UMBRELLA LIABILITY <input checked="" type="checkbox"/> OCCUR <input type="checkbox"/> CLAIMS MADE DEDUCTIBLE <input checked="" type="checkbox"/> RETENTION \$ 10,000	16019050	3/31/2010	3/31/2011	EACH OCCURRENCE \$ 5,000,000 AGGREGATE \$ 5,000,000 \$ \$ \$
D		WORKERS COMPENSATION AND EMPLOYERS' LIABILITY ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? (Mandatory in NH) <input type="checkbox"/> If yes, describe under SPECIAL PROVISIONS below	AOS HOUB3298N69210	3/31/2010	3/31/2011	<input checked="" type="checkbox"/> WC STATU-TORY LIMITS <input type="checkbox"/> OTH-ER E.L. EACH ACCIDENT \$ 1,000,000 E.L. DISEASE - EA EMPLOYEE \$ 1,000,000 E.L. DISEASE - POLICY LIMIT \$ 1,000,000
		OTHER				

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES / EXCLUSIONS ADDED BY ENDORSEMENT / SPECIAL PROVISIONS

City Tempe, its officials, employees, and volunteers, and is recognized as Additional Insureds with respects all liabilities (except Workers' Comp./Employers' Liability) arising from the Named Insured's operations and/or work performed by the Named Insured, ATIMA. As respects the policy, it is understood and agreed that the insurance company waives its right of subrogation against the certificate holder which may arise from a payment of a claim under the policy.

CERTIFICATE HOLDER

City of Tempe
Attn: Telecommunications Policy Administrator
120 E. 5th St.
Tempe, AZ 85281

CANCELLATION

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL ENDEAVOR TO MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO DO SO SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER, ITS AGENTS OR REPRESENTATIVES.

AUTHORIZED REPRESENTATIVE

IMPORTANT

If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

DISCLAIMER

This Certificate of Insurance does not constitute a contract between the issuing insurer(s), authorized representative or producer, and the certificate holder, nor does it affirmatively or negatively amend, extend or alter the coverage afforded by the policies listed thereon.