

REVISED

**Tempe City Council
Formal Council Meeting
Harry E. Mitchell Government Center
Tempe City Hall - City Council Chambers
31 East Fifth Street, Tempe, Arizona
Thursday, April 04, 2013
7:30 PM**

Members of the City Council may attend either in person or by telephone conference call.

1. **INVOCATION - Councilmember Navarro**
2. **PLEDGE OF ALLEGIANCE**
3. **MINUTES - Councilmember Arredondo-Savage**
 - A. Approval of Council Meeting and Council Committee Meeting Minutes
 1. Formal City Council Meeting - March 21, 2013
 2. Executive Session - March 21, 2013
 - B. Acceptance of Committee, Board & Commission Meeting Minutes
 1. Development Review Commission - February 26, 2013
 2. Development Review Commission Study Session - February 26, 2013
 3. General Plan 2040 Community Working Group - February 27, 2013
 4. Hearing Officer - March 5, 2013
 5. Mayor's Youth Advisory Commission - March 5, 2013
4. **REPORTS AND ANNOUNCEMENTS**
 - A. Mayor's Announcements
 1. **Recognition by North Tempe Neighborhood Association to Don Hawkes and the Public Works Department**
 - B. Manager's Announcements
5. **AGENDA**

All items listed on the agenda will be considered as a group and will be enacted with one motion by the City Council unless an item is removed for separate consideration. Members of the public may remove public hearing items for separate consideration. Public hearing items are designated by an asterisk (*). Councilmembers may remove any item for separate consideration.

Agenda items scheduled for Introduction/First Public Hearing will be heard, but will not be voted upon at this meeting. Items scheduled for Second Public Hearing/Final Adoption will be voted upon tonight.

'q-j' indicates quasi-judicial items. The City Council sits as a quasi-judicial body when hearing variances. In this situation, the City Council must conduct itself as a court, not as a legislative body. Pre-meeting contact with the City Council on quasi-judicial matters is prohibited. Any materials or conversations concerning the item shall only be presented to the City Council at the scheduled public hearing.

Legal Advice: If necessary, the City Council may vote to adjourn to executive session for the purpose of obtaining legal advice from the Council's attorney on any matter listed on the agenda pursuant to A.R.S §38-431.03(A)(3).

A. Miscellaneous Items

- *A1. Hold a public hearing to recommend the approval of a Series 12 restaurant liquor license for Veggie Boy, LLC, dba Green: New American Vegetarian, 2240 North Scottsdale Road, #7+8.

Fiscal Impact: N/A

- *A2. Hold a public hearing to recommend the approval of a Series 06 bar liquor license for Moirbia LLC, dba Robbie Fox's Public House, 640 South Mill Avenue, #B2-105.

Fiscal Impact: N/A

- *A3. Hold a public hearing to recommend the approval of a Series 06 bar liquor license for Moonshine Group, LLC, dba Moonshine Whiskey Bar, 410 South Mill Avenue, #D101.

Fiscal Impact: N/A

- *A4. Hold a public hearing to recommend the approval of an acquisition of control and agent change of a Series 09 liquor store liquor license for Smart & Final Stores, LLC, dba Smart & Final #480, 1737 East Broadway Road #104.

Fiscal Impact: N/A

- A5. Authorize the Mayor to execute a Wired Telecommunications License and Right-of-Way Use Agreement between the City of Tempe and MCI Communications Services Inc. dba Verizon Business Services.

Fiscal Impact: Facilities owned by MCI/Verizon that carry interstate telecommunications are subject to a \$2.01 per linear foot fee, which is adjusted yearly based on the consumer price index. For this license and right-of-way use agreement, MCI/Verizon will pay an initial fee of \$ 1,575.84, which is based upon 784 linear feet. The proceeds will be deposited into the General Fund. MCI/Verizon will also pay any applicable permit fees, damage fees, and reasonable costs associated with any construction, maintenance and/or operation of its facilities.

- A6. Authorize the Mayor to execute an In-Kind Dark Fiber Agreement between Zayo Group LLC and the City of Tempe.

Fiscal Impact: N/A

- A7. Authorize the Mayor to execute a Wired Telecommunications License and Right-of-Way Use Agreement between the City of Tempe and Zayo Group, LLC.

Fiscal Impact: Zayo will pay transaction privilege tax on its intrastate telecommunications gross revenue and as fair and reasonable compensation for occupation and use of the right-of-way for dark fiber leasing, Zayo will provide an in-kind payment of dark fiber to the City on the terms and conditions outlined in a separate agreement. For the term from September 20, 2012, to March 21, 2013, Zayo will pay \$ 41,315.50 in arrearages.

B. Award of Bids/Contracts

- B1. Approve the renewal of a one-year contract with Express Scripts, formerly known as Medco Health Solutions, to provide a pharmacy network for eligible City employees and dependents overseen by the Human Resources Department.

Fiscal Impact: Total cost of this contract will not exceed \$3,000,000 during the one-year renewal period. Sufficient funds will be appropriated in the Health Fund – cost centers 4167 and 4169 - for the anticipated expenditures in the upcoming fiscal year.

- B2. Approve the one-year renewal of a contract with Allegiance Benefit Plan Management, Inc./CIGNA for a Preferred Provider Organization medical network, Exclusive Provider Organization medical network, Flexible Spending Account administration and Consolidated Omnibus Budget Reconciliation Act administration services for eligible City employees and dependents overseen by the Human Resources Department.

Fiscal Impact: Total cost of this one year renewal will not exceed \$17,000,000 during the one-year contract period beginning July 1, 2013. Sufficient funds will be appropriated in the Health Fund – cost centers 4167 and 4169 – for the anticipated expenditures in the upcoming fiscal year. The City of Tempe medical plans are self-funded – the total costs of the program includes administrative expenses (approximately \$615,000 this renewal period) and the actual medical claims incurred by the covered members. To limit the City's liability, stop loss insurance is purchased to cap the City's exposure on large claims.

- B3. AGENDA ITEM REMOVED/DELETED Approve the renewal of a one year contract with Holmes Murphy & Associates as the City's employee benefits consultant for utilization by the Human Resources Department.**

- B4. Approval of a one-year contract renewal with JPMorgan Chase Bank, N.A. for lockbox services for the expedited collection of payments due the City for alarm permits, business sales tax, licensing payments and utilities.

Fiscal Impact: Total cost of this contract will not exceed \$124,000 during the one-year renewal period. Sufficient funds are available in cost centers 1831 (General Fund) and 1841 (Water and Wastewater Fund) for the anticipated expenditures in the current fiscal year.

- B5. Approve the utilization of a six-month State of Arizona contract with Knowledge Services for information technology consulting and temporary staffing services to be used on an as needed basis for the Finance and Technology Department.

Fiscal Impact: Total cost of this contract shall not exceed \$200,000 during the six-month contract period. Sufficient funds have been appropriated in various City-wide operating and capital improvement cost centers for the anticipated expenditures in the current fiscal year.

- B6. Approve the utilization of a State of Arizona contract with Aeroflex Wichata, Inc. for a one time purchase of radio diagnostic and testing equipment to be used by the Finance and Technology Department.

Fiscal Impact: Total cost of this purchase shall not exceed \$72,000. Sufficient funds have been appropriated in cost center 5501989 (Radio System Replacement) for the anticipated expenditures in the current fiscal year.

- B7. Approve the award of a one-year contract with four, one-year renewal options to Sun Valley Vending, Inc. to provide snack and soda vending services throughout the City.

Fiscal Impact: There is no cost to the City in utilization of this program. Most snack & soda machines are operated as a convenience for City employees, however, there are some machines, primarily located at recreational facilities, which are commission based with the proceeds used to support programs at the facilities which have been reviewed and authorized by City Council. The anticipated total revenue generated for the vendor during the one-year term of this contract is not expected to exceed \$70,000.

- B8. Approval of a one-year sole source contract renewal for annual software maintenance and support services with Oracle Corporation for the City's enterprise and department level applications and databases which include PeopleSoft Financials, Human Resources/Payroll, Tax and License and Utility Billing as well as other systems throughout the City.

Fiscal Impact: Total cost of this contract will not exceed \$789,000 during the one-year contract renewal period. Sufficient funds have been appropriated in cost centers 1841 (Water/Wastewater Fund) and 1991 (General Fund) for the anticipated expenditures in the current fiscal year.

- B9. Approval of a one-year sole source contract renewal for annual software maintenance and support services with The Active Network, Inc. for the City's Class software system utilized by Community Services, Public Works and other City departments.

Fiscal Impact: Total cost of this contract will not exceed \$72,000. Sufficient funds have been appropriated in cost centers 1991 and 2521 (General Fund), and 2513 and 2517 (Golf Fund) for the anticipated expenditure in the current fiscal year.

C. Ordinances and Items for Introduction/First Hearing - These items will have two public hearings before final Council action

- *C1. Introduce and hold the first public hearing to adopt an ordinance approving the conveyance of certain real property owned by the City, which is located near Fifth Street and Farmer Avenue, to Farmer Arts, LLC, and authorizing the Mayor to execute the requisite documents. The second and final public hearing is scheduled for April 18, 2013. (Ordinance No. 2013.18)

Fiscal Impact: The City will receive various public amenities described in the Development Agreement (enhanced streetscape and linear park). The Developer is required to pay all costs, expenses and fees associated with the opening and closing of Escrow and be responsible for the perpetual maintenance of all public amenities.

D. Ordinances and Items for Second Hearing/Final Adoption - None

E. Resolutions

- E1. Adopt a resolution authorizing the mayor to execute a Second Amended and Restated Street and Landscape Easement for the benefit of the ARGO Development covering real property located at 601West Rio Salado Parkway. (Resolution No. 2013.30)

Fiscal Impact: No fiscal impact to City funds.

- E2. Adopt a resolution authorizing the Mayor to execute the Intergovernmental Agreement between the City of Tempe and the Town of Guadalupe for the purpose of satisfying a Federal Emergency Management Agency Homeland Security Grant to purchase and distribute dual-band portable radios and accessories. (Resolution No. 2013.31)

Fiscal Impact: This intergovernmental Agreement will result in the City receiving \$9,320 reimbursement from the Town of Guadalupe to be returned to the Radio Replacement program CIP (6947).

- E3. Adopt a resolution authorizing the Mayor to sign an intergovernmental agreement with the Regional Public Transportation Authority for dial-a-ride and related mobility services.

Fiscal Impact: Net cost to Tempe is estimated to be \$295,210. Gross cost of Tempe's dial-a-ride and mobility programs is \$1,111,418. Funding sources include: Regional Proposition 400 funding (\$689,000 - 62%), federal grants (\$38,000 - 3%), fare revenue (\$89,000 - 8%), and Tempe local funds (\$295,000 - 27%). Funding for Tempe's local share is provided by the Transit fund in operating budget cost center 3914.

6. CURRENT EVENTS/COUNCIL ANNOUNCEMENTS/FUTURE AGENDA ITEMS

7. PUBLIC APPEARANCES

According to the Arizona Open Meeting Law, the City Council may only discuss matters listed on this agenda. Matters discussed by the public during public appearances cannot be discussed by the City Council unless they are specifically listed on this agenda. There is a five-minute time limit per speaker. Speaker's visual aids or recorded tapes are not allowed.

Members of the public shall refrain from making personal, impertinent or slanderous remarks and from becoming boisterous while addressing the City Council or while attending the meeting. Unauthorized remarks from the audience, clapping, stomping of feet, yelling or any similar demonstrations are also prohibited. Violations of these rules may result in removal from the City Council meeting.

A. Scheduled

1. Mike Anaya - Water Repair Issues
2. Marc Stevens – Complaint about Tempe Municipal Court
3. Citizens' concerns regarding policing

B. Unscheduled

The City of Tempe endeavors to make all public meetings accessible to persons with disabilities. With 72 hours advance notice, special assistance can also be provided for sight and/or hearing impaired persons at public meetings. Please call (480) 350-2905 (voice) or (480) 350-2750 (TDD) to request an accommodation to participate in the City Council meeting.

**Agendas are also available at www.tempe.gov/clerk
Watch this meeting live on Cox cable channel 11 or www.tempe.gov/tempe11.
Video replay of this meeting is available the next day at www.tempe.gov/tempe11.**



Minutes Formal City Council Meeting March 21, 2013

Minutes of the Formal Council Meeting of Thursday, March 21, 2013, held at 7:30 p.m. in the Harry E. Mitchell Government Center, Tempe City Hall, City Council Chambers, 31 E. Fifth Street, Tempe, Arizona.

COUNCIL PRESENT:

Mayor Mark W. Mitchell

Councilmember Robin Arredondo-Savage

Councilmember Kolby Granville

Councilmember Corey D. Woods

Vice Mayor Onnie Shekerjian

Councilmember Shana Ellis

Councilmember Joel Navarro

STAFF PRESENT:

Andrew Ching, Interim City Manager

Judi Baumann, Interim City Attorney

Lisa Collins, Interim Community Development Director

Jeff Kulaga, Assistant City Manager

Brigitta M. Kuiper, City Clerk

Various Department Heads or their representatives

Mayor Mitchell called the meeting to order at 7:58 p.m.

1. Councilmember Arredondo-Savage gave the invocation.
2. Mayor Mitchell led the audience in the **Pledge of Allegiance**.

3. MINUTES

A. Approval of Council Meeting and Council Committee Meeting Minutes

Motion by Councilmember Woods to approve the following COUNCIL MEETING AND COUNCIL COMMITTEE MEETING MINUTES; second by Councilmember Arredondo-Savage. Motion passed unanimously on a voice vote 7-0.

1. Formal Council Meeting - March 7, 2013
2. Issue Review Session - January 24, 2013
3. Executive Session - February 27, 2013 and March 7, 2013

B. Acceptance of Committee, Board & Commission Meeting Minutes

Motion by Councilmember Woods to accept the following COMMITTEE, BOARD AND COMMISSION MEETING MINUTES; second by Councilmember Arredondo-Savage. Motion passed unanimously on a voice vote 7-0.

1. Aviation Commission - February 12, 2013
2. Commission on Disability Concerns - February 7, 2013
3. Enhanced Services Commission - February 6, 2013
4. Hearing Officer - February 19, 2013
5. Mayor's Community Roundtable - December 4, 2012
6. Mayor's Youth Advisory Commission - February 19, 2013
7. Tempe Fire and Police Public Safety Personnel Retirement Boards Joint Meeting - January 8, 2013
8. Tempe Fire Public Safety Personnel Retirement System Board - February 7, 2013

9. Tempe Police Public Safety Personnel Retirement System Board Meeting - January 8, 2013

4. REPORTS AND ANNOUNCEMENTS

A. Mayor's Announcements

1. *2013 Bike Hero Award - Maja Wessels*

Mayor Mitchell presented the 2013 Tempe Bike Hero Award to Maja Wessels.

2. *National League of Cities Diversity Award Presentation*

Mayor Mitchell presented the National League of Cities Diversity Award to Ginny Belousek from the City of Tempe Diversity Office for the City's program, *Teens Conversing to Build an Inclusive Community*.

B. Manager's Announcements – None.

5. AGENDA

All items in these minutes identified with an asterisk (*) **are public hearing items**. All items listed on the agenda are approved with one City Council action. Items scheduled for Introduction/First Public Hearing will be heard but not adopted at this meeting. Items scheduled for Second Public Hearing/Final Adoption will be voted upon at this meeting.

Mayor Mitchell announced consideration of the **AGENDA** items.

Motion by Councilmember Woods to approve the Agenda with the exception of items 5E4 and 5E5, which were removed for separate consideration; second by Councilmember Ellis. Motion passed on a roll call vote 7-0.

A. Miscellaneous Items

- A1. Approved the February 2013 Report of Claims Paid to be filed for audit.

Fiscal Impact: Total payments in February: \$11,458,216.15

- A2. Approved a Final Subdivision Plat for PANDA EXPRESS BROADWAY located at 908 East Broadway Road. The applicant is HSB Architects + Engineers.

Fiscal Impact: There is no fiscal impact on City funds.

The following conditions of approval apply:

1. The subdivision plat for Panda Express Broadway for the +/-0.461 net acre property including the consolidation of existing parcels into one lot and the dedication to public right of way shall be put into proper engineered format with appropriate signature blanks and recorded with the Maricopa County Recorder's Office through the City of Tempe Community Development Department on or before March 21, 2014 or prior to issuance of building permit, whichever comes first. Failure to record the plat on or before March 21, 2014, which is one (1) year from the date of City Council approval, shall make the City Council approval of the plat null and void.
2. Provide a sidewalk easement at the driveways if a portion of disabled accessible sidewalk bypass at driveways is located on the subject property.
3. Either have easements and agreements including vehicle cross access and sidewalk easement agreements "dedicated hereon" the subdivision plat or have easements and agreements reviewed by the Public Works Department and Building Safety Division, dedicated by separate instrument and recorded at the Maricopa County Recorder's Office. Complete the easements and agreements prior to issuance of Building Permit.

4. All property corners shall be set and verified by a Registered Land Surveyor. Submit complete and sealed Notice of Verification to Public Works/Land Services Division staff no later than three (3) months from the date of County recordation or as determined by staff.

- *A3.** Held a public hearing and recommended the approval of a Series 10 beer and wine store liquor license for 99Cents Only Stores of California, Inc., dba 99 Cents Only Store #133, 790 East Southern Avenue.

Fiscal Impact: N/A

- *A4.** Held a public hearing and recommended the approval of a Series 10 beer and wine store liquor license for Pick & Move Food Mart LLC, dba Apache Food Mart, 1900 East Apache Boulevard, #113.

Fiscal Impact: N/A

- *A5.** Held a public hearing and recommended the approval of a Series 12 restaurant liquor license for Chop Shop University, LLC, dba Original Chop Shop Co., 222 East University Drive.

Fiscal Impact: N/A

B. Award of Bids/Contracts

- B1.** Approved the renewal of one-year contracts with Baker and Taylor, Inc. and Midwest Tape, LLC for the purchase of library books and non-print media used by the Community Services Department.

Fiscal Impact: Total combined cost of these two contracts will not exceed \$300,000 during the one-year renewal period. Sufficient funds have been appropriated in cost center 2440 (General Fund) for the anticipated expenditures in the current fiscal year.

- B2.** Awarded a two-year contract with three, one-year renewal options to N/S Corporation for the purchase of replacement parts for the bus wash system at the East Valley Bus Operations and Maintenance facility for the Public Works Department. **(Contract #2013-54)**

Fiscal Impact: Total cost of this two-year contract will not exceed \$53,000. Sufficient funds have been appropriated in cost center 3914 (Transit Fund) for the anticipated expenditures in the current fiscal year.

- B3.** Awarded a professional services contract to Arcadis U.S., Inc. to study water and wastewater rates and development fees. **(Contract #2013-49)**

Fiscal Impact: Total contract amount is not to exceed \$147,990. Sufficient funds for this contract are available in Water Fund operating budget cost center 3002, account no. 6672 and will be transferred to Capital Improvement Fund No. 3203394, 2013 Water & Wastewater Rates and Development Fees Study.

- B4.** Awarded job order no. 7 to MGC Contractors, Inc. for construction of a pipeline between City well site no. 9 and a Salt River Project irrigation pipeline located at 1510 East Calle de Caballos.

Fiscal Impact: Total job order amount is \$311,664 and project contingency amount is \$30,000. Funds were approved and appropriated for fiscal year 2012/2013 in Capital Improvement Fund No. 3204419, Well No. 9 Pump to Waste Line. Sufficient funds will be transferred to Capital Improvement Fund No. 3204411, Well No. 9 Pump to SRP Irrigation Pipeline, to fund this job order.

- B5. Awarded a construction contract to AUI Inc., to replace the gravity sewer line in Scottsdale Road from Curry Road to the Gilbert Road metering station. **(Contract #2013-55)**

Fiscal Impact: Total construction contract amount is \$818,802 and project contingency amount is \$81,000. Funds were approved and appropriated in fiscal year 2008/2009 in Capital Improvement Fund No. 3209399, Sewer Replacement/Upsize on Scottsdale Road – Curry to Gilbert. Sufficient funds will be transferred to Capital Improvement Fund No. 3209391 to cover this construction contract and related costs.

- B6. Awarded job order no. 5 to PCL Construction, Inc. for an emergency waterline repair and pavement restoration at 1230 East Guadalupe Road due to a waterline break.

Fiscal Impact: Total job order amount is \$63,313.67. Funds were approved and appropriated for fiscal year 2012/2013 for waterline replacement and repair in Capital Improvement Project (CIP) No. 3299989. Funding will be transferred from CIP No. 3299989 to CIP No. 3205601, Emergency Waterline Repair – 1230 East Guadalupe Road, to fund this job order and related expenses.

- B7. Approved the issuance of a one-year contract with four one-year renewal options to Newt Fogal Sales for the purchase of street sweeper brooms to be used by the Public Works Department. **(Contract #2013-56)**

Fiscal Impact: Total cost of this one-year contract will not exceed \$75,000. Sufficient funds have been appropriated in the Highway User Revenue Fund – account 3813 – for the anticipated expenditure in the current fiscal year.

C. **Ordinances and Items for Introduction/First Hearing - These items will have two public hearings before final Council action - None**

D. **Ordinances and Items for Second Hearing/Final Adoption**

- *D1. Held the second and final public hearing and adopted **ORDINANCE NO. 2013.16** for an Amended Planned Area Development Overlay for a proposed commercial development for PANDA EXPRESS RESTAURANT located at 908 East Broadway Road. The applicant is HSB Architects + Engineers.

Fiscal Impact: While this ordinance change does not directly impact revenue, the planned development will result in collection of the standard development fees, calculated according to the approved fee structure at the time of permit issuance.

The following conditions of approval apply:

1. A building permit application shall be made on or before March 21, 2015 or the Planned Area Development Overlay of the property may revert to that in place at the time of application. Any reversion is subject to a public hearing process as a Planned Area Development Overlay amendment.
2. The property owner shall sign a waiver of rights and remedies form. By signing the form, the Owner(s) voluntarily waive(s) any right to claim compensation for diminution of Property value under A.R.S. §12-1134 that may now or in the future exist, as a result of the City's approval of this Application, including any conditions, stipulations and/or modifications imposed as a condition of approval. The signed form shall be submitted to the Community Development Department no later than April 22, 2013 or the Planned Area Development Overlay shall be null and void.
3. Prior to issuance of building permit, the Amended Planned Area Development Overlay document for Panda Express Broadway shall be put into proper engineered format with appropriate signature blanks and kept on file with the City of Tempe Community Development Department.

4. Reduce minimum vehicle parking--landscape setback from 10'-0" to 6'-0" at front yard on Rural Road and increase minimum vehicle parking—landscape setback from 0'-0" to 6'-0" on Broadway Road. At each frontage measure minimum parking setback from right of way line after dedication to parking space nose overhang over landscape.
5. Increase minimum landscape lot coverage from 7 percent to 23 percent.
6. Restore the minimum building rear yard setback from 0'-0" to 10'-0".
7. Complete the Cross Access Easement agreement between subject property and the property to north. Present recorded agreement to Engineering Division during Engineering Plan Check. Include an exhibit in the recorded agreement that depicts the final site plan for the subject property. Complete maintenance of Off-street Parking Covenant and Agreement between the two properties that stipulates the four (4) off-site parking spaces that are dedicated to the subject property. Process this agreement through the Planning Division. Record this agreement prior to issuance of building permit.

***D2.** Held the second and final public hearing and adopted **RESOLUTION NO. 2013.23** for a General Plan Density Map Amendment, **ORDINANCE NO. 2013.17** for a Zoning Map Amendment and a Planned Area Development for APACHE VILLAS, located at 2148 East Apache Boulevard. The applicant is George Swarstad, Bowman Consulting.

Fiscal Impact: The planned development is requesting City of Tempe participation in the project for points towards a competitive process for Federal tax credit rebate for affordable housing. The requested participation would be up to \$62,000 contributed through a reduction of the standard development fees, calculated according to the approved fee structure at the time of permit issuance, and other mechanisms agreed upon through a separate Development Agreement.

The following conditions of approval apply:

1. A building permit application shall be made on or before March 21, 2015, or the zoning of the property may revert to that in place at the time of application. Any reversion is subject to a public hearing process as a zoning map amendment.
2. The property owner(s) shall sign a waiver of rights and remedies form. By signing the form, the Owner(s) voluntarily waive(s) any right to claim compensation for diminution of Property value under A.R.S. §12-1134 that may now or in the future exist, as a result of the City's approval of this Application, including any conditions, stipulations and/or modifications imposed as a condition of approval. The signed form shall be submitted to the Community Development Department no later than April 21, 2013, or the PAD, Zone Map Amendment and General Plan Map Amendment approval shall be null and void.
3. An Encroachment Permit must be obtained from the Engineering Department prior to submittal of construction documents for building permit. The limitations of this encroachment include;
 - a. a maximum projection of eight (8) feet for any upper level balconies or decorative architectural features of the building,
 - b. a minimum clear distance of twenty-four (24) feet between the sidewalk level and any overhead structure, and
 - c. any other requirements described by the encroachment permit or the building code.
4. The Planned Area Development for APACHE VILLAS shall be put into proper engineered format with appropriate signature blanks and kept on file with the City of Tempe's Community Development Department prior to issuance of building permits.
5. An amended Subdivision Plat is required for this development and shall be recorded prior to issuance of building permits.
6. The Subdivision Plat shall be put into proper engineered format with appropriate signature blanks and recorded

with the Maricopa County Recorder's Office through the City of Tempe's Community Development Department on or before March 21, 2014. Failure to record the plat on or before March 21, 2014, within one year of City Council approval, shall make the plat null and void.

7. All property corners shall be set and verified with staff upon final recordation of the subdivision plat, no later than three (3) months from the date of County recordation or as determined by staff.
8. The construction of the commercial office pad shall commence within one year of issuance of building permits for the residential apartment community.

E. Resolutions

- E1. Adopted **RESOLUTION NO. 2013.25** to enter into an intergovernmental agreement between the City of Tempe and the Arizona Department of Transportation for acquisition of federal funds for railroad safety improvements on Fifth Street at the Union Pacific Railroad crossing.
(**Contract #2013-47**)

Fiscal Impact: Budget appropriation for the City's portion of the project has been included as part of the recommended fiscal year 2013/14 Capital Improvement Program budget.

- E2. Adopted **RESOLUTION NO. 2013.26** to enter into an intergovernmental agreement between the City of Tempe and the Arizona Department of Transportation for acquisition of federal funds for railroad safety improvements on Broadway Road at the Union Pacific Railroad crossing.
(**Contract #2013-48**)

Fiscal Impact: Budget appropriation for the City's portion of the project has been included as part of the recommended fiscal year 2013/14 Capital Improvement Program budget.

- E3. Adopted **RESOLUTION NO. 2013.27** authorizing the Mayor to execute an amended funding agreement between the City of Tempe and the Arizona Board of Regents for and on behalf of Arizona State University-Indian Legal Program Scholarships/Clinic for the disbursement of a portion of the Salt River Pima-Maricopa Indian Community annual 12% local revenue-sharing contribution.
(**Contract #2013-06I1**)

Fiscal Impact: Not applicable.

- E4. **THIS ITEM WAS REMOVED FOR SEPARATE CONSIDERATION. SEE BELOW FOR DISCUSSION AND ACTION.** Adopt a resolution authorizing the City Manager to execute documents to proceed with the property exchange with Salt River Project and Golub Company to facilitate the relocation of a portion of the Kirkland McKinney Ditch for the benefit of the development at 855 South Rural Road. (Resolution No. 2013.28)

- E5. **THIS ITEM WAS REMOVED FOR SEPARATE CONSIDERATION. SEE BELOW FOR DISCUSSION AND ACTION.** Adopt a resolution establishing a 120 day period for the City of Tempe and CBS Outdoor to negotiate a Development and Disposition Agreement regarding the removal of certain freestanding off-premises signs within Tempe, in exchange for the authority to erect off-premises freeway signs, with terms and conditions consistent with this resolution. (Resolution No. 2013.29)

AGENDA ITEM(S) REMOVED FOR SEPARATE CONSIDERATION:

- E4. Adopted **RESOLUTION NO. 2013.28** authorizing the City Manager to execute documents to proceed with the property exchange with Salt River Project and Golub Company to facilitate the relocation of a portion of the Kirkland McKinney Ditch for the benefit of the development at 855 South Rural Road.

Fiscal Impact: The Developer will pay all costs associated with the relocation of the canal per the Development and Disposition Agreement.

Councilmember Ellis declared a conflict of interest.

Motion by Councilmember Navarro to approve item 5E4; second by Councilmember Woods. Motion passed on a roll call vote 6-0-1 with Councilmember Ellis abstaining.

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- E5.** Adopted **RESOLUTION NO. 2013.29 as amended** establishing a 120 day period for the City of Tempe and CBS Outdoor to negotiate a Development and Disposition Agreement regarding the removal of certain freestanding off-premises signs within Tempe, in exchange for the authority to erect off-premises freeway signs, with terms and conditions consistent with this resolution.

Fiscal Impact: No direct fiscal impact from establishing a negotiation period, although it is anticipated there will be an impact if the parties reach an agreement, which would be detailed in a subsequent request for council action.

Councilmember Ellis declared a conflict of interest.

The City Council, Andrew Ching, Interim City Manager, and Lisa Collins, Interim Community Development Director, discussed the following: support for the removal of billboards in the interior of Tempe; concerns with digital billboards within the interior of Tempe; amending the resolution to clarify that it does not approve sites for new freeway billboards; concerns with placing signs in close proximity to residential neighborhoods; potential code amendments. The City Council and staff also discussed that the 120-day period allows for negotiations; a development and disposition agreement will be required for each billboard that is removed or erected.

Charles Huellmantel, on behalf of CBS Outdoor, stated that CBS Outdoor has no objections to amending the resolution to clarify that the resolution does not approve any new locations and that terms will be negotiated. CBS Outdoor has been willing to remove more interior billboards than is required. The applicant is amenable to discussing billboard proximity to residential neighborhoods and continuing negotiations.

Mayor Mitchell proposed an amendment to the resolution stating that any potential sites for new freeway billboards are not approved as part of this resolution, and are subject to negotiation and final approval in a development agreement.

Motion by Councilmember Granville to approve the resolution with the amendment as proposed by Mayor Mitchell; second by Councilmember Woods. Motion passed on a roll call vote 4-2-1 with Vice Mayor Shekerjian and Councilmember Arredondo-Savage voting no, and Councilmember Ellis abstaining.

6. CURRENT EVENTS/COUNCIL ANNOUNCEMENTS/FUTURE AGENDA ITEMS

Councilmember Ellis

- Kiwanis Club of Tempe Easter Egg Hunt on March 30, 2013 at 9:00 a.m. at Kiwanis Park.

Councilmember Arredondo-Savage

- Bike Week and Tour de Tempe at Kiwanis Park on April 7, 2013 at 7:30 a.m.
- Bike to Work Day on April 17, 2013 at 6:30 a.m.

Councilmember Granville

- Thanked staff for responding to inquiries regarding material presented to the City Council.

Mayor Mitchell

- Union Bank coming to Tempe with 250 jobs; thanked staff.
- This is the last weekend to attend a Spring Training game.
- Tour de Tempe at Kiwanis Park on April 7, 2013.
- Tempe Diablos Education Excellence Event at the Tempe Center for the Arts on March 28, 2013.
- YouthFest Courage Awards at 6:00 p.m. on April 1, 2013.
- Happy Birthday to his wife.

Manager's Announcements.

Andrew Ching, Interim City Manager, congratulated Greg Ruiz on his selection as Fire Chief. He thanked Tempe staff Joe "Okie" O'Connor and Charlie Reynolds, who came to the aid of a rowing crew on Tempe Town Lake on March 8, 2013.

7. PUBLIC APPEARANCES

A. Scheduled

1. Marc Stevens – Complaint about Tempe Municipal Court
No one spoke.

2. Citizens' concerns regarding policing
No one spoke.

B. Unscheduled

No one spoke.

The meeting adjourned at 9:27 p.m.

I, Brigitta M. Kuiper, the duly-appointed City Clerk of the City of Tempe, Maricopa County, Arizona, do hereby certify the above to be the minutes of the Formal City Council meeting of March 21, 2013, by the Tempe City Council, Tempe, Arizona.

Mark W. Mitchell, Mayor

ATTEST:

Brigitta M. Kuiper, City Clerk

MINUTES OF THE DEVELOPMENT REVIEW COMMISSION JANUARY 22, 2013

Harry E. Mitchell Government Center
Tempe City Hall - City Council Chambers
31 E. 5th Street, Tempe, AZ 85281
6:00 PM (5:30 Study Session)

Commission Present:

Mike DiDomenico, Chair
Paul Kent
Peggy Tinsley
Angie Thornton
Jim Delton
Linda Spears
Ron Collett

Commission Absent:

Dennis Webb
Dave Maza
Dan Killoren

City Staff Present:

Lisa Collins, Interim Community Dev. Director
Steve Abrahamson, Planning & Zoning Coordinator
Sherri Lesser, Senior Planner
Diana Kaminski, Senior Planner
Kevin O'Melia, Senior Planner

1. CONSIDERATION OF MEETING MINUTES: 12/11/12

On a motion by Commissioner Tinsley and seconded by Commissioner Collett, the Commission with a vote of 6-0 (Commissioner Spears abstained) approved the minutes of the December 11, 2012 meeting.

CONSENT AGENDA

On a motion by Commissioner Thornton and seconded by Commissioner Kent, the Commission with a vote of 7-0 approved the Consent Agenda as recommended in the staff report.

3. Request for a Development Plan Review consisting of a proposed +/-4,795 sf. office/clubhouse, remodel of an existing +/-1,729 sf. office/clubhouse, a proposed +/-2,080 sf. fitness building and associated site amenities in two courtyards for **THE HAVEN (PL120267)** located at 1440 East Broadway Road. The applicant is Todd & Associates Architecture and Planning, Incorporated.

STAFF REPORT: [DRCr TheHaven 012213](#)

2. Request appeal for a Use Permit Revocation for tobacco retail sales with live entertainment for **MIDNIGHT HOOKAH (PL110015)** located at 1630 E Apache Boulevard Suites 103-104. The appellant is Nadir Yousef, Midnight Hookah.

THIS ITEM WAS CONTINUED FROM THE DECEMBER 11, 2012 HEARING AND THE JANUARY 8, 2013 HEARING

STAFF REPORT: [DRCr MidnightHookah 012213](#)

This case was presented by Diana Kaminski and represented by Lynn Lagarde, attorney for the applicant.

Ms. Kaminski gave a brief presentation on the history of this case as reported in the staff report.

Ms. Lagarde addressed the Commission and thanked them for allowing a continuance on this case. Ms. Lagarde indicated that although staff does not feel Mr. Yousef was responsive to the issues brought forth, she indicated he was responsive. She also stated that up until October of 2012 it was unclear to Mr. Yousef as to the occupancy for both suites. She indicated that since it was determined that it was 49 in the combined suites, he has been operating that way. She also indicated he has made many other changes to comply with the conditions of approval. Ms. Lagarde stated that there are many statements in the staff report that are prejudicial and inaccurate and it may give the Commission a negative opinion that may not be warranted.

Commissioner Collett asked about the letter from the Community Development Department, dated June 2012, that indicated the total occupancy is 49 people. He also asked about the hours of operation as stated in the conditions of approval.

Ms. Lagarde indicated that Mr. Yousef has been operating according to the conditions of approval since October and there was some confusion about the occupancy number but he has been operating under the 49 occupancy since October.

Commissioner Kent asked for clarification as to the suites occupied as it would appear there are three suites that are occupied by Midnight Hookah.

Ms. Lagarde indicated that she couldn't confirm the numbering on the suite and Chair DiDomenico indicated that it could have been an issue when the suites were renumbered with the post office.

Chair DiDomenico opened the hearing to public input.

Chuck Buss, from University Heights Neighborhood, spoke in opposition of Midnight Hookah. He stated that Mr. Yousef has been unresponsive to the neighbor's concerns and he caused a scene when he confronted Mr. Buss outside of the Hearing Officer meeting.

Chair DiDomenico asked Mr. Buss how the noise has been over the last few months. He also asked if Mr. Buss had an issue with the use or the way business has been conducted.

Mr. Buss indicated that it had been pretty quiet. He also stated that his issue is with both the use and the way Mr. Yousef conducts his business.

Chair DiDomenico closed the hearing to public input.

Commissioner Spears asked the members from the Police Department to compare calls of service from this hookah lounge to others in the City.

Sue Scoville, Tempe Police Department, indicated that other hookah lounges do not have the number of calls or types of calls for service that they experience with Midnight Hookah.

Commissioner Kent asked how many calls for service to Midnight Hookah since November.

Officer Scoville indicated none directly related to the business.

Commissioner Spears asked if Officer Scoville had contact with security guards or staff during a call and if they were receptive and/or cooperative.

Officer Scoville indicated that she had not been on the calls for service but had been out once issues had been identified and offered Mr. Yousef ideas and information so he could better prevent issues. She indicated that Mr. Yousef appeared cooperative and willing to make the necessary changes but some of those issues have not yet been addressed, such as security cameras.

Commissioner Thornton questions the reasoning that the parking lot is Mr. Yousef's responsibility.

Officer Scoville indicated that businesses open late at night could attract a criminal element and it's important that as a business owner he take measures to eliminate loitering, etc., so that the business isn't a facilitator for drug deals, shootings, fights etc. and he creates a safe environment for his business and the shopping center as a whole. Cameras in the parking lots will also be able to identify if there are false reports being made or if there are issues that need to be addressed.

Ms. Lagarde is not sure if there are actually two calls for service relating to a gun or if it was a duplicate call. Mr. Yousef had an incident after hours with an individual. She indicated that Mr. Yousef has had security monitoring the parking lot. She also indicated cameras have not been installed because they are afraid they will be stolen. She also asked for a ninety day extension.

Chair DiDomenico asked about patrons bringing alcohol into the lounge.

Ms. Lagarde indicated that Mr. Yousef will not allow any outside containers inside the establishment.

Chair DiDomenico asked about the container of alcohol found in the dishwasher.

Ms. Lagarde indicated the employee was fired, Mr. Yousef wasn't there at the time the incident occurred.

Chair DiDomenico asked about the white substance found.

Ms. Lagarde indicated that the substance tested negative for methamphetamine and cocaine but no further testing was done.

Chair DiDomenico indicated he does not have an issue with the use as a hookah lounge and is glad to see that the past few months have been better but that does not take away from the issues that have occurred in the past.

Commissioner Collett stated that although this case is supposed to be heard denovo, he does not want the misunderstanding that the Commission is to only take into consideration the things that have occurred in the past few months. He also indicated that in his opinion, Mr. Yousef's past actions over the past year or more, speak louder than his words.

On a motion by Commissioner Spears and seconded by Commissioner Collett, the Commission with a vote of 7-0 denied the appeal and upheld the decision of the Hearing Officer to revoke the Use Permit.

4. ANNOUNCEMENTS - None

The meeting was adjourned at 7:00 p.m.

Prepared by: Lisa Novia, Administrative Asst. II
Reviewed by: Lisa Collins, Interim Director Community Development Department



Lisa Collins, Interim Director, Community Development Department

MINUTES OF THE DEVELOPMENT REVIEW COMMISSION FEBRUARY 26, 2013

Harry E. Mitchell Government Center
Tempe City Hall - City Council Chambers
31 E. 5th Street, Tempe, AZ 85281
6:00 PM (5:30 Study Session)

Commission Present:

Mike DiDomenico, Chair
Peggy Tinsley
Linda Spears
Angie Thornton
Peggy Tinsley
Jim Delton
Dave Maza
Paul Kent (Study Session only)

Commission Absent:

Dennis Webb
Dan Killoren

City Staff Present:

Lisa Collins
Ryan Levesque
Diana Kaminski
Steve Abrahamson
Lisa Novia

Chair DiDomenico called the meeting to order at 6:00 p.m., which included the introduction of the Commission and City staff. It had been determined at the Study Session that both Item Nos. 2 and 3 could be placed on the Consent Agenda. Seeing no one from the public wishing to speak on either case, both items were placed on the Consent Agenda.

1. **CONSIDERATION OF MEETING MINUTES: 1/22/13**

On a motion by Commissioner Tinsley and seconded by Commissioner Collett, the Commission with a vote of 6-0 (Commissioner Maza abstained) approved the minutes from January 22, 2013.

CONSENT AGENDA

On a motion by Commissioner Collett and seconded by Commissioner Spears, the Commission with a vote of 7-0 approved the Consent Agenda as recommended in the following staff reports:

2. Request for a Development Plan Review for **APACHE VILLAS (PL120395)**, located at 2148 E Apache Boulevard on 2.147 acres. The applicant is George Swarstad, Bowman Consulting.

STAFF REPORT: [DRCr ApacheVillas 022613](#)

3. Request for a Development Plan Review consisting of a new four-story mixed-use building with 30 dwelling units for **RESIDENCES ON FARMER (PL130013)**, located at 615 South Farmer Avenue. The applicant is 7th and Farmer, LLC.

STAFF REPORT: [DRCr ResidencesonFarmer 022613](#)

4. ANNOUNCEMENTS

There were no announcements.

The meeting was adjourned at 6:10 p.m.

Prepared by: Lisa Novia, Administrative Asst. II
Reviewed by: Lisa Collins, Interim Director Community Development Department



Lisa Collins, Interim Director, Community Development Department

PUBLIC MEETING MINUTES

MINUTES OF THE DEVELOPMENT REVIEW COMMISSION STUDY SESSION

JANUARY 22, 2013

**HARRY E. MITCHELL GOVERNMENT CENTER
TEMPE CITY HALL – CITY COUNCIL CHAMBERS
31 EAST 5TH STREET
5:30 p.m.**

AGENDA

Commission Present:

Mike DiDomenico, Chair
Paul Kent
Peggy Tinsley
Angie Thornton
Jim Delton
Linda Spears
Ron Collett

Commission Absent:

Dennis Webb
Dave Maza
Dan Killoren

City Staff Present:

Lisa Collins, Interim Community Dev. Director
Steve Abrahamson, Planning & Zoning Coordinator
Sherri Lesser, Senior Planner
Diana Kaminski, Senior Planner
Kevin O'Melia, Senior Planner

Chair DiDomenico called the Study Session to order at 5:30. He indicated that prior to the PAD discussion; there would be some regular housekeeping issues to review.

The minutes of December 11, 2012 were recommended for approval with no modifications. He also indicated that there were two cases on the agenda this evening, as one item had previously been pulled. He stated that Item

No. 2, the appeal for Midnight Hookah, would be heard and Item No. 3, The Haven, could be placed on the Consent Agenda.

Sherri Lesser, Senior Planner, gave a brief overview of the history of the PAD process.

Chair DiDomenico asked Ms. Lesser if there is a minimum standard of density that the PAD process can address.

Ms. Collins stated that the General Plan allows for ranges in density and although there is a maximum, the Commission is not held to approving cases that fall to the higher end of that range. If a development comes in higher than the maximum, then a General Plan Amendment is necessary and also possibly a Zoning Map Amendment.

Chair DiDomenico asked staff if something, such as a fast food restaurant, could replace a project with much more density, such as multi-family housing and if there is a test in density on the minimum side.

Ms. Collins indicated that with mixed use and R1-PAD there are no development standards. A PAD is necessary in those zoning districts to create the development standards and creating the maximums for that piece of land. The approval of PAD's is very important and although a project may come in that is not bigger than what the PAD allows, it could be drastically different and then it could be considered a major amendment. PAD's can provide a great deal of flexibility, just not a lot of certainty.

Chair DiDomenico stated that he feels the minimums are as important as the maximums as it relates to density. He asked if someone can come in and purchase a 30 acre piece of property zoning multi-family and build two units.

Ms. Collins stated that yes, there are times where a site could have significant development and it comes in with a lot less than what we'd like to see but private property rights allow them to do what they want with their property. She stated that the question should be is there anything we can do about it, short of having a development agreement.

Chair DiDomenico stated that he would like to see the Commission spend some time and make the process more protective of the General Plan.

Commissioner Spears asked about parking.

Ms. Collins indicated that although the PAD gives us the ability to amend parking; it may not be the best way and it may be time to look at the parking ordinance and looking at parking in the downtown. She indicated that it would be good for the Commission to discuss General Plan 2040 and what it is and how to deal with zoning that is on land lower than the General Plan is recommending and when the property owner/developer doesn't want to rezone as you cannot force someone to rezone into conformance with the General Plan.

Commissioner Collett expressed concern over the changing of the General Plan every 10 years and trying to work within those changing guidelines.

Commissioner Spears stated that she felt the intent of the PAD process was to give a developer room to work outside the development standards when a project cannot fit into the current zoning on a site and that the City is supposed to be given a unique or special project for approval of that PAD.

Ms. Collins indicated that she think staff can do a better job articulating what they feel is good about the projects and what the benefits the City will receive from approving the PAD.

Chair DiDomenico asked for input from the group as to what worked best for their schedules for scheduling short working retreats for the Commission to facilitate discussions on various topics such as PAD's and the General Plan.

Ms. Collins indicated that she would work with staff and the Commission to find a time that would work for everyone.

Chair DiDomenico stated that the since City is no longer televising the DRC meetings, staff is looking into alternatives so that it may be possible to start televising the meetings again. One of the alternatives is possibly moving the meeting to the afternoons during working hours. He indicated that he wanted to keep the Commission apprised of the various solutions being looked at and if anyone has any suggestions, to please let staff know.

The Study Session adjourned at 6:00 p.m.

Prepared by: Lisa Novia, Administrative Asst. II

Reviewed by: Lisa Collins, Interim Director Community Development Department



Lisa Collins, Interim Director, Community Development Department

**Development Review Commission
STUDY SESSION**

FEBRUARY 26, 2013

**HARRY E. MITCHELL GOVERNMENT CENTER
TEMPE CITY HALL – CITY COUNCIL CHAMBERS
31 EAST 5TH STREET
5:30 p.m.**

AGENDA

Commission Present:

Mike DiDomenico, Chair
Peggy Tinsley
Linda Spears
Angie Thornton
Ron Collett
Jim Delton
Dave Maza
Paul Kent (Study Session only)

Commission Absent:

Dennis Webb
Dan Killoren

City Staff Present:

Lisa Collins, Interim Community Development Director
Ryan Levesque, Senior Planner
Diana Kaminski, Senior Planner
Steve Abrahamson, Planning & Zoning Coordinator
Lisa Novia, Administrative Asst. II.

Chair DiDomenico called the Study Session to order at 5:30. The Commission reviewed the minutes and agreed that they could be approved as written. It was discussed that both Item Nos. 2 and 3 could be placed on the Consent Agenda, barring any public comment requests.

Mike Davis and Buck Yee from Davis gave a brief presentation on the Marina Heights development that is anticipated to be heard by the Commission within the next several months.

The Study Session concluded at 5:55 p.m.

Prepared by: Lisa Novia, Administrative Asst. II

Reviewed by: Lisa Collins, Interim Director Community Development Department

A handwritten signature in black ink, appearing to read "Lisa Collins". The signature is written in a cursive, flowing style.

Lisa Collins, Interim Director, Community Development Department



**Meeting Minutes
General Plan 2040
Community Working Group**

Wednesday, February 27, 2013
6:00 PM
Tempe Public Library
Tempe Learning Center
3500 South Rural Road, Tempe, Arizona

<p>CWG Members Present Alan Beaudoin Don Cassano Ryan Guzy Cole Hickman Gary Johnson Ed Mitchell Michael Myrick Celeste Plumlee Marie Provine Julie Ramsey Joe Salvatore Don Watkins Steve Wegener Woody Wilson Jeremy Capello Lee</p>	<p>Staff Present Nancy Ryan Nancy Woods Patty Hatvick Josh Roffler Maja Aurora Naomi Farrell Oliver Ncube Joe Nucci Nathan Hallam Shawn Wagner Eric Kamienski Bonnie Richardson Shauna Warner John Osgood Wydale Holmes Aaron Peterson</p>
<p>CWG Members Absent JoLyn Gibbons Armando Espinosa Brad Graham Melody Moss Dennis Webb Lisa Roach Fred Warren</p>	<p>Audience Members Charles Buss Karyn Gitlis Darlene Justus Benjamin Shaw Haryaksha Gregor Knauer Barbara Sherman Jana L. Granillo Henry Cappello</p>

The meeting was called to order at 6:07PM.

Item 1 Welcome and Introductions

Joe Salvatore (CWG Chairman) introduced himself and shared the procedural changes to the CWG’s review of the General Plan topics by small group activity.

Item 2 Approval of the Meeting Minutes from January 3, 2013

Joe Salvatore inquired if the CWG had any comments. No comments were offered. Joe called for a motion to approve the minutes with the change. Motion was made by Don Cassano and seconded by Gary Johnson. The minutes were approved unanimously.

Item 3 Public Appearances

Chairman Salvatore called for public appearances.

Charles Buss from the University Heights Neighborhood Association stated that he has concerns about the density and historic preservation of future development west of Dorsey between Apache Blvd and 8th Street. He added that as these new 10, 15 even 20 story buildings stretch eastward they will eventually impose upon my neighborhood of small single story homes and the City should be working to protect them instead of saying yes to everything the developers want; the neighborhood needs to be heard too. He felt that early discussions before official required neighborhood, DRC and Council meetings with project developers would help the developer to understand that this area does not want to see massively tall buildings casting shadows on their homes. He added that they do want buildings that scale down in height over the last few hundred feet toward Dorsey ending in 3 or at most 4 stories (like Gracie's Village) and to provide open space breaks (view corridors) in the design at the junction of Dorsey with Hall, Orange, Lemon, Don Carlos streets, to add a lush than normal tree lined landscape plan with wide pedestrian sidewalks and bike paths on both sides of Dorsey to unite it as one neighborhood.

Karen Gitlis from the Maple Ash Neighborhood spoke the General Plan to have a stronger influence for preserving Cultural Resource areas. She stated that GP 2030 did not provide the language the City Council felt they could use to prevent a 3-lot tie (combination of three lots into one) in the Maple Ash neighborhood, which would have prevented increased zoning entitlements to the developer. She asked that the General Plan should not be used to increase zoning entitlements that are out of character with the surrounding properties, but rather include within the Cultural Resource designations consideration of lot coverage, height, context, massing and lot ties and not only density.

Darlene Justus from the North Tempe Neighborhood stated that Tempe is not doing enough to protect the native desert in Papago Park and shared photographs of desert areas scraped by utility contractor, and native plants inappropriately trimmed by volunteers. Darlene noted that the desert though seemingly bare has a fragile crust that if disturbed takes many years to recover. She said that she supported that equestrian use within Papago Park. Darlene referred to the City of Scottsdale General Plan goals and policies regarding the importance for conservation and preservation of the desert environment. Darlene asked the CWG to recognize in the General Plan the importance to preserve the natural desert parks.

Item 4 Sharing feedback from Community and Boards or Commissions

Nancy Ryan noted that this will be a standing item on the agenda that allows for the CWG to share any comments from the community, or boards and commissions. Ed Mitchell shared that the Commission on Disability Concerns had asked him to share their concern with the breadth and difference in transportation pricing structure and availability of information. Gary Johnson from the Neighborhood Advisory Commission shared that neighbors and friends in the community had a concern for high rises, how many are being built, views, impact on cultural heritage areas.

Item 5 Guiding Principles

Nancy Ryan stated the intent is to find some overriding key principals to help guide the specific chapters and development of the general plan, and the Principles were changed to reflect comments from the CWG at December 18, 2012 meeting. Nancy identified the changes to include:

- First Guiding Principal changed to Balanced Land Use
Added housing variety and affordability

- **Enhanced Quality of Life and Preservation of Neighborhood Character**
 Added: Heighten the spirit of giving in caring with programs to serve those who are most vulnerable
 Added: Enhance the ability for people to walk, bike and shop in areas near their homes; for workplaces, homes or schools accessible by transit, and to preserve important historic and cultural assets of the City, which make neighborhoods unique and desirable. Include open space, parks and recreation and the arts as an essential part of that desired quality of life. Engage citizens in the community and include them in changes that affect their neighborhoods.
- **Increased Economic Vitality**
 Added: Education quality and accountability is a critical component of economic vitality providing businesses with a skilled work. Accentuate Tempe as a destination of cultural, educational and recreational attributes.
- **Sustained Mobility / Greater Accessibility**
 Added: Continue to be a leader in multi-modal transportation
 Added: Ensure accessibility for persons of all abilities to transportation modes
- **Sustainability and Environmental Stewardship**
 Modified: Focus efforts on stewardship of resources that include air, water, land and riparian habitat; and man-made practices of energy conservation, recycling, green building, and alternative transportation modes. Pursue conditions that maintain or improve community health.

Marie Provine suggested that the Principle of Enhanced Quality of Life and Preservation of Neighborhood Character still needed to acknowledge equity of public investment. She explained it to be the actions the City takes to enhance quality of life and neighborhood preservation, to the extent that they involve public outlays or tax relief, should be fairly distributed throughout the city, so that no particular part of the City gets a disproportionate public investment.

Item 6 Small Group Activity – Facilitated Rotations

Wydale Holmes explained the activity. The CWG will break into smaller groups and rotate about every fifteen minutes. Subject matter experts will give an introduction at the beginning of each rotation. Facilitators will document and reflect the groups view points on charts. At the end of all five rotations, members will dot the top two to three ideas in each subject.

The CWG broke into groups for the activity. A summary of the CWG comments during the activity is provided in Attachment A

Item 7 Small Group Activity Report Out and Top Ideas Identification

Nancy Woods (Conservation)
 Wydale Holmes (Open Space, Recreation and Cultural Amenities)
 Patty Hatvick (Public Facilities and Services)
 Aaron Peterson (Human Services)
 Josh Roffler (Neighborhood and Historic Preservation)

The top ideas were by topic presented:

Environmental Planning and Water Resources

- Enhanced landscape requirements, to result in more trees, more parking lot tree coverage, and that will ultimately benefit in improved air quality
- Ambient temperature reduction through technologies, advances in materials and building construction techniques

Open Space, Recreation and Cultural Amenities

- Walkable, Connected, Mixed-Use with specific strategies unique to the area/neighborhood and to align/integrate identities with entire City Vision. Consider use of bike paths, etc. as a framework to connect open space.
- Add shade trees, especially in places like the Tempe Beach Amphitheater, that produce environmental/comfort from landscaping that attracts tourism and metropolitan focal point

Neighborhood and Historic Preservation

- Concern about increased rentals (character of neighborhoods)
- Sensitivity to issues of height as well as density
- More input in planning and zoning from neighborhoods

Public Facilities and Services

- Incubator (Start-up businesses) Concept-
Multi-Use buildings (*aka Mixed Use*)
Encourage new business and economic development
Emerging High Tech and Small industry
Artists open to all ideas.
- South Tempe Multi-Gen Center
- Divide Tempe into boroughs (Each needs infrastructure, distribute facilities)
- Restrooms in downtown area

Human Services

- Better advertise/market TCC and Tempe Community Foundation programs addressing these topics
- Connect social services/counseling with homelessness, preventative services
- Aging in place
Incentives for in-home safety features for aging population
Senior Housing - incentives to offset remodeling costs
- Aging population, closing schools - what are the trends?

Item 8 Wrap up and Closing

Nancy Ryan thanked the CWG for their participation and asked if the format was acceptable. The group liked the format therefore it will continue at future meetings.

Item 9 Future Meeting Date

The next CWG meeting date will be March 27, 2013, from 6 to 9PM at the Tempe Library Tempe Learning Center on the lower level.

The meeting was adjourned at 9:12 PM.

Prepared by: Nancy Ryan
Reviewed by: Lisa Collins

Nancy Ryan
Community Development

**Minutes
HEARING OFFICER
MARCH 5, 2013**

Minutes of the regular public hearing of the Hearing Officer, of the City of Tempe, which was held at the Council Chambers, 31 East Fifth Street, Tempe, Arizona.

Present:

Vanessa MacDonald, Hearing Officer
Steve Abrahamson, Planning & Zoning Coordinator
Sherri Lesser, Senior Planner
Diana Kaminski, Senior Planner
Michael Spencer, Senior Code Inspector
Brandy Zedlar, Code Inspector
Shawn Daffara, Code Inspector
Julie Stenner, Executive Assistant

Number of Interested Citizens Present: 28

Meeting convened at 1:44 PM and was called to order by Ms. MacDonald. She noted that anyone wishing to appeal a decision made by the Hearing Officer would need to file a written appeal to that decision within fourteen (14) days, by March 19, 2013 at 3:00 PM, to the Community Development Department.

-
1. Ms. MacDonald noted that the Hearing Officer Minutes for February 19, 2013 had been reviewed and approved.

-
2. Request approval to abate public nuisance items at the CARRILLO PROPERTY (PL130016) located at 504 East Bell De Mar Drive. The applicant is the City of Tempe.

There was no one present to represent the property owner.

Brandy Zedlar requested a 180 day open abatement for the property located at 504 East Bell De Mar Drive. The property is in violation of deteriorated landscape, junk and debris. A complaint was received on September 28, 2012. A citation has been issued to the property owner in which he did appear in court and was found responsible. Mr. Carrillo indicated the property was in the foreclosure process and he has no intention to clean up the property at this time. A tree has recently uprooted and needs to be removed from the property. This item will be added to the abatement. The 180 day open abatement is being requested due to the property being vacant.

Ms. MacDonald stated since the property is going into foreclosure the 180 day open abatement is necessary.

DECISION:

Ms. MacDonald approved abatement proceedings for PL130016/ABT13002 for an open period of 180 days.

3. Request approval to abate public nuisance items at the FELSINGER PROPERTY (PL130029) located at 1031 East Lilac Drive. The applicant is the City of Tempe.

There was no one present to represent the property owner.

Michael Spencer requested a 180 day open abatement for the property located at 1031 East Lilac Drive. The property is in violation of deteriorated landscape. Notices have been sent to the property owner and he has failed to take any action to alleviate the problems with the landscape at this property. This property has been abated several times over the years. The owner has shown no indication that he will maintain the property.

Ms. MacDonald agreed the property is in a state of disrepair.

DECISION:

Ms. MacDonald approved abatement proceedings for PL130029/ABT13003 for an open period of 180 days.

4. Request approval to abate public nuisance items at the BROWN PROPERTY (PL130035) located at 2512 East Del Rio Drive. The applicant is the City of Tempe.

There was no one present to represent the property owner.

Shawn Daffara is presenting this case for Jody Benson. A 180 day open abatement has been requested for the property located at 2512 East Del Rio Drive. This case originated in February 2012. The property has been in violation of weeds, junk and debris, and inoperable vehicles. Inspector Benson sent notices and found out the property owner is deceased. The property owner has a son in the vicinity that was trying to clean up the property but has failed to do so. Staff is asking for an abatement to remove the inoperable vehicles, junk and debris and clean up the deteriorated landscaping. The property is still in the deceased owners name at this time.

DECISION:

Ms. MacDonald approved abatement proceedings for PL130035/ABT13004 for an open period of 180 days.

5. Request approval for a Use Permit to allow a tobacco retailer (electronic cigarette retail business) for ZIKWID (PL130020) located at 725 South Rural Road, Suite #111. The applicant is Chad E. Green, ECIGsupply LLC DBA Zikwid.

Chad Green was present to represent this case.

Diana Kaminski introduced the case. The property is located at 725 South Rural Road, on the north east side of Rural Road and University Drive in the Cornerstone Shopping Center. It is a suite within an existing commercial development. The applicant is requesting a Use Permit for a tobacco retailer. The business is for an electronic cigarette retailer. Staff has not received any public input. Staff recommends approval of the Use Permit. The applicant has reviewed the conditions of approval. Condition number 7 regarding the hours of operation can be removed.

Ms. MacDonald stated condition number 7 would limit the hours of operation. Some of the other tenants in the Cornerstone shopping center are open until 9:00 PM. Ms. MacDonald asked Mr. Green if he would be selling tobacco products.

Mr. Green stated they would not be selling tobacco products. The business is strictly electronic cigarettes.

Mr. Green agreed to the conditions of approval.

There was no public input.

Ms. MacDonald noted that this request meets the criteria for a Use Permit:

1. Traffic generated by this use should not be excessive.
2. It won't create a nuisance resulting from odor, dust, gas, noise, vibration, smoke, heat or glare.
3. It won't contribute to the deterioration of the neighborhood.
4. It is compatible with existing surrounding structures and uses.
5. Will allow you to adequately control disruptive behavior both inside and outside the property.

DECISION:

Ms. MacDonald approved PL130020/ZUP130006 subject to the following conditions:

1. This Use Permit is valid only after a Building Permit has been obtained and the required inspections have been completed and a Final Inspection has been passed.
2. The Use Permit is valid for the plans as submitted within this application. Any additions or modifications may be submitted for review during building plan check process.
3. If there are any complaints arising from the Use Permit that are verified by a consensus of the complaining party and the City Attorney's office, the Use Permit will be reviewed by City staff to determine the need for a public hearing to re-evaluate the appropriateness of the Use Permit, which may result in termination of the Use Permit.
4. Any intensification or expansion of use shall require a new Use Permit.
5. No outdoor live entertainment or outdoor speakers shall be allowed.
6. Live entertainment requires a separate Use Permit.
7. ~~Hours of operation to end no later than 8pm on a daily basis.~~ (REMOVED BY HEARING OFFICER)

-
6. Request approval for a Variance to reduce the west street side yard setback for an attached garage addition for the SHEKERJIAN RESIDENCE (PL130021) located at 1301 East Myrna Lane. The applicant is Brian Shekerjian.

Brian Shekerjian was present to represent this case.

Sherri Lesser introduced the case. This is a Variance to reduce the west side yard setback for a garage addition. This property is located in the Corona Del Sol Estates, south of Warner Road and west of McClintock Drive. Staff is recommending approval of the Variance. The Staff Report outlines how the tests have been met to receive a Variance. Staff has not received any opposition or letters of support regarding this request. The applicant submitted a petition of support from the neighborhood meeting.

Ms. MacDonald stated she saw the petition of support that was included in the Staff Report as well as the list of the other Variances granted in the neighborhood. She asked Ms. Lesser how the easement affects this property.

Ms. Lesser stated there are four easements on this property. There were over twenty Variances granted in this subdivision for side yard setbacks varying from two feet down to a minimum of three feet. This property is the only one she saw with an easement. The easement was noted strictly for information. The property owner cannot build or encroach in the easements.

Mr. Shekerjian had a question regarding the on-site retention noted in condition number 2. He will check with the Public Works Department – Engineering for clarification.

Mr. Shekerjian agreed to the conditions of approval.

Ms. MacDonald stated she saw another house in the neighborhood with a very similar addition. This provided a good visual representation and it is a good looking addition.

There was no public input.

Ms. MacDonald noted that this request meets the criteria for a Variance and found as follows:

1. She does believe that special circumstances are applicable to the property, including its size, shape, topography, location, or surroundings.
2. She believes the strict application of this Code will deprive this property of privileges enjoyed by other property of the same classification in the same zoning district.
3. The adjustment authorized shall not constitute a grant of special privileges inconsistent with the limitations upon other properties in the vicinity and zone in which such property is located.
4. She does not believe that special circumstances are self-imposed by the property owner.

DECISION:

Ms. MacDonald approved PL130021/VAR13001 subject to the following conditions:

1. The variance is valid for the plans as submitted within this application.
2. The applicant shall obtain all necessary permits and clearances from the Public Works Department-Engineering and Building Safety Division for on-site retention and construction documents.

7. Request approval for a Use Permit to allow a tobacco retailer (electronic cigarette retail business) for SYNERGY VAPOR LABS (PL130023) located at 3415 South McClintock Drive, Suite #106. The applicant is David Phemister, Synergy Labs LLC.

David Lee Phemister was present to represent this case.

Diana Kaminski introduced the case. Synergy Vapor Labs is located at the south east corner of Southern Avenue and McClintock Drive in an existing commercial shopping center. The applicant is requesting a Use Permit for a tobacco retailer. The use is for electronic cigarettes. Staff has not received any calls of inquiry from the public regarding this use. The applicant is familiar with the conditions of approval. There are a few changes to be read into the record. Condition number 7 regarding the hours of operation can be removed. The hours of operation can be left at the discretion of the tenant. There was an issue with the Certificate of Occupancy that was discovered today. This issue will need to be resolved by the property owner. Staff added condition of approval number 8 which reads: The property owner shall resolve the certificate of occupancy for the suites within the building within 60 days of this approval.

The property owner and property manager had previously come in with an applicant for a smoke shop tobacco retailer to be located in the other building on this site. The placement of the building was too close to McClintock High School for a tobacco retailer due to the separation requirements. The tobacco retailer successfully relocated into one of the suites of the adjacent building. The same property owner and property manager allowed the current applicant to occupy a suite in the building that is closer to the school. It has been determined the new applicant is also too close to the school. A recommendation has been made to look for a suite in the other building. The tenant is currently in discussion with the property owner. He has already opened his business in the first suite facing Southern Avenue. Diana Kaminski presented pictures of the suite the applicant has already improved. The applicant will now need to make improvement on the suite he will be relocating to. The flooring, paint, carpet, and wall furnishings will need to be improved in the new suite. The improvements will not require a building permit. There is a discrepancy with the suiting map that identifies three suites, but the Certificate of Occupancy identifies those three suites as one space. The Certificate of Occupancy will need to be resolved for the benefit of the tenant.

Mr. Abrahamson stated staff will follow-up and make sure the Certificate of Occupancy is accommodated.

Mr. Phemister stated due to the verbiage of being a tobacco retailer in the Zoning Ordinance there was some confusion missed by some of the involved parties. He is going to lose the money he used to improve the first suite occupied. Electronic cigarettes are an emerging industry and a new product designed to transition people away from using tobacco. They are not really cigarettes in any form. E-cigarettes are vaporizers and batteries with a nicotine base solution. They are a nicotine delivery system that you use instead of smoking tobacco. In 2010 electronic cigarettes were placed under tobacco retailer in the Zoning Code. He believes there is a lack of knowledge of the product. By design this product gets people off of tobacco and helps them taper off the nicotine until they are done altogether. Electronic cigarettes do not fall under tobacco or smoking in the available legislature in the Smoke Free Act of Arizona and SB1280. He is concerned that the property owner may terminate his lease due to the Certificate of Occupancy.

Ms. MacDonald indicated the Zoning Code has not kept up with the different innovations of different products. This may be addressed when the code is revised.

Mr. Phemister was concerned over the exclusivity rights for his business at that particular property.

Ms. MacDonald stated the exclusivity rights would be between the tenant and the landlord.

Mr. Phemister agreed to the conditions of approval.

There was no public input.

Ms. MacDonald noted that this request meets the criteria for a Use Permit:

1. Traffic generated by this use should not be excessive.
2. It won't create a nuisance resulting from odor, dust, gas, noise, vibration, smoke, heat or glare.
3. It won't contribute to the deterioration of the neighborhood.
4. It is compatible with existing surrounding structures and uses.
5. Will allow you to adequately control disruptive behavior both inside and outside the property.

DECISION:

Ms. MacDonald approved PL130023/ZUP13010 subject to the following conditions:

1. This Use Permit is valid only after a Building Permit has been obtained and the required inspections have been completed and a Final Inspection has been passed.
2. The Use Permit is valid for the plans as submitted within this application. Any additions or modifications may be submitted for review during building plan check process.
3. If there are any complaints arising from the Use Permit that are verified by a consensus of the complaining party and the City Attorney's office, the Use Permit will be reviewed by City staff to determine the need for a public hearing to re-evaluate the appropriateness of the Use Permit, which may result in termination of the Use Permit.
4. Any intensification or expansion of use shall require a new Use Permit.
5. No outdoor live entertainment or outdoor speakers shall be allowed.
6. Live entertainment requires a separate Use Permit.
7. ~~Hours of operation to end no later than 9pm on a daily basis.~~ (REMOVED BY HEARING OFFICER)
8. **The property owner shall resolve the certificate of occupancy for the suites within the building within 60 days of this approval. (ADDED BY STAFF)**

8. Request approval for a Use Permit to allow a fraternity for TEMPE DORMS/CAMPUS LOFTS (PL130011) located at 1116 East Lemon Street. The applicant is Janine Meighen-Urquilla, AZ Rental Homes.

Continued from February 19, 2013

Janine Meighen-Urquilla, AZ Rental Homes and Justin Marino, Fraternity Member of Phi Gamma Delta (Fiji) were present to represent this case.

Diana Kaminski introduced the case. The property is an existing established apartment community located on the north side of Lemon Street in a primarily R-4 Multi-family Residential District. The Tempe Dorms application is to allow a fraternity to occupy the existing apartment community. This would be for the Alpha Sigma Chapter of the Phi Gamma Delta (Fiji) Fraternity. It would not be for all the members of the community. The fraternity has approximately 90 members. There are 17 units in the apartment complex with an on-site student manager as well as the management company that manages the property for the property owner. The fraternity members have been residing at the location for approximately two years and were not aware of the requirement for the Use Permit. Staff reviewed the previous activity on the site to get a sense if there was a change from a previous use as an apartment community to the fraternity. Up until recently the comparative data has been about the same as other apartment communities in the area. There are several conditions of approval. An additional condition of approval will be added which reads: 10. The Use Permit conditionally approved until 12/17/2013. After that date, staff shall evaluate and may administratively renew the Use Permit for an unlimited time period with no additional fee to applicant. If unable to approve administratively, application shall return to Hearing Officer in Public Hearing.

Ms. MacDonald stated the Use Permit may be administratively renewed. If there are a sufficient amount of complaints another hearing would be necessary.

Ms. Kaminski stated she has received a few calls of inquiry that have expressed concern about loud parties.

Ms. MacDonald stated the Staff Report noted inquiries from five individuals. Two expressed concern about noise and parties. One express concern with parking, but felt the issue has been resolved after communication with the manager on site. One parent called, who is in support of the application. A fraternity member living at the complex also expressed support for the requested Use Permit.

Ms. Meighen-Urquilla from AZ Rental Homes is here to represent the property owner. She stated representatives were present from the fraternity. Ms. Meighen-Urquilla agreed to the conditions of approval. She stated the members of the fraternity would be responsible for the Special Event permits. The fraternity will be notified of all the conditions of approval if the Use Permit is granted.

David Watkins is part of the graduate group that works with Alpha Sigma Chapter Phi Gamma Delta. He is part of the housing corporation which is a group of graduates that are responsible and work with the under graduate group as well as the international headquarters in terms of operations of facility for the fraternity. They are in constant contact with the brothers that live at the property and with Janine to make sure the property is in good order. They also work on the upkeep and improvements of the property.

Ms. MacDonald stated she wanted to go over the conditions of approval listed in the Staff Report with someone who would be at the property on a daily basis. The concern on this property is some of the behavioral issues.

Justin Marino, Fraternity Member of Phi Gamma Delta (Fiji) lives at this apartment complex.

Ms. MacDonald reviewed some of the conditions of approval. This Use Permit does not grant any outdoor live entertainment. A Special Event Use Permit would be required for each event. If a Special Event permit is not obtained and the Police Department is called it will be a verifiable complaint. The applicant will need to work with City of Tempe Crime Prevention Unit for a security plan prior to April 5, 2013. An occupancy inspection and clearance from the Tempe Fire Department shall be obtained prior to the Use Permit becoming effective. Fire sprinklers shall be installed within the next two years to bring this property into compliance. All nonconforming building lighting shall be removed and replaced with compliant light fixtures. Dead or missing trees and landscape material will need to be replaced. The Use Permit criteria looked at by the Hearing Officer includes two items that are related to behavior. They are adequately controlling disruptive behavior both inside and outside the property and not creating a nuisance arising from odor, dust, gas, noise, vibration, smoke, heat or glare which exceeds ambient conditions. Noise and vibration from loud parties are primary concerns.

Justin Marino agreed to the conditions of approval. He stated they are doing their best right now and are striving to improve. The fraternity wants to comply with the City and their neighbors as well.

Kenneth Burger indicated the lot next door, 1122 East Lemon has also been purchased by a fraternity with intent to evict the current occupants and have it ready for use as a frat house, putting two frat houses next door to each other. Mr. Burger stated his concern with the proximity issue.

Ms. MacDonald stated city staff will need to be diligent to follow up with the property owner to let them know there is a Use Permit process in effect prior to converting this apartment complex to a fraternity house.

Ms. Kaminski stated some uses have separation requirements. There is no proximity separation requirement for fraternity uses.

Chuck Buss was present to represent University Heights Neighborhood Association. He spoke in opposition of the Use Permit. His neighborhood is about 900 feet east of this property. He stated his concerns regarding noise, loud parties, traffic and loitering. He has visited the site a few times on a Thursday afternoon and on a Saturday night around midnight. He did not see parties, but it seems to be a frequently visited location. Nobody wants to have a bunch of fraternities next to their neighborhood. He was disappointed that ASU tore down the north and south fraternity rows. He spoke with Stephanie Salazar at ASU and she indicated they are working on a new dormitory complex south west of Apache and Rural. They are trying to encourage fraternities to reside there. Mr. Buss believes the fraternities would be better off away from neighborhoods and around other fraternities. He likes the additional condition to review the Use Permit. He asked how many complaints it would take to trigger a full-fledged public hearing.

Ms. MacDonald stated the condition was strengthened with the expiration date of the Use Permit. If there are not any significant issues the Use Permit can be renewed. If there are verifiable complaints that involve Police activity the Use Permit does not need to be renewed.

Mr. Abrahamson stated if there are neighborhood concerns they will be monitored and the City will work with the neighborhood regarding issues of this particular use.

Ms. Kaminski stated this condition has been used on other uses and with previous cases. The Hearing Officer recently went through a revocation process for a Use Permit. If this stipulation would have been in place the process would not have taken the length of time that it did.

Ms. MacDonald stated the Use Permit criteria will be looked at by staff administratively. This apartment complex is surrounded by other apartment complexes. It will need to be compared to the other apartment complexes in the area. The property will be evaluated by the number of police calls along with other objective criteria.

David Watkins spoke in favor of the Use Permit. The importance of developing young men is expanded upon by a fraternity. Management, budgeting, the operations of a company, the interaction of personnel are all building better young men. The housing capacity that the current location allows is the extent of community or brotherhood. There are opportunities to help the community. Parties are not the main focus of the fraternity. Parties may possibly take place but they will be monitored and they will be responsible. Mr. Watkins requested the conditions of approval to allow the fraternity to be focused on the items that need to be addressed. This is all part of the educational process the Greek system is responsible for and participates in. The security issue is extremely important. This is how the whole process began by trying to install a gate on the property to reduce the transient activity. The intent is to install the gate after this process is complete. Prior to the fraternity living at this location a party or two probably took place at the apartments. The fraternity brings a sense of ownership to the property.

Philip Heide, volunteer advisor to Alpha Sigma Chapter, Phi Gamma Delta is in favor of the Use Permit. He has nothing to add to Mr. Watkins comments.

Scott Minchuk has been a member of the Phi Gamma Delta Fraternity at Arizona State for four years. He spoke in favor of the Use Permit. He will be graduating this semester. He is also the President of Order of Omega at Arizona State University. Order of Omega is a Greek Honor Society that promotes fellowship among all Greeks. He represents about 150 people. This house is important to the fraternity. This is the first fraternity to apply for a Use Permit in Tempe. They are leaders, they want to follow the rules and help out. The fraternity participates in many philanthropy events and volunteer events. They also sponsor Terrace Road by doing street cleanings several times a year. They are helping the community by picking up trash and painting over graffiti. They take care of the community and want to be a part of it. The fraternity members have improved their current property and they work directly with their neighbors. They have resided at this location for two years. The fraternity has done well in the past few years and they are going to continue to do that. The fraternity is very involved with ASU. They have donated books and canned food to those in need. They just participated in a dance marathon which gives back to the Phoenix Children's Hospital. They are good members of this community.

Ms. MacDonald stated she looked at the Fiji Page on Facebook. She was impressed with the activities the fraternity has participated in. She believes the members present today have made a commitment to be good neighbors. She thinks they will do a good job spreading the word to the fraternity brothers and visitors as well.

Ms. MacDonald noted that this request meets the criteria for a Use Permit:

1. Traffic generated by this use should not be excessive.
2. It won't create a nuisance resulting from odor, dust, gas, noise, vibration, smoke, heat or glare.
3. It won't contribute to the deterioration of the neighborhood.
4. It is compatible with existing surrounding structures and uses.
5. Will allow you to adequately control disruptive behavior both inside and outside the property.

DECISION:

Ms. MacDonald approved PL130011/ZUP13002 subject to the following conditions:

1. The Use Permit is valid for the plans as submitted within this application. Any additions or modifications may be submitted for review during building plan check process.
2. If there are any complaints arising from the Use Permit that are verified by a consensus of the complaining party and the City Attorney's office, the Use Permit will be reviewed by City staff to determine the need for a public hearing to re-evaluate the appropriateness of the Use Permit, which may result in termination of the Use Permit.
3. Any intensification or expansion of use shall require a new Use Permit.
4. No outdoor live entertainment (this includes bands and disc jockeys) or outdoor speakers shall be allowed unless part of a special event use permit.
5. Special events require a separate special event permit per event.
6. The applicant shall contact the City of Tempe Crime Prevention Unit for a security plan within 30 days of this approval. Contact Crime Prevention at 480-350-8714 before April 5, 2013.
7. An occupancy inspection and clearance from the Tempe Fire Department shall be obtained prior to the use permit becoming effective.
8. All nonconforming building lighting shall be removed and replaced with compliant light fixtures.
9. Replace all dead or missing trees and landscape material.
10. **The Use Permit conditionally approved until 12/17/2013. After that date, staff shall evaluate and may administratively renew the Use Permit for an unlimited time period with no additional fee to applicant. If unable to approve administratively, application shall return to Hearing Officer in Public Hearing. (ADDED BY HEARING OFFICER)**

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9. Request approval for a Use Permit to allow a wireless communications facility, monopole and equipment shelter for VERIZON PHO CHIGORIN (PL130018) located at 9365 South McKemy Street. The applicant is Michael J. Campbell, Verizon Wireless by Campbell A&Z, LLC.

Continued from February 19, 2013

Michael J. Campbell was present to represent this case.

Steve Abrahamson introduced the case. This is a request for wireless facility in the form of a monopole. The request is for a Use Permit to allow a 60 foot monopole in the GID, General Industrial District off of McKemy Street. This is in the southern portion of the City of Tempe near a residential area within the City of Chandler. The request meets all the criteria for a Use Permit. Staff has received one concern from a neighbor to the south, within the City of Chandler over the appearance of the requested antenna. Through the conditions of approval staff is recommending a monopalm instead of a monopole since there was an expressed concern with the location.

Ms. MacDonald stated there are no other palm trees in the area. She asked if there was a different type of tree that could be mimicked by a cell phone tower.

Mr. Abrahamson stated pine trees could be mimicked, but there are no pine trees in this area as well.

Mr. Campbell is the consultant for Verizon Wireless. Verizon is proposing a 60 foot monopole in the GID, General Industrial District. Warner Road Business Park is a major industrial complex. The monopole would be located on the north side of the four acre parcel. The primary building is almost 28 foot tall. There are currently two tenants in the building. The building is used for manufacturing and distribution type uses. The proposed site is located on the north end of the property. The proposed project would take up approximately four parking spaces and one parking island, measuring an area of about 20 feet by 42 feet. The monopole and equipment cabinet would be surrounded by an 8 foot cmu block wall. Staff has requested a parking island at the east end. The applicant thought it would be more affective on the west end near McKemy, but they are willing to place it wherever staff wants it. The applicant just received the Staff Report on Friday and that was the first he had heard of the recommended monopalm. Prior to Friday, the suggested monopalm had not been communicated to him. He respects the fact that someone may have a differing opinion as to what might be a visual impact. A monopole allows more flexibility with the antennas than a monopalm. There is another monopole within the industrial park. The other pole is not noticeable; it is located between two industrial buildings. The nearest house is located 507 feet from the proposed antenna site. Due to the distance, the large industrial buildings and the trees, the visual impact of the monopole from the neighborhood would be minimal. The applicant prefers the monopole over the monopalm due to the placement of the antennas and the flexibility it allows.

Ms. MacDonald noted she received an email and aerial views from Rich Grams. The email does not include his address. Ms. MacDonald believes a monopole is completely appropriate for this location. Condition number 6 recommending the modified monopalm will be removed.

Mr. Campbell agreed to the conditions of approval.

Ms. MacDonald read the email from Rich Grams into the record. He stated his concern regarding the proposed location of the monopole and the proximity to upscale houses in Ray Ranch Estates. He believes there are other possible locations for the monopole north of Warner between the railroad tracks and Kyrene. He stressed the severity of this proposal.

Ms. MacDonald noted that this request meets the criteria for a Use Permit:

1. Traffic generated by this use should not be excessive.
2. It won't create a nuisance resulting from odor, dust, gas, noise, vibration, smoke, heat or glare.
3. It won't contribute to the deterioration of the neighborhood.
4. It is compatible with existing surrounding structures and uses.
5. Will allow you to adequately control disruptive behavior both inside and outside the property.

DECISION:

Ms. MacDonald approved PL130018/ZUP13005 subject to the following conditions:

1. The Use Permit is valid for the plans as submitted within this application.
2. The applicant shall provide updated tenant and parking data during planning plan check process.

3. Obtain all clearances from Building Safety prior to use permit becoming effective.
4. Provide a landscape island, designed per ZDC requirements, at the west end of scope of work area.
5. All equipment to be removed within 30 days of termination of use.
6. ~~The tower to be modified to a 60' high monopalm, design and details to be reviewed in planning plan check process.~~ (REMOVED BY HEARING OFFICER)

10. Request approval for a Use Permit to allow a restaurant/bar for the FIREHOUSE (PL120431) located at 4 East University Drive. The applicant is Amy Nations.

Continued from February 19, 2013

William G. Was III was present to represent this case.

Diana Kaminski introduced the case. The applicant is requesting a Use Permit to allow a bar in the City Center Zoning District. The property is located at the north east corner of Mill Avenue and University Drive. The Firehouse opened last year as a restaurant. They have been very successful with their sales of alcohol and they are applying for an Arizona State Liquor License to change from a Series 12 Restaurant license to a Series 6 Bar license. The Use Permit is required to change the use from a restaurant to a bar. Staff has not received any inquiries from the public. Staff reviewed and supports the shared parking analysis that was submitted by the applicant. Staff recommends approval of the Use Permit for the bar.

Ms. MacDonald reviewed condition of approval number 5 which reads Outdoor vending requires a separate Use Permit. It was her understanding there has been some outdoor grilling and sales of hamburgers or hotdogs.

Mr. Was stated they would not be doing that again without going through the proper channels.

Ms. MacDonald indicated the Firehouse would be back to process a Use Permit for live entertainment.

Mr. Was stated they would be back for the live entertainment Use Permit.

Mr. Was agreed to the conditions of approval.

There was no public input.

Ms. MacDonald noted that this request meets the criteria for a Use Permit:

1. Traffic generated by this use should not be excessive.
2. It won't create a nuisance resulting from odor, dust, gas, noise, vibration, smoke, heat or glare.
3. It won't contribute to the deterioration of the neighborhood.
4. It is compatible with existing surrounding structures and uses.
5. Will allow you to adequately control disruptive behavior both inside and outside the property.

DECISION:

Ms. MacDonald approved PL120431/ZUP12131 subject to the following conditions:

1. The Use Permit is valid for the plans as submitted within this application. Any additions or modifications may be submitted for review during building plan check process.
2. If there are any complaints arising from the Use Permit that are verified by a consensus of the complaining party and the City Attorney's office, the Use Permit will be reviewed by City staff to determine the need for a public hearing to re-evaluate the appropriateness of the Use Permit, which may result in termination of the Use Permit.
3. Any intensification or expansion of use shall require a new Use Permit.
4. No live entertainment is allowed without a separate use permit.
5. Outdoor vending requires a separate use permit.

6. No outdoor speakers shall be allowed.
7. The applicant shall contact the City of Tempe Crime Prevention Unit for a security plan within 30 days of this approval. Contact William Gallauer at 480-350-8749 before March 19, 2013.
8. An occupancy inspection and clearance from the Tempe Fire Department shall be obtained prior to the use permit becoming effective.
9. Business hours are: Monday-Thursday 10am-2am, Friday-Sunday 8am to 2am.

The next Hearing Officer public hearing will be held on March 19, 2013.

There being no further business the public hearing adjourned at 3:22 PM.

Prepared by: Julie Stennerson, Executive Assistant
Reviewed by:



Steve Abrahamson, Planning & Zoning Coordinator
for Vanessa MacDonald, Hearing Officer

SA:js

Minutes

Mayor's Youth Advisory Commission

March 5, 2013

Minutes of the Mayor's Youth Advisory Commission held on March 5, 2013, 6:30 p.m., at the Tempe, Public Library Board Room, 3500 S. Rural Road 2nd Floor, Tempe, Arizona.

MEMBERS Present: Jesica Ast, Rohit Badia, Katie Barone, Raquel Camarena, Zaria Guignard, Mohammad Halloum, Timur Karamanov, Andrea Lara-Garcia, Jeremy Cappello Lee, Amanda Milovich, Andie Niebling, John Osgood, Julia Rasmussen and Humza Zubair.

MEMBERS Absent: Dominic Bonelli, Zach Mitchell, Will Morgan, Ashley Noble, Maria Ornelas, and Chris Vega.

City Staff Present: Kim Bauman and Lily Villa.

Guests Present: None.

Agenda Item 1 – Call Meeting To Order

Jeremy Cappello Lee, Chair called the meeting to order at 6:35 p.m.

Agenda Item 2 – Minutes from February 19, 2013 Meeting

Timur Karamanov read the minutes from the February 19, 2013 meeting.

MOTION: **Zaria Guignard** moved to approve the minutes.

SECOND: **Humza Zubair** seconded the motion.

DECISION: Minutes were approved.

Agenda Item 3- Treasurer's Report

Amanda Milovich provided the treasurer's report.

Agenda Item 4 – Announcements

There were no announcements.

Agenda Item 5- 2013 Courage Awards and Tempe Top Teens Recognition

Jeremy passed around a sign-up sheet for the dinner and **Kim Bauman, Advisor** asked members to have their final decision on whether they plan to attend by the March 19th meeting.

Agenda Item 6 – Community Service Project Planning

- 1) **Lily Villa, Advisor** had members begin planning the “Be Fit, Don’t Sit” community service project. The following was determined.
- The project will be provided after-school at Curry and Waggoner Elementary Schools to K-3rd grade Kid Zone participants.
 - The project will occur in April and tentative dates were decided upon. The project will begin at 4 p.m. each date and last one hour.
 - Tentative activities were discussed and members will finalize activities at their next meeting.

Agenda Item 7 – Future Agenda Items

- Community Service Project Planning
- Courage Awards and Tempe Top Teens Recognition.

The Commission’s next meeting will be **March 19, 2013**.

Meeting adjourned at 7:25 p.m.

Prepared by: Jessica Ast

Reviewed by: Kim Bauman

Chris Vega, Vice Chair
Mayor’s Youth Advisory Commission



CITY OF TEMPE
REQUEST FOR COUNCIL ACTION

Council Meeting Date: 4/4/2013
Agenda Item: 5A1

ACTION: Hold a public hearing to recommend the approval of a Series 12 restaurant liquor license for Veggie Boy, LLC, dba Green: New American Vegetarian, 2240 North Scottsdale Road, #7+8.

FISCAL IMPACT: N/A

RECOMMENDATION: Recommend approval of this application because the applicant and location have met all City and County liquor licensing criteria.

BACKGROUND INFORMATION: Andrea Dahlman Lewkowitz is the Agent for this application, license number 105941. This is an existing business applying for a new license. Tempe City Code requires that the Tempe Police Department conduct a background investigation on all liquor license applicants. Additionally, the city code requires that business locations be inspected by Fire Prevention, Building Safety and the County Health Department to ensure the establishment meets minimum city and county code licensing criteria. The Community Development Department has determined that a use permit is not required at this time. The premises has been posted for a 20-day period, per Arizona Revised Statute. No public opposition has been received regarding this liquor license application. State statute requires municipalities to make one of three recommendations to the Arizona Department of Liquor Licenses and Control (AZ DOL):

1. Approval
2. Denial (this results in a public hearing set by the AZ DOL)
3. No recommendation (this may result in a public hearing set by the AZ DOL)

ATTACHMENTS: N/A

STAFF CONTACT(S): Bruce L. Smith, License & Collection Supervisor, (480) 350-8509

Department Director: Ken Jones, Finance & Technology Department Director
Legal review by: David Park, Assistant City Attorney
Prepared by: Ana Perez, Financial Services Technician II

**CITY OF TEMPE
REQUEST FOR COUNCIL ACTION****Council Meeting Date: 4/4/2013
Agenda Item: 5A2**

ACTION: Hold a public hearing to recommend the approval of a Series 06 bar liquor license for Moirbia LLC, dba Robbie Fox's Public House, 640 South Mill Avenue, #B2-105.

FISCAL IMPACT: N/A

RECOMMENDATION: Recommend approval of this application because the applicant and location have met all City and County liquor licensing criteria.

BACKGROUND INFORMATION: Randy D. Nations is the Agent for this application, license number 121362. This application is a person and location transfer of a Series 06 bar liquor license from It Just Doesn't Matter LLC, dba Final Score Sports Grill, 10237 North 35th Avenue #4A, Robert Wayne Powell, Agent. to Moirbia LLC, dba Robbie Fox's Public House, 640 South Mill Avenue, #B2-105, Randy D. Nations, Agent. This business has an existing Series 12 restaurant liquor license.

Tempe City Code requires that the Tempe Police Department conduct a background investigation on all liquor license applicants. Additionally, the city code requires that business locations be inspected by Fire Prevention, Building Safety and the County Health Department to ensure the establishment meets minimum city and county code licensing criteria. The Community Development Department has determined that a use permit is not required at this time. The premises has been posted for a 20-day period, per Arizona Revised Statute. No public opposition has been received regarding this liquor license application. State statute requires municipalities to make one of three recommendations to the Arizona Department of Liquor Licenses and Control (AZ DOL):

1. Approval
2. Denial (this results in a public hearing set by the AZ DOL)
3. No recommendation (this may result in a public hearing set by the AZ DOL)

ATTACHMENTS: N/A

STAFF CONTACT(S): Bruce L. Smith, License & Collection Supervisor, (480) 350-8509

Department Director: Ken Jones, Finance & Technology Department Director
Legal review by: David Park, Assistant City Attorney
Prepared by: Ana Perez, Financial Services Technician II

**CITY OF TEMPE
REQUEST FOR COUNCIL ACTION****Council Meeting Date: 4/4/2013
Agenda Item: 5A3**

ACTION: Hold a public hearing to recommend the approval of a Series 06 bar liquor license for Moonshine Group, LLC, dba Moonshine Whiskey Bar, 410 South Mill Avenue, #D101.

FISCAL IMPACT: N/A

RECOMMENDATION: Recommend approval of this application because the applicant and location have met all City and County liquor licensing criteria.

BACKGROUND INFORMATION: Randy D. Nations is the Agent for this application, license number 206009. This application is a person to person transfer of a Series 06 bar liquor license from Blue Pacific Entertainment Corp, dba Margarita Rocks, 410 South Mill Avenue, #D101, Randy D. Nations, Agent. to Moonshine Group LLC, dba Moonshine Whiskey Bar, 410 South Mill Avenue, #D101, Randy D. Nations, Agent. This is a new business applying for a license at a location whose previous occupant had a similar type of business operation and liquor license. This applicant is operating with an interim permit.

Tempe City Code requires that the Tempe Police Department conduct a background investigation on all liquor license applicants. Additionally, the city code requires that business locations be inspected by Fire Prevention, Building Safety and the County Health Department to ensure the establishment meets minimum city and county code licensing criteria. The Community Development Department has determined that a use permit is not required at this time. The premises has been posted for a 20-day period, per Arizona Revised Statute. No public opposition has been received regarding this liquor license application. State statute requires municipalities to make one of three recommendations to the Arizona Department of Liquor Licenses and Control (AZ DOL):

1. Approval
2. Denial (this results in a public hearing set by the AZ DOL)
3. No recommendation (this may result in a public hearing set by the AZ DOL)

ATTACHMENTS: N/A

STAFF CONTACT(S): Bruce L. Smith, License & Collection Supervisor, (480) 350-8509

Department Director: Ken Jones, Finance & Technology Department Director
Legal review by: David Park, Assistant City Attorney
Prepared by: Ana Perez, Financial Services Technician II

**CITY OF TEMPE
REQUEST FOR COUNCIL ACTION****Council Meeting Date: 4/4/2013
Agenda Item: 5A4**

ACTION: Hold a public hearing to recommend the approval of an acquisition of control and agent change of a Series 09 liquor store liquor license for Smart & Final Stores, LLC, dba Smart & Final #480, 1737 East Broadway Road #104.

FISCAL IMPACT: N/A

RECOMMENDATION: Recommend approval of this application because the applicant and location have met all City and County liquor licensing criteria.

BACKGROUND INFORMATION: Joseph Ovidio Cipollini is the Agent for this application, license number 118941. If a person other than those persons originally licensed acquires control over a license, they must file notice of the acquisition with the Arizona Department of Liquor Licenses and Control and list the new officers, directors or other controlling persons. All officers, directors or other controlling persons must meet the qualifications for licensure as prescribed by Arizona Revised Statute. This business has had a Series 09 liquor store liquor license since 2008. Tempe City Code requires that the Tempe Police Department conduct a background investigation on all liquor license applicants. The premises has been posted for a 20-day period, per Arizona Revised Statute. No public opposition has been received regarding this liquor license application. State statute requires municipalities to make one of three recommendations to the Arizona Department of Liquor Licenses and Control (AZ DOL):

1. Approval
2. Denial (this results in a public hearing set by the AZ DOL)
3. No recommendation (this may result in a public hearing set by the AZ DOL)

ATTACHMENTS: N/A

STAFF CONTACT(S): Bruce L. Smith, License & Collection Supervisor, (480) 350-8509

Department Director: Ken Jones, Finance & Technology Department Director

Legal review by: David Park, Assistant City Attorney

Prepared by: Ana Perez, Financial Services Technician II



CITY OF TEMPE
REQUEST FOR COUNCIL ACTION

Council Meeting Date: 4/04/2013
Agenda Item: 5A5

ACTION: Authorize the Mayor to execute a Wired Telecommunications License and Right-of-Way Use Agreement between the City of Tempe and MCI Communications Services Inc. dba Verizon Business Services.

FISCAL IMPACT: Facilities owned by MCI/Verizon that carry interstate telecommunications are subject to a \$2.01 per linear foot fee, which is adjusted yearly based on the consumer price index. For this license and right-of-way use agreement, MCI/Verizon will pay an initial fee of \$ 1,575.84, which is based upon 784 linear feet. The proceeds will be deposited into the General Fund. MCI/Verizon will also pay any applicable permit fees, damage fees, and reasonable costs associated with any construction, maintenance and/or operation of its facilities.

RECOMMENDATION: Authorize the Mayor to execute the agreement.

BACKGROUND INFORMATION: In 1988, the City adopted Ordinance No. 88.15 that granted a license to MCI to allow its fiber-optic cable for interstate telecommunications to occupy the City's right-of-way. MCI's route was in the Union Pacific Railroad's right-of-way, but intersected with the City's right-of-way at various street crossings along the way. Under the terms of the ordinance, the effective date of the license was when MCI accepted it, which was April 4, 1988. The term of the license was for 25 years and thus expired on April 3, 2013. Under Sections 31A-10(a) and 31A-14 of the Tempe City Code, MCI/Verizon wishes to continue to use the right-of-way and needs to have a license and agreement in order to continue providing services and/or do any work in the right-of-way. This agreement is for a five year term.

ATTACHMENTS: Agreement and Exhibits A, B and C.

STAFF CONTACT: Jenae Naumann, Assistant City Attorney, (480) 350-8402

Department Directors: Don Bessler, Public Works Director
Legal review by: Jenae Naumann, Assistant City Attorney
Prepared by: Donna Rygiel, Engineering Contract Supervisor

**WIRED TELECOMMUNICATIONS LICENSE AND
RIGHT-OF-WAY USE AGREEMENT
BETWEEN THE CITY OF TEMPE AND
MCI COMMUNICATIONS SERVICES INC. DBA
VERIZON BUSINESS SERVICES**

Contract No. C2013-

This Wired Telecommunications License (“License”) and Right-of-Way Use Agreement (“Agreement”) is entered into this ____day of April, 2013, by and between the City of Tempe, an Arizona municipal corporation (“City”) and MCI Communications Services Inc., dba Verizon Business Services (“MCI”), a Delaware corporation.

RECITALS

WHEREAS, City owns public street and alley right-of-way and public utility easements within the boundaries of the City of Tempe; and

WHEREAS, MCI has obtained from the Arizona Corporation Commission a certificate of convenience and necessity by Decision No. 54507 dated April 29, 1985, to its predecessor MCI Telecommunications Corporation, as expanded by Decision No. 55946 dated December 20, 1995 (collectively, the “CC&N”); and

WHEREAS, MCI has previously received permission from the City to place its Facilities (as defined herein) in the right-of-way pursuant to Ordinance No. 88.15 dated February 25, 1988, effective March 26, 1988, and the license accepted on April 4, 1988; and

WHEREAS, MCI desires the ability to be able to install, operate, maintain and repair future Facilities within the right-of-way and/or operate, maintain and repair existing Facilities within a portion of the right-of-way, subject to the requirements of this License and Agreement; and

WHEREAS, MCI has applied to City for permission to continue using the right-of-way to maintain its existing Fiber Optic Networks; and

WHEREAS, MCI also desires to obtain from the City a telecommunications license to provide Telecommunication Services; and

WHEREAS, City is authorized to regulate its streets, alley and public utility easements, and to grant, renew, deny, amend and terminate licenses for and otherwise regulate the installation, operation, repair, and maintenance of such Facilities within the City’s boundaries pursuant to City Charter, Tempe City Code, Chapter 31A, and by virtue of federal (47 U.S.C. § 253) and state statutes (including, but not limited to, A.R.S. §§ 9-581, 9-582, and 9-583), by the City’s police powers, its authority over public right-of-way, and its other governmental powers and authority; and

WHEREAS, City wants to reserve rights to construct and use and allow others to construct and use all manner of additional improvements in the right-of-way; and

WHEREAS, MCI agrees to provide and maintain accurate maps showing the location of all Facilities owned or used by MCI on both public and private property within City, and to comply with such other mapping requirements as City may establish from time to time; and

WHEREAS, MCI will secure the appropriate licenses, encroachments and other permits required by the City Code for the placement of its Facilities within City right of way; and

WHEREAS, MCI has agreed to comply with public property use requirements that City has established and may establish from time to time.

NOW THEREFORE, for and in consideration of the foregoing, the amounts hereinafter to be paid by MCI, and the covenants and agreements contained herein to be kept and performed by MCI, and for other good and valuable consideration, the City hereby grants to MCI a telecommunication license (“License”) and permission to use the public right-of-way pursuant to the terms and conditions set forth herein.

SECTION 1. Definitions

ACC means the Arizona Corporation Commission.

A.R.S. means Arizona Revised Statutes.

Backbone means a high-speed network that interconnects smaller, independent networks and is the through-portion of a transmission network (not the spurs that branch off).

Cable Services and Cable System shall have the same meaning as defined in Chapter 10 of the Tempe City Code.

Call means the operations required to set up or establish, maintain, and terminate or release a connection through a telephone network in support of a communication between two or more stations. A call comprises a sequence of events that begins when an end user at an originating station initiates a call request to a switch that may work in conjunction with other switches to establish a connection to an end user at a destination station, and concludes when one party (user) terminates the connection.

Claim(s) means and includes losses, claims, damages, suits, actions, payments, judgments, demands, expenses and costs, including, but not limited to, reasonable attorney’s fees incurred through all appeals.

Coarse Wavelength Division Multiplexing (“CWDM”) is a variation of WDM that carries four to eight wavelengths per fiber or more that is designed for short to medium-haul networks (regional and metropolitan areas).

Commercial Mobile Radio Services means two-way voice commercial mobile radio service as defined by the FCC in 47 U.S.C. § 157.

Common carrier means a private company offering interstate or foreign communication by wire or radio or the interstate or foreign transmission of energy to the general public on a non-discriminatory basis.

Conduit means a pipe of either metal, ceramic or plastic that is designed to protect buried cables.

Conduit System means any combination of Ducts, Conduits, manholes and handholes joined to form an integrated whole.

Contractor means any person, firm, partnership, corporation, association or other organization, or a combination of any of them, that performs services or provides goods relating to this Agreement. Contractor shall include any subcontractor hired and/or used by MCI for the performance of services or provision of goods relating to this Agreement.

Dark Fiber means fiber optic strands that are not connected to transmission equipment.

Dense Wavelength Division Multiplex (“DWDM”) is a variation of WDM but with much higher bandwidth and density. Using DWDM, up to 80 or more separate wavelengths or channels of data can be multiplexed on a single optical fiber. Each channel carries a time division multiplexed (TDM) signal. Since each channel can carry up to 2.5 Gbps, up to 200 billion bits per second can be delivered by the optical fiber simultaneously.

Duct means a single enclosed tube, pipe or channel for enclosing and carrying cables, wires, and other facilities.

Equipment means any tangible asset used to install, repair, or maintain Facilities in any ROW.

Facilities means the plant, equipment, and property used in the provision of communication and telecommunication services and not owned by the City, including but not limited to poles, wires, pipe, conduits, pedestals, antenna, and other appurtenances placed in, on, or under Public Highways.

FCC means the Federal Communications Commission.

Fiber Optic Network is a communication system consisting of an optical transmitter to convert an electrical signal into an optical signal to send into the optical fiber, a cable containing bundles of multiple optical fibers that is routed through underground conduits and buildings, multiple kinds of amplifiers, and an optical receiver to recover the signal as an electrical signal.

Information Service means “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.”

Inner-Duct means a pathway created by subdividing a Duct into smaller channels.

Intrastate Call means a call in a conventional circuit-switched network that originates and terminates in a single state.

Interstate Call means a call in a conventional circuit-switched network that originates in one state and terminates in a different state (or country).

Interstate Telecommunications Services Provider means a Telecommunications Corporation that places underground or above ground Facilities in the Public Highway for interstate telecommunications services.

Interstate Traffic means a communication or transmission that originates in any state, territory, or possession of the United States, or the District of Columbia and terminates in another state, territory, possession, or the District of Columbia.

Manhole means an enclosure, usually below ground level and entered through a hole on the surface covered with a cast iron or concrete manhole cover, which personnel may enter and use for the purpose of installing, operating, repairing, and maintaining cable and fiber in a Conduit, Duct or Inner-Duct.

Multichannel Video System includes:

- (a) A “cable system,” as the term is defined in title VI of the Federal Communications Act of 1934, providing service within the City;
- (b) An “open video system,” as the term is defined in title VI of the federal Communications Act of 1934 and implementing regulations, providing service within the City;
- (c) Any other system providing Multichannel Video Service within the City, where the service is transmitted in whole or in part via wires or lines that are in or cross any ROW within the City. The preceding sentence shall apply whether the provider owns, leases or otherwise obtains the right to use the wires or lines, including wires or lines of a telecommunications provider used pursuant to tariff or otherwise for that purpose;
- (d) Any other system providing Multichannel Video Service within the City where a license or similar permission or approval from the City is required under applicable law,

For purposes of this License, “Multichannel Video Services” means multiple channels of video programming where some or all of the video programming is generally considered comparable to programming provided by a television broadcast station or by a direct to home satellite service. Multichannel Video Service specifically includes, but is not limited to, “cable service” as the term is used in Title VI of the Federal Communications Act of 1934.

Parties shall collectively mean the City of Tempe and MCI Communications Services, Inc.

Point of Presence (POP) means a telecommunications facility where network equipment is located to be used to connect customers to a network backbone.

Provider means a Telecommunications Corporation that constructs, installs, operates, repairs, or maintains Telecommunications Facilities in the City Public highways.

Public Emergency means any condition which, in the opinion of City officials, poses an immediate threat to the lives or property of the citizens of Tempe 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.

Public Highway means the roads, streets and alleys and all other dedicated public ROW and public utility easements of the City.

Public Service Corporation means a corporation or company engaged in furnishing gas, oil, or electricity for light, fuel, or power; or in furnishing water for irrigation, fire protection, or other public purposes; or in furnishing, for profit, hot or cold air or steam for heating or cooling purposes; or engaged in collecting, transporting, treating, purifying and disposing of sewage

through a system, for profit; or in transmitting messages or furnishing public telegraph or telephone service, and all corporations other than municipal, operating as common carriers. However, a message transmitting company is only a public service corporation if it is a common carrier.

Right-of-way (“ROW”) shall have the same meaning as Public Highway.

Service Lateral means an underground facility that is used to transmit, distribute, or furnish communications from a common source to an end-use customer.

Telecommunications means the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received. **However, the term does not include commercial mobile radio services, pay phone services, interstate services, cable services, information services, or the leasing of dark fiber for transmission purposes.**

Telecommunications Corporation means any Public Service Corporation to the extent that it provides telecommunications services in this state.

Telecommunications Services means the offering of telecommunications for a fee directly to the public, or to such users as to be effectively available directly to the public, regardless of the facilities used.

Wavelength Division Multiplexer (“WDM”) means a device that combines optical signals from multiple different single-wavelength end devices onto a single fiber. WDM carries two to four wavelengths per fiber.

SECTION 2. Permission to Use Right-of-Way

2.1 Subject to the provisions of this Agreement, the Tempe City Code, the City of Tempe Charter, and Arizona and federal law, City hereby grants to MCI permission to use the designated portions of the right-of-way (“ROW”) subject to and conditioned upon MCI’s full, timely, complete and faithful performance of all obligations to be performed or required hereunder by MCI, and MCI hereby accepts the terms and conditions of this License and Agreement.

2.2 MCI’s use and occupation of the ROW shall in all respects conform to all and each of the following provisions:

2.2.1 Permitted Uses. MCI shall use the portions of the ROW solely for the uses allowed under this License and Agreement and shall conduct no other activity at or from those designated portions of the ROW as described on Exhibit A. The permitted uses are limited to the following:

2.2.1.1 Constructing, maintaining, repairing and operating the Facilities as described in this Agreement.

2.2.1.2 Using the Facilities to provide interstate long-distance telecommunications access.

2.3 All other uses of the ROW are prohibited. MCI may not allow third parties to use the Facilities for any use that MCI itself does not have the authority under this License and Agreement to use the Facilities for.

2.3.1 The Telecommunications License granted by this Agreement does not allow MCI to provide one-way transmissions by anyone directly to customers or any other type of video programming or other programming or transmission that may be subject to a cable television license or franchise. This License does not allow a Multichannel Video System and/or the providing of Multichannel Video Services.

2.3.2 If MCI ever obtains or seeks federal, state or local approval to provide a cable system or open video system (“Video Services”) over the Fiber Optic Networks, this License and Agreement shall remain in effect according to its terms and MCI shall continue to pay any fee required by this Agreement, regardless of any legal or regulatory provisions, permits or other processes or rules that might now or hereafter provide otherwise.

2.3.3 Without limiting the other amendment or waiver provisions of this License and Agreement, no change to or waiver of this Agreement’s provisions regarding Video Services is effective without a formal amendment to this Agreement executed by City after approval by the City Council. City has not promised any such amendment or waiver. This Agreement does not prohibit the parties from entering into other agreements regarding the Fiber Optic Networks or Conduit Systems, should both parties desire to do so in their sole and absolute discretion.

2.4 The authority to install and construct any Conduit System and/or Fiber Optic Networks on City property granted herein authorizes MCI only to install such Fiber as is necessary to construct and operate the infrastructure described in this Agreement in order to provide the authorized Services and does not authorize MCI to install or construct any Facilities not expressly provided for in this Agreement.

2.5 To the extent that MCI uses the City’s ROW to provide services other than interstate or intrastate toll Calls through its Fiber Optic Networks, use of the ROW is subject to the terms and conditions of this Agreement and any applicable permits and laws.

2.6 MCI shall comply with all applicable laws as amended from time to time, including but not limited to, the Tempe City Code and the City Charter and Arizona and federal law in the exercise and performance of its rights and obligations under this Agreement. If it is necessary for MCI to comply with any law or regulation of the FCC or the ACC to engage in the business activities anticipated by this Agreement, MCI shall comply with such laws or regulations. 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.

SECTION 3. Non-Exclusive Rights/Priority Rights

3.1 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.

3.2 Any and all rights granted to MCI shall be subject to the prior and continuing right of City to use the ROW exclusively or concurrently, with any other person or persons, and to manage City's own facilities. Any and all rights granted to MCI shall also be subject to all deeds, easements, dedications, conditions, covenants, restrictions, encumbrances, and claims to title which may affect public property. Nothing in this License shall be construed to grant, convey, create or vest a perpetual real property interest in land to MCI, including any fee or leasehold interest, easement, or any franchise rights.

3.3 Any right or privilege claimed pursuant to this Agreement by MCI for any use of any public ROW shall be subordinate to: A) any prior or subsequent lawful occupancy or use thereof by the City or any other governmental entity; B) any prior lawful occupancy or use thereof by any other person; and C) to any prior easements therein, provided however, that nothing herein shall extinguish or otherwise interfere with property rights established independently of this Agreement.

3.4 There is hereby reserved to City every right and power required pursuant to this Agreement to be herein reserved or provided by any lawful ordinance or the Charter of the City, and MCI by its execution of this Agreement agrees to be bound thereby and to comply with any lawful action or lawful requirements of the 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 lawful governmental right or power of City.

3.5 Nothing in this Agreement shall be construed to prevent the City from abandoning, altering, improving, repairing, or maintaining its facilities and/or the ROW, and for that purpose to require MCI, at no expense to the City, to remove, relocate or abandon in place MCI's Facilities in order to accommodate the activities of the City. The City shall not be liable for lost revenues sustained by MCI, however caused, because of damage, modification, alteration, or destruction of its Facilities in the ROW, when such costs or lost revenues result from the construction, operation, and/or maintenance of City facilities and/or the ROW, provided that the activities resulting in such costs or lost revenues are conducted in accordance with applicable laws and regulations.

SECTION 4. Notice of Other Users

4.1 MCI may enter into contracts with unrelated third parties ("Users") in the ordinary course of MCI's business for use of the Conduit Systems and/or Fiber Optic Networks within the portions of the ROW subject to this Agreement. Such contracts ("User Contracts") shall be subject to all requirements and provisions of this Agreement and the following:

4.1.1 No person shall transmit data over the Fiber Optic Networks or otherwise use the Conduit System(s) except under a User Contract with MCI.

4.1.2 Such Users shall not perform any construction, maintenance, repair or other work of any kind in the ROW related to the Fiber Optic Networks or Conduit System(s) and the identity of such Users must be disclosed to the City upon request, but such information will be considered Confidential and Proprietary under Section 31.2.3. All User Contracts shall prohibit such Users from performing any construction, maintenance, repair or other work of any description in the ROW related to the Fiber Optic Networks or Conduit System(s), unless such Users have an agreement with the City.

4.1.3 In the event the User Contract provides for the User to construct, install, operate or maintain any portion of the Fiber Optic Networks or Conduit System(s) within the route in the ROW, no such arrangement shall proceed until the User enters into an Agreement with the City for use of the City's ROW.

4.2 MCI shall cause to comply with this Agreement all persons using the ROW through or under MCI or this Agreement. MCI is responsible for any violations of this Agreement by persons using the ROW through or under MCI or this Agreement.

SECTION 5. Description of the Fiber Optic Network Services and Routes

5.1 MCI currently only uses its Fiber Optic Network to provide interstate and intrastate toll communication services in accordance with its CC&N.

5.2 MCI's current route for its Conduit Systems and Fiber Optic Networks is shown on Exhibit A ("Route"). The route is mainly in United Pacific Railroad right-of-way; however, portions of the City's ROW are occupied at the street crossings. Such street crossings total 784 linear feet.

SECTION 6. Regulatory Conditions Relating to Right-of-Way Usage

For purposes of this Agreement, whenever work is done in the ROW relating to any of the Facilities, MCI agrees that it is solely responsible for the acts, errors, omissions, and any negligence of any or all of its Contractors and that the obligations of Sections 6 and 7 of this Agreement are imposed on both MCI and any of its Contractors, who will be considered MCI's representatives and for whom MCI will be responsible. MCI will ensure that MCI and its representatives comply with Public ROW use requirements as follows:

6.1 Registration. MCI agrees to register with the City by completing an application or renewal application form and the paying the applicable application fee.

6.2 Notice of Changes. MCI shall file a proposed amendment to the registration before it makes any change that would render the registration information incomplete or inaccurate. Whenever possible, a change of MCI's name or address must be filed at least sixty (60) days prior to the date the change becomes effective and a change in the telephone number must be filed ten (10) days before the change becomes effective. In the case of a change in the Facilities (by addition, subtraction or modification or movement), the change in Facilities must be filed at least sixty (60) days before work commences on the Facilities unless the relocation was ordered by the City. In the case of a change in services, the change must be noticed thirty (30) days before the earlier of the date the service commences, or MCI begins marketing the service.

6.3 MCI is completely responsible for ensuring that its Facilities are constructed, installed, operated, repaired, and/or maintained in accordance with the Tempe City Code and established practices with respect to such public ROW and easements such as the proper permits being applied for prior to commencing any work and that the terms and conditions of such permits are strictly followed.

6.4 MCI's use of the public ROW and easements under the control of the City shall be according to plans approved by the City Engineer, provided that such approval shall not be unreasonably withheld or delayed.

6.5 The Facilities to be constructed, installed, operated, maintained, upgraded and removed hereunder, shall be so located or relocated as to interfere as little as possible with traffic or other authorized uses within said public ROW and easements. Any phases of construction and/or installation relating to traffic control, backfilling, compaction and paving, as well as the location or relocation of said Facilities shall be subject to regulation by the City Engineer.

6.6 MCI and its representatives shall be subject to the City's exercise of such police, regulatory and other powers as it now has or may later obtain, and a License may not waive the application of the same. City shall have continuing jurisdiction and supervision over any Facilities located within or on public ROW. Daily administrative, supervisory, and enforcement responsibilities shall be delegated and entrusted to the City Manager or designee to interpret, administer and enforce the provisions of this License and Agreement.

SECTION 7. Plan Approval, Permits, and Inspection

7.1 No Facilities shall be installed, constructed, located on, or attached to any property within the City until MCI has applied for and received approval for permits from the City Engineer. MCI shall be solely responsible for any and all acts, errors, omissions and negligence of its Contractors who are involved in the installation, construction, maintenance, repair, location, relocation and any other activity involving MCI's Facilities subject to this License and Agreement. Additionally, MCI and its Contractors shall comply with all other provisions of the Tempe City Code, including, but not limited to, Chapter 25 regarding off-site construction, Chapter 29 regarding streets and sidewalks, and other applicable City and/or Maricopa County regulations. All rights hereunder are granted under the express condition that the City shall have the power at any time to impose lawful restrictions and limitations upon, and to make regulations as to MCI's use of the public ROW as may be deemed best for the public interest, safety, or welfare to the same extent that such restrictions and limitations are applied to all non-governmental users of the public ROW.

7.2 MCI shall submit the applicable 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. MCI and/or its Contractors shall abide by all stipulations of all licenses and permits issued. If MCI desires to change the location of any portion of the Conduit System(s) and/or Fiber Optic Network(s), including any related Facilities or equipment, from that set forth in the initial Permit Application, MCI shall apply for and obtain approval for an amendment to the permit prior to installation or construction, which approval shall not be unreasonably withheld or delayed, subject to the provisions of Section 7.4.

7.3 The City may issue reasonable policy guidelines to all licensees/users of the ROW to establish procedures for determining how to control issuance of engineering permits to multiple licensees/users for the same one mile segments of their Facilities. MCI agrees to cooperate with the City in establishing such policy and to comply with the procedures established by the City Engineer or designee to coordinate the issuance of multiple engineering permits in the same one mile segments.

7.4 City will approve or deny such applications based on the availability of space at the location sought by MCI, safety and other considerations in accordance with the City's Code, applicable ROW construction regulations and other applicable law. MCI and/or its Contractor(s) agree to comply with the terms of any City-issued licenses and permits.

7.5 Any new Conduit or other Facilities placed in the ROW will be constructed using industry standard boring and trenching construction methods. Other material placed in the ground may include concrete manholes, generally 4x4x4, pull boxes/handholes (#7s and #9s) and HDPE couplings and elbows, fiber optic cable, splice cases, tracer wire, grounding material, mule tape, jet string and conduit plugs. MCI and/or its Contractors will install any new Conduit and access points (manholes/pull boxes) using industry standard practices and in full compliance with 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's supplements to MAG, and the City of Tempe Utility Permit and Construction Manual.

7.6 If MCI desires to change the components of any of the Fiber Optic Network(s), written approval, which shall not be unreasonably withheld or denied, of such change must be obtained from a representative of the City Engineer.

7.7 The City shall have the right to inspect all construction or installation work performed subject to the provisions of this License and to make such tests as it shall find necessary to meet City standards as set forth in the City of Tempe Utility Permit and Construction Manual and the MAG Uniform Standard Specifications and Standard Details for Public Works Construction and any and all applicable City of Tempe Supplements thereto and to ensure compliance with the terms of this License and other pertinent provisions of law.

7.8 Any new Conduit System(s) and/or Fiber Optic Network(s) shall be installed in multiple phases as agreed upon by MCI and the City. If portions of a project will take place on the major arterial streets in City, MCI and City will work to minimize the inconvenience to the citizens of City and others who use those major arterial streets impacted by the project by developing segments of the project to be completed in sequence.

7.9 Any Conduit Systems and/or Fiber Optic Network(s) to be constructed, installed, operated, repaired, 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. MCI shall not install, operate, or allow the use of Equipment, methodology or technology that may or would interfere with the optimum effective use or operation of City's existing or future fire, emergency or other communications equipment, methodology or technology (i.e., voice or other data carrying receiving or transmitting equipment). If such interference should occur, MCI shall immediately discontinue using the Equipment, methodology or technology that causes the interference until MCI takes corrective measures to alter the Fiber Optic Network(s) to eliminate such interference. Any such corrective measures shall be made at no cost to City. MCI shall be responsible to ensure compliance with this Agreement by all persons using any or all of MCI's Conduit Systems.

7.10 Co-location. MCI's installation of the Facilities shall be reasonably coordinated with other utilities and City to accommodate opportunities for common installation along with MCI's route as set forth in this Agreement. All installations of cable and/or fiber shall be in Conduit or Innerduct as reasonably approved by the City Engineer; provided, however, nothing herein shall require MCI to incur any material additional expense to accommodate common installations.

7.11 Although the exact placement and location of any additional Facilities shall be determined by City through the permit process, MCI has expressed its intent and City has expressed its desire to have any Facilities installed outside of the paved street areas whenever such location is feasible and reasonable. Further, if it is the intent and desire of MCI for the Conduit Systems to be placed by directional boring under such streets when feasible and

reasonable, bore profiles based on vacuum pothole information shall be part of the engineered plans submitted to the City. Arterial streets shall not be bored unless approved by the City Engineer. In the event that a street opening in new pavement or resurfaced pavement cannot be avoided, MCI agrees to pay a surcharge fee to cover damages and early deterioration will be assessed for cutting new or resurfaced pavements less than seven years old.

7.12 MCI shall also provide and identify a representative, such as a project manager, who shall be the contact person for the City during any construction periods.

7.13 MCI shall provide written notice to the owners or other persons having lawful control of adjoining property of any activity by MCI that may interfere with access to any adjoining property during all construction activities or other operations, except to the extent that this requirement of maintaining access is waived in writing by the owner or other person having lawful control of such adjoining property.

7.13.1 If an emergency requires activity without such written notice, MCI shall use commercially reasonable efforts to provide timely actual notice to the owners or other persons having lawful control of the adjoining property. Upon request, MCI shall promptly furnish to City documentation of such permission from such other affected property owner.

7.14 Whenever MCI or its Contractors shall cause any opening or alteration to be made for any purpose in any public streets, public places or property of third parties, the opening or alteration shall be completed and restored with due diligence within seven (7) business days, weather permitting. MCI shall upon the completion of the opening or alteration, restore the property, improvements or landscaping disturbed by MCI or its Contractors to a condition substantially comparable to the condition before the opening or alteration and the restoration shall be performed with due diligence within a reasonably prompt time.

7.15 Traffic Control.

7.15.1 All traffic shall be regulated in accordance with MAG; the City of Tempe Barricade Manual, latest edition, available through the City of Tempe Traffic Engineering; the Manual on Uniform Traffic Control Devices (MUTCD); and any Special Provisions included herein.

7.15.2 At the time of the pre-construction conference, MCI shall designate an American Traffic Safety Services Association (ATSSA) certified individual who is well qualified and experienced in construction traffic control and safety, to be responsible for implementing, monitoring, and altering traffic control measures as necessary to insure that traffic is carried through the work area in an effective manner and that motorists, pedestrians, bicyclists, and workers are protected from hazards and accidents. At the same time, the City shall designate a representative who will be responsible for ensuring that all traffic control and traffic control alterations are implemented per these traffic control specifications.

7.15.3 MCI shall have the full responsibility and liability for traffic control for a project. MCI shall submit a Traffic Control Plan to Traffic Engineering for approval one (1) week prior to beginning work under this Agreement. It shall be noted that Traffic under this Agreement shall include all motor vehicles, bicyclists, and pedestrians. MCI shall not begin construction until the Traffic Control Plan is approved by the City. An approved

Traffic Control Plan shall be maintained onsite during all phases of construction, otherwise construction will cease until the Traffic Control Plan is approved.

7.15.4 During construction it may be necessary to alter traffic control as approved by Traffic Engineering. Alterations to traffic control shall be in accordance with the latest edition of Part VI of the Manual on Uniform Traffic Control Devices: "Traffic Control for Streets and Highway Construction and Maintenance Operations"; the latest edition of the City of Phoenix Traffic Control Manual; or the City of Tempe Barricade Manual, latest edition. The most restrictive manual shall apply. MCI shall pay any and all applicable barricade fees.

7.15.5 In the event MCI or its Contractors damages any traffic signal equipment, traffic signal conduit, loop detectors and/or circuits, it shall have them repaired immediately at its expense by an electrical contractor that has had traffic signal experience which is pre-approved by the City. Any damage repaired by the City will be billed to MCI at cost.

7.15.6 MCI shall notify all adjacent or affected residents or businesses at least forty-eight (48) hours in advance of any street, alley, sidewalk, and driveway closures and make suitable arrangements to have all vehicles moved to a satisfactory location outside the closed area.

7.15.7 Pedestrian access shall be maintained along the length of the project at all times per the requirements of the ADA and as approved by Traffic Engineering.

7.15.8 Speed limits shall be strictly enforced.

7.15.9 For more information, please contact the City of Tempe Traffic Engineering.

7.16 Clean Up. MCI and/or its Contractors shall, during construction and upon completion of the work, remove all temporary construction facilities, debris, and unused materials provided for in the work, and put the work site and public ROW in a safe, neat and clean condition.

7.17 Safety. MCI and MCI's Contractors shall be solely and completely responsible for the conditions of any job site where the infrastructure is being placed, including safety of all persons (including employees) and property during performance of the work. This requirement shall apply continuously and not be limited to normal working hours. Safety provisions shall conform to all applicable federal (including OSHA), state, county, and local laws, ordinances, codes, and regulations. Where any of these are in conflict, the more stringent requirement shall be followed. MCI's failure to thoroughly familiarize itself with the aforementioned safety provisions shall not relieve MCI from compliance with these provisions.

7.18 Blue Stake. MCI and its Contractors 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 MCI'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 Engineer.

SECTION 8. Hazardous Substances

MCI's and its Contractors' activities upon or about the ROW shall be subject to the following regarding any hazardous or toxic substances, waste or materials, or any substance now

or hereafter subject to regulation under the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. §§ 9601, et. seq., the Arizona Hazardous Waste Management Act, A.R.S. §§ 49-901, et. seq., the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901, et. seq., the Toxic Substances Control Act, 15 U.S.C. § 2601, et. seq., or any other federal, state, county or local law pertaining to hazardous substances, waste or toxic substances and their reporting requirements (collectively “Toxic Substances”);

1. MCI and/or its Contractors shall not produce, dispose, transport, treat, use or store any Toxic Substances upon or about the ROW. The prohibitions of the preceding sentence only shall not apply to:
 - a. Ordinary gasoline, diesel fuel or other fuels or lubricants necessary for ordinary use in motor vehicles and ordinary construction machinery permitted upon the ROW. Such materials must be properly and lawfully contained in ordinary quantities in ordinary tanks and receptacles that are permanently installed in such vehicles and machinery, or small portable tanks that are being used for fueling permitted construction machinery.
 - b. Electric backup batteries.
2. MCI and/or its Contractors shall dispose of any Toxic Substances away from the ROW as required by law and as reasonably required by City.
3. MCI and/or its Contractors shall not use the ROW in a manner inconsistent with regulations issued by the Arizona Department of Environmental Quality, or in a manner that would require a permit or approval from the Arizona Department of Environment Quality or any other governmental agency. The preceding sentence does not prohibit ordinary permits for control of dust during construction permitted by this Agreement.
4. In addition to, and without limitation of any other indemnities or obligations, MCI shall pay any damages incurred and indemnify, defend and hold City harmless against any loss or liability incurred by reason of any Toxic Substance on or affecting the portion of the ROW used that is attributable to or caused by MCI and/or its Contractor(s).
5. MCI and/or its Contractors shall immediately notify City of any Toxic Substance at any time discovered or existing upon the ROW. MCI is not responsible for Toxic Substances that may exist at the ROW if MCI’s Contractors and/or any other persons using the ROW under this Agreement did not do any of the following:
 - a. Participate in the Toxic Substance coming to the ROW
 - b. Fail to immediately report the Toxic Substance to City
 - c. Participate in spreading or otherwise disturbing the Toxic Substance
 - d. Exacerbate the effects of the Toxic Substance or the difficulty or cost of dealing with the Toxic Substance
6. MCI understands the hazards presented to persons, property and the environment by dealing with Toxic Substances. MCI acknowledges the possibility that the ROW may contain actual or presumed asbestos and other Toxic Substances containing materials.

7. Within twenty-four (24) hours after any violation by MCI and/or by its Contractors of this Agreement pertaining to Toxic Substances, MCI shall give City notice reporting such violation.

SECTION 9. On-Call Assistance

MCI shall be available to staff employees of any City department having jurisdiction over MCI'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 Network. City may contact by telephone the network control center operator at the following phone number 1-800-MCI-WORK (1.800.624.9675) regarding such problems or complaints, and may use that number in order to reach MCI at any time for any emergency matter. MCI shall use reasonable efforts to respond to any issues within the time frames specified in its service level agreements. MCI shall make arrangements with a local entity to handle any necessary problems or complaints that require a physical presence.

SECTION 10. Mapping Requirement

10.1 MCI shall maintain As-Built Drawings of its Facilities located within the ROW and furnish a copy both electronically in an ESRI-compatible mapping format (or in a mapping format compatible with the current City electronic mapping format as specified by the City) and in hard copy form. Upon completion of new or relocation construction of underground Facilities in the ROW, MCI shall create and maintain precise, up-to-date maps of any of its Conduit System and/or Fiber Optic Network routes and any above ground Facilities located in the ROW and precise and verifiable horizontal and vertical location information and will make this information available to the City upon the installation of any new Facilities. MCI will also provide surface-location marking of any of MCI's Facilities that are located underground within any public ROW within ten (10) business days of installation.

10.2 If complete updates are not provided in a compatible format, MCI shall pay the actual, reasonable costs the City incurs to update the City's electronic mapping format due to the location or relocation of MCI's Facilities.

10.3 In the event MCI fails to supply records in the City specified format and there is a cost to the City in converting MCI-provided files, MCI will be responsible for the conversion costs and will pay such costs within thirty (30) days of the date of the bill from the City invoicing the amount due.

SECTION 11. Relocation

11.1 MCI shall relocate at no expense to the City any Facilities or other encroachment installed or maintained in, on or under any public place or ROW, 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 any applicable issued permits. MCI shall comply with any and all requirements of Sections 31A-31, 31A-32, and 31A-34 of the Tempe City Code. Within ninety (90) days after service of notice by the City, MCI shall remove the designated portions of the Facilities, or in the event that, by the nature of the removal such removal cannot be performed within the ninety-day period, MCI shall take reasonable steps to remove the Facilities and diligently prosecute the removal to completion,

and, if requested, restore the sidewalks and other ROW to a condition comparable to the condition before the construction of the public improvement at no cost and expense to the City.

11.2 MCI agrees to obtain a permit as required by this Agreement prior to removing, abandoning, relocating or reconstructing any portion of its Conduit System(s) or Fiber Optic Network(s) on public property or ROW. Notwithstanding the foregoing, City understands and acknowledges there may be instances when MCI is required to make repairs that are of an emergency nature or in connection with an unscheduled disruption of the Facilities. MCI will maintain any annual permits required by the City for such maintenance and emergency repairs. MCI will notify City before the repairs and will apply for and obtain the necessary permits in a reasonable time after notification.

11.3 If the City needs to perform any part of the necessary relocation or removal work that has not been done within the time required by the City, it shall be entitled to seek payment for such relocation costs by drawing upon the letter of credit or security fund required by this Agreement pursuant to Section 25.

SECTION 12. Expansion or Extension of the Current Use Area

12.1 Any further expansion and/or extension of MCI's Fiber Optic Network and or empty Conduit placement outside the current route(s) shall require written approval from the City Manager or the City Engineer, as his or her designee, who may refer the matter to the City Council for approval, provided that such consent, by either the City Manager, City Engineer, or the City Council, shall not be unreasonably withheld or delayed.

12.2 MCI agrees that such further expansions and/or extensions beyond the current route(s) shall be at all times governed by the terms and conditions of this Agreement.

12.3 Requests for expansions and/or extensions should identify the route, number of conduits, size of conduits, fiber count and intended use.

SECTION 13. Damage to Public Property.

13.1 In addition to any indemnity obligation under this License and Agreement, whenever the installation, use, maintenance, removal, or relocation of any of MCI's Facilities is required or permitted under this Agreement, and such installation, removal or relocation damages or disturbs the surface or subsurface of any ROW or public property or any public improvement that may be located thereon, therein, or thereunder, however such damage or disturbance was caused, MCI, at its sole cost and expense, shall promptly restore the surface or subsurface of the ROW or public property and/or repair or replace the surface, subsurface and/or public improvement therein, or thereunder, in as good a condition as before in accordance with applicable laws, normal wear and tear excepted, reasonably satisfactory to the City Engineer. If MCI does not repair the damage or disturbance as just described, then City shall have the option, upon ten (10) business days' prior written notice to MCI, to perform or cause to be performed such reasonable and necessary work on behalf of MCI and to charge MCI for the proposed costs to be incurred or the actual costs incurred by the City at City's standard rates.

13.2 Notwithstanding the notice provision above, in the event of a Public Emergency, the City shall have the right to immediately perform, without prior written notice to MCI, such reasonable and necessary work on behalf of MCI to repair and return public property to a safe and satisfactory condition in accordance with applicable laws, normal wear and tear excepted,

reasonably satisfactory to the City Engineer. The City shall provide written notice to MCI of the repairs as soon as practicable after the work has begun. MCI agrees that any severed City-owned fiber must be completely repaired or replaced to the nearest splice point and any damaged City-owned Conduit must be replaced or repaired and restored to its original condition. If the City needs to perform any part of the necessary repairs, relocation and/or removal work, it shall be entitled to seek payment for such repairs and/or relocation and/or removal costs from MCI and may draw upon the performance bond and/or letter of credit or security fund required by this Agreement in full or partial satisfaction of such costs, if payment is not made by MCI as required by Section 13.3 below.

13.3 Upon the receipt of a demand for payment by City, MCI shall, within thirty (30) days, reimburse City for such costs.

13.4 For any pavement cuts by MCI, MCI 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 caused by MCI's or its representatives' actions, in accordance with the provisions of Chapter 29 of the Tempe City Code and the fees established by the City pursuant thereto. MCI agrees to pay such costs within thirty five (35) days from the date of receipt of an invoice from City. Failure to do so shall entitle City to draw upon the letter of credit or security fund and/or performance bond.

SECTION 14. Public Emergency Disruption by City.

City shall have the right, because of a Public Emergency, to sever, disrupt, relocate, remove, tear out, dig-up or otherwise damage and/or destroy Facilities of MCI without any prior notice to MCI, if the action is deemed reasonably necessary by either the City Manager, Fire Chief, Police Chief, City Engineer, or Public Works Director or designee. In such event, neither the City nor any agent, contractor or employee of City shall be liable to MCI, its Contractors or its customers for any harm so caused to them or the Facilities. When practical and if possible, City will consult with MCI in advance to assess the necessity of such actions and to minimize to the extent practical under the circumstances damage to and disruption of operation of the Fiber Optic Networks. City shall inform MCI of any actions taken. MCI shall be responsible for repair at its sole expense of any of its Facilities damaged pursuant to any such action taken by City related to the Public Emergency.

SECTION 15. Public Safety/Public Emergency.

15.1 If any of MCI's Facilities or activities present any immediate hazard or impediment to the public, to the City, to other City improvements or activities within or outside of the route area(s), or to City's ability to safely and conveniently operate the ROW or perform City's utility, public safety and/or other public health, safety and welfare functions, then MCI shall immediately remedy the hazard, comply with City's request to secure the route area, and otherwise cooperate with City at no expense to City to remove any such hazard or impediment.

15.2 In the event of a Public Emergency, neither the City nor any agent, contractor or employee of the City shall be liable to MCI or its Contractors or its customers or other third parties for any harm so caused to them by the reasonable actions of the City or its agents, contractors or employees in reasonably responding to such Public Emergency. When practical and if possible, City will consult with MCI in advance to assess the necessity of such actions and to minimize, to the extent practical under the circumstances, damage to and disruption of either the public property involved or the Facilities involved.

SECTION 16. Contractors

16.1 The specific independent Contractors identified and used by MCI for the construction activities to expand and extend MCI's Facilities will need to be approved by the City Engineer or designee prior to issuance of each construction permit. Any Contractors performing construction work within the ROW or public easements shall comply with licensing requirements of the Arizona General Contractors Association.

16.2 All independent Contractors shall provide their own insurance policies or shall furnish separate certificates and endorsements for each. All coverages for independent Contractors shall be subject to all the requirements stated herein for MCI.

SECTION 17. Legal Workers

If, and to the extent A.R.S. § 41-4401 is applicable to this Agreement, MCI shall comply with laws regarding workers as follows:

17.1 MCI represents to City that MCI and all of its Contractors will comply with all federal immigration laws and regulations that relate to their employees and that there is compliance with the E-Verify Program under A.R.S. § 23-214(A).

17.2 A breach of the foregoing representation by MCI shall be deemed a material breach of this Agreement that is subject to penalties up to and including termination of this Agreement.

17.3 City retains the legal right to inspect the papers of any employee of MCI or any Contractor who works pursuant to this Agreement to ensure that they or the Contractor is complying with the representation given above.

17.4 City may conduct random verification of MCI's and its Contractor's employment records to ensure compliance with the representation given above; in the case of MCI's records, the City may inspect such records at MCI's local offices during regular business hours in the presence of MCI's legal counsel.

17.5 MCI shall indemnify, defend and hold City harmless for, from and against all losses and liabilities arising from any and all violations of the representation given above.

SECTION 18. Effective Date and Validity of Agreement

18.1 This Agreement is effective upon signature by MCI and the execution of it by the Tempe City Council.

18.2 MCI shall acknowledge that as a condition of acceptance of this Agreement, MCI was required to be represented throughout the negotiations of the Agreement by its own attorneys and MCI had the opportunity to consult with its own attorneys about its rights and obligations regarding this Agreement. MCI 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, MCI acknowledges and accepts the right and authority of City to execute this Agreement and to enforce the terms herein.

SECTION 19. Term of Agreement

19.1 Any and all of MCI's rights that may exist under the original ordinance are hereby terminated.

19.2 The original term of this License and Agreement shall terminate 11:59 p.m. on the date prior to the date that is the fifth (5th) annual anniversary of this Agreement, which is the date of approval of this Agreement by the City Council, unless sooner terminated as set forth in this Agreement.

SECTION 20. Modification, Renewal, Extension

20.1 If MCI wishes to renew its License and continue using the ROW, then at least one hundred and eighty (180) days prior to the expiration of this License and Agreement, MCI shall apply to the City for a new License and Agreement in accordance with the then existing federal, state, and local laws.

20.2 MCI shall pay to City the applicable fee at the time of the submission of the application for renewal.

20.3 City shall have the right to renegotiate any of the terms from the prior agreement. MCI understands that the City may adopt future code amendments and/or fee schedules relating to Facilities located within the ROW, which may replace in its entirety the current fees and other costs imposed upon MCI under this Agreement. MCI acknowledges the right of the City to adopt and implement such lawful code amendments and/or fee schedules.

20.4 If MCI's Facilities remain in the ROW, and MCI continues to use such Facilities beyond the expiration of the license term, the License shall be considered to be in a "Holdover Term," subject to the terms and conditions of this Agreement. Such Holdover Term, however, shall not exceed sixty (60) days beyond the expiration of the term, and no permits will be issued to MCI by the City until a new License has been approved by the City Council.

20.5 Failure by MCI to have a valid License and Agreement to use the ROW by the expiration of the Holdover Term shall result in immediate withdrawal and revocation of any existing permits issued by the City to MCI. If, however, MCI has timely filed its application and is in active negotiations with the City prior to the expiration of the License and Agreement, the City may, in its discretion, grant, extend, or take no action on permits issued to MCI prior to the expiration of this Agreement.

SECTION 21. Payments

21.1 By entering into this Agreement, neither party waives any current or future rights reserved under law or the Telecommunications Act of 1996, including but not limited to, those rights set forth in Sections 253(c), reserving the City's right to manage the public ROW and to require fair, non-discriminatory and reasonable compensation from MCI for use of the public ROW.

21.2 MCI shall be solely responsible for payments to City as follows:

21.2.1 Application Fee – MCI shall pay City an application fee for the administrative costs involved in the issuance of a telecommunications license, which shall be due at the time of the submittal of the application.

21.2.2 Transaction Privilege Tax – If MCI provides any qualifying services under Tempe City Code Sec. 16-470 using the Fiber Optic Networks, it will be responsible for payment of the transaction privilege tax.

21.2.3 ROW Usage Fee for Provision of Interstate Telecommunication Services – A Fiber Optic Network in the ROW that carries interstate traffic between and among Verizon Business's interstate points of presence exclusive of the Fiber Optic Network used by the local Fiber Optic Network and the portion of the interstate Fiber Optic Network that carry intrastate calls is subject to an annual fee based on the number of linear feet of trench in the ROW. The annual fee is Two Dollars and One (\$ 2.01) per linear foot, which shall be adjusted annually as provided in Section 21.2.3.1.

21.2.3.1 Commencing on July 1, 2013, and on each July 1 through the fifth year of the term, the linear foot fee shall be escalated annually by the United States Department of Labor, Bureau of Labor Statistics, Consumer Price Index-All Urban Consumers, West Region for All Items (CPI) average percentage as calculated at the end of the prior calendar year. If there is no increase in the CPI, the fee shall remain what it was for the prior year.

21.2.3.2 The portion of the route of interstate telecommunication services that is currently within the City's ROW and subject to the fee is 784 linear feet.

21.2.3.3 For this Agreement, the annual fee for use of the ROW for the provision of interstate and intrastate toll telecommunications services is \$ 1,575.84. Upon each anniversary of this Agreement, the fee will be adjusted as provided by Section 21.2.3.1 above, and payment made as required by Section 21.3.

21.3 For any annual payment(s) owed, MCI shall make such payment(s) to the City within ten (10) business days of the effective date of this Agreement and by the anniversary of such effective date thereof for the duration of the term.

21.4 Permit Fees – MCI shall pay all applicable construction permit fees to place Facilities in the ROW, which includes charges for encroachment permit applications, issuance, inspection, testing, plan review and any other fees adopted by City and applicable to persons doing work and/or encroaching in the City's ROW pursuant to Tempe City Code 29-19. If, at the request of MCI, the needs of MCI's work requires after hours or nighttime work outside of normal business hours, MCI shall reimburse the City according to the Section 29-19 fee schedule in place.

21.5 Damage Fees – MCI shall pay any reasonable costs associated with any damage caused to the ROW or public property Tempe City Code Sections 29-18 and 29-19.

21.6 Pro-rated Fees – Within thirty (30) days after the issuance of a permit for the installation of additional footage of Conduit(s), if such installation subjects MCI to an annual fee pursuant to Section 21.2.3 or Section 21.2.4 above (if applicable), MCI will pay a pro-rated portion of the annual fee, as adjusted, per linear foot for that section of its expanded route. The prorated annual fee shall be determined by multiplying the annual footage fee, as adjusted, for the year of payment, by a fraction, the numerator of which is the number of full months between the month

of issuance of the permit and the next following anniversary date of this Agreement and the denominator of which is twelve (12).

21.6.1 In the event MCI cancels or returns a permit and does not construct or install the facilities, which had been approved by such a permit, the footage fees previously paid for ROW or public property used or occupied by MCI shall be refunded to MCI by City.

21.7 Any checks should reference the contract number of this Agreement and be sent to:

City of Tempe
Attn: Telecommunications Policy Administrator
120 E. 5th St., 2nd Floor
Tempe, AZ 85281

21.8 MCI agrees that if it fails to pay any amounts owed to the City by the time prescribed for payment, MCI shall pay interest on the amounts owed at the rate of one percent (1%) per month.

SECTION 22. In-Kind Payment as an Offset to Fees Owed

This Agreement does not currently provide for any in kind payments by MCI, however, should fees be owed under Section 21 above, the Parties may agree in writing to an in kind payment of fiber(s) and/or conduit(s) to offset such fees or transaction privilege taxes owed through an addendum to this Agreement.

SECTION 23. Taxes

MCI shall pay any applicable city, county and state transaction privilege and use taxes. Such taxes are in addition to any non-tax amounts owed by MCI pursuant to Section 21. MCI consents to the disclosure of any and all information reported on MCI's transaction privilege tax returns by authorizing and allowing the City's tax collector to release such information to the City Manager or designees.

SECTION 24. Performance Bond

24.1 Prior to receiving any permit to construct, install, maintain or perform any work on public property that requires a permit from the City pursuant to applicable City codes, MCI shall cause to be filed and maintain until either completion of the construction or termination of this Agreement as determined by MCI, a faithful performance bond in favor of City in the sum of One Hundred Thousand Dollars (\$100,00.00) or the amount of the construction costs (whichever is greater) to guarantee that MCI shall observe, fulfill and perform each and every term of this Agreement. In case of any breach of any condition of this Agreement, any amount of the sum of the bond, up to the whole thereof, may be forfeited to compensate City for any damages it may suffer by reason of such breach. Said bond shall be acknowledged by MCI, as principal, and shall be issued by a surety with an AM Best rating of A-VII or better for the last four quarters. City and MCI agree that the process and procedure for drawing upon, curing, and replenishing the performance bond shall be the same as set forth below for the security fund and/or letter of credit.

24.2 If MCI has completed the above construction and wants the bond released, the City will need to inspect and approve the construction prior to such release. However, a performance bond will be required for each subsequent or additional construction project and/or work on public property.

SECTION 25. Security Fund Account/Letter of Credit

25.1 Upon application for continued use of the ROW, but no later than five (5) business days before this Agreement is submitted to the City Council for approval, MCI shall provide either a cash deposit or domestic irrevocable standby letter of credit to the City Engineer in the initial amount of Fifty Thousand Dollars (\$ 50,000.00) as a security fund that is in compliance with the standards and form set forth in Exhibit B to this Agreement or its equivalent. Said cash deposit or letter of credit shall be maintained with the City for the term of this Agreement as security for the faithful performance by MCI of all the provisions of this Agreement, and compliance with all lawful orders, permits and directions of any department or office of the City having jurisdiction over its acts or defaults under this Agreement and any permit issued pursuant thereto, and the payments by MCI of any fees, claims, liens and taxes due the City which arise by reason of the construction, operation or maintenance of the Facilities. City shall have the full power of withdrawal of funds from the cash deposit put into the security fund account or letter of credit except that all interest accrued on any cash deposit shall be payable to MCI on demand. No withdrawals shall be made from the security fund account without the prior written approval of the City Manager and prior written notice of intent to withdraw to MCI.

25.2 Within twenty (20) days after notice to MCI that any amount has been withdrawn by City from the security fund account or letter of credit, MCI shall deposit a sum of money sufficient to restore such security fund account to the original amount or present to the City an additional irrevocable letter of credit in said amount so that the total amount of funds available to the City is Fifty Thousand Dollars (\$ 50,000.00).

25.3 If MCI fails, within ten (10) business days of a notice of intent to draw on either the security fund account or on the letter of credit, to either dispute the notice in writing; or pay City any taxes or fees due and unpaid; or fails to repay to City, within such ten (10) business days of such notice, any damages, costs or expenses which City shall be compelled to pay by reason of any act or default of MCI in connection with this Agreement; or fails, within thirty (30) days of such notice of failure by City to dispute the notice in writing, or comply with any provision of this Agreement which City reasonably determines can be remedied by an expenditure of funds from the cash deposit in the security fund account or letter of credit, City may immediately withdraw the amount thereof, with interest from the security fund account. Upon such withdrawal, City shall notify MCI of the amounts and date thereof.

25.4 Any funds that City erroneously or wrongfully withdraws shall be returned to MCI, with interest of 1.0% per month, within thirty (30) business days of such a determination.

25.5. The rights reserved to City, with respect to the security fund account and/or letter of credit, are in addition to all other rights of City whether reserved by this Agreement or authorized by law, and no action, proceeding or exercise of a right with respect to such security fund account or letter of credit shall affect any other right City may have.

SECTION 26. Insurance

26.1 Minimum Limits of Insurance. MCI shall at all times during the term of this Agreement, at its own cost and expense, carry and maintain commercial general liability insurance against claims for bodily injury (including death) or property damage, products/completed operations and personal and advertising injury, which insurance shall cover claims as may be occasioned by the operations, act, omission or negligence of MCI or its officers, agents, representatives, or employees during all times that this License and Agreement is in effect. Limits may be attained by a combination of

primary and umbrella liability coverage. MCI shall maintain limits no less than those stated herein for each type of insurance.

26.2 General Requirements. MCI's insurance of the types and amounts required in this Section shall be from companies possessing a current A.M. Best, Inc. rating of A-VII, or better and legally authorized or permitted to do business in the State of Arizona.

26.2.1 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.

26.2.2 The insurance coverage, except workers' compensation and employer's liability, and professional liability, required by this Agreement, shall include City, its agents, representatives, directors, officials, and employees, as additional insureds as their interest may appear, and shall specify that insurance afforded MCI shall be primary insurance, and that any self-insured retention and/or insurance coverage carried by City or its employees shall not contribute to the coverages provided by MCI. This provision and the inclusion of the City as an additional insured shall not be construed as giving rise to responsibility or liability of the City for applicable deductible amounts under such policy(ies).

26.2.3. The insurance policies shall contain a waiver of transfer rights of recovery (subrogation) for workers compensation against City, its representatives, officers, directors, officials and employees for any claims arising out of MCI's acts, errors, mistakes, omissions, work or service.

26.2.4. 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 MCI who shall be solely responsible for the deductible and/or self-insured retention. The amounts of any deductibles and/or self-insured retentions shall be noted on the Certificate of Insurance. City, at its option, may require MCI to secure payment of such deductibles or self-insured retentions by a surety bond or an irrevocable letter of credit.

26.2.5 All policies 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.

26.2.6. MCI shall be responsible for ensuring that the City is notified within thirty (30) days of the occurrence of any reduction in the insurance coverage amounts, cancellation or expiration of any of the policies as required by this License and Agreement.

26.2.7 MCI shall furnish separate certificates and endorsements for each Contractor. All coverages for Contractors shall be subject to the same limits as required for MCI.

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

26.3. Proof of Insurance-Certificates of Insurance.

26.3.1. Prior to or upon execution of this Agreement, MCI shall furnish to City Certificates of Insurance issued by MCI's agent or broker, 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 including the City as an Additional Insured pursuant to Section 26.2.2 and shall be attached as Exhibit C to this Agreement.

26.3.2. If a policy does expire during the life of this Agreement, a renewal certificate must be sent to the City ten (10) business days prior to the expiration date.

26.3.3. All Certificates of Insurance shall identify the policies in effect on behalf of MCI, their policy period(s), and limits of liability. Coverage shown on the Certificate of Insurance must coincide with the requirements in this Agreement. 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 copy to:
City of Tempe
Attn: City Engineer
31 E. 5th St.
Tempe, AZ 85281

26.3.4. City reserves the right to review, within at least ten (10) business days, certified copies of any or all of the herein required insurance policies and/or endorsements. Such policies shall be made available for review in Maricopa County Arizona. City shall not be obligated, however, to review same or to advise MCI of any deficiencies in such policies and endorsements, and such receipt shall not relieve MCI from, or be deemed a waiver of City's right to insist on, strict fulfillment of MCI's obligations under this Agreement.

26.4. Required Coverage.

26.4.1 Such insurance shall protect MCI from claims set forth below that may arise out of or result from the operations of MCI under this Agreement and for which MCI may be legally liable, whether such operations be by MCI or by anyone directly employed by MCI. Coverage under the policy will be at least as broad as ISO forms or equivalent thereof, including but not limited to severability of interest and waiver of subrogation clauses.

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

26.4.3 Claims for damages insured by usual personal and advertising injury liability coverage;

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

26.4.5 Claims involving contractual liability applicable to MCI's obligations under the Indemnification Agreement.

26.5 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/umbrella liability 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 ISO Additional Insured form, and shall include coverage for MCI's completed operations and products.

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

MCI shall maintain Worker's Compensation insurance to cover obligations imposed by federal and state statutes having jurisdiction over MCI'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, MCI will require the subcontractor to provide Worker's Compensation and Employer's Liability as required of MCI.

26.7. Automobile Liability.

If MCI owns and/or operates vehicles in Arizona, MCI shall maintain Commercial 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 MCI's work. Any combination between automobile liability and excess/umbrella liability amounting to a minimum of \$5 million per occurrence in coverage will be acceptable. Coverage shall be at least as broad as ISO policy form or equivalent. Such insurance shall include coverage for pollution for upset/overturn/collision of the automobile(s) and loading and offloading 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.

SECTION 27. Indemnity.

27.1 MCI acknowledges that it has liability for any and all of its Facilities installed in the public ROW, its use of the ROW and for its exercise of its rights under this License and Agreement directly or through its Contractor(s), except for the intentional acts or gross negligence on the part of the City or its agents. To the fullest extent permitted by law, MCI, shall defend, indemnify and hold harmless the City, or its officials, boards, commissions, agents or employees, individually and collectively, from and against any and all Claims as defined in Section 1 arising out of or alleged to have resulted from or materially related to the acts, errors, mistakes, or omissions of MCI, its employees, representatives, or any tier of Contractors or any other person for whose acts, errors, mistakes, and/or omissions MCI may be legally liable. This defense and indemnification requirement includes any Claims or amounts arising or recovered under worker's compensation laws or any other law, bylaw, or ordinance, order or decree related to any failure on the part of MCI, its agents, employees or representatives to fulfill MCI's

obligations under this Agreement, whether resolution of the above Claim(s) proceeds to judgment or not. The provisions of this Section shall survive termination of this Agreement. This Section applies even if the party seeking damages makes a claim against the City or brings a claim against the City based on vicarious liability or non-delegable duty.

27.2 MCI further agrees to indemnify and hold harmless the City, its officers and its employees from and against all costs, damages, and expenses incurred by the City, its officers and its employees in the defense of any litigation brought by third parties challenging the right of the City to enter into this Agreement with MCI under City or other applicable law.

27.3 In the event that a notice of claim is served on the City or litigation is commenced against the City, the City may, but is not required to, tender the defense of the litigation to MCI, who shall defend the litigation. If the City tenders the defense to MCI, MCI shall have the right to retain counsel of its own choice, to settle all or any part of the litigation on terms acceptable to MCI (and, where such terms directly obligate or affect the City, acceptable to the City). MCI 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 MCI or its insurance carrier.

27.3.1 The parties shall promptly notify each other in writing of any claims, demands, or lawsuits which may involve the City and provide copies of all accident reports, incident reports, statements or other documents that are relevant to the claims, demands or lawsuits or which may lead to the discovery of relevant materials or information, in the possession of the other party, its employees, representatives, Contractors, and/or others.

27.3.2 Subject to any privilege and/or confidentiality legal protections, both parties agree to make their employees, representatives, and Contractors available to the other party to gather any relevant information relating to an incident from which any claim, demand, or lawsuit arises.

27.4 It is the purpose of this Section to provide maximum indemnification to the 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 MCI against any and all claims, demands or lawsuits. The sole exception shall be an express determination by a court of competent jurisdiction upon full adjudication of the case that the damages arose either from City's sole gross negligence or intentional acts or that the City was comparatively at fault for the damages. Only in this event may MCI then commence an action against the City for damages related to that portion judicially determined to be City's fault.

27.5 The provisions of this Section 27 shall not be dependent or conditioned upon the validity of this License, but shall be and remain a binding right and obligation of the City and MCI, even if part or all of this License is declared null and void in a legal or administrative proceeding. It is the intent of MCI and the City upon the effective date of this License, that this Section serves as any such declaration and shall be a binding obligation of and inure to the benefit of MCI and the City and their respective successors and assigns, if any. Any failure by MCI shall be considered a material breach of this License and Agreement.

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

27.7 As a condition to City's executing this Agreement, MCI specifically agrees that to the extent any provision of this Section is not fully enforceable against MCI for any reason

whatsoever, this Section shall be deemed automatically reformed to the minimal extent necessary to cause it to be enforceable to the fullest extent permitted by law.

SECTION 28. Limitation of Liability

28.1 The City and its officers, agents, elected or appointed officials, employees, departments, boards and commissions, shall not be liable to MCI or to its affiliates or customers for any interference with or disruption in the operations of MCI's Fiber Optic Networks or the provision of services, or for any damages arising out of or materially related to MCI's use of the ROW, except to the extent of intentional misconduct or gross negligence on the part of the City its officers, agents, elected or appointed officials, employees, departments, boards and commissions.

28.2 MCI also agrees that it shall have no recourse whatsoever against the City or its officials, boards, commissions, agents or employees for any loss, costs, expense or damages arising out of or materially related to any provision or requirement of the City because of the enforcement of this License and Agreement or because of defects in this License or Tempe City Code Chapter 31A.

28.3 MCI shall assume the risk of, and hereby relinquishes any claim against the City in connection with any final, non-appealable determination by a court of competent jurisdiction that the City lacked the current statutory authority under Arizona law to issue this License.

SECTION 29. Transferability of License and Agreement

29.1 This License is personal to MCI.

29.2 Except as otherwise provided in this Agreement, the rights, privileges and License granted herein shall not be sold, sublet, assigned, conveyed or otherwise transferred, nor shall any of the rights or privileges herein granted or authorized be leased, assigned, sold, conveyed or otherwise transferred, either in whole or in part, nor shall title thereto, either legal or equitable, or any right, interest or property therein, pass to or vest in any person, except MCI, either by act of MCI or operation of law, without the express written consent of the City, which consent shall not be unreasonably withheld or delayed. Prior to any proposed transfer of any kind becoming final, MCI shall seek the consent of the City to the proposed transfer. Approval by the City to a transfer does not constitute a waiver or release of any of the rights of the City under the Tempe City Code or this Agreement, whether arising before or after the date of transfer.

29.3 "Transfer" transactions shall mean all of the following transactions, circumstances and conditions and to all persons claiming pursuant to such transactions, circumstances and conditions:

- (a) Any voluntary or involuntary assignment, conveyance or transfer of the ROW or any interest therein or any rights under this Agreement, in whole or in part.
- (b) Any assignment by MCI of any interest in this Agreement for the benefit of creditors, voluntary or involuntary.
- (c) Any voluntary or involuntary pledge, lien, mortgage, security interest, judgment, claim or demand, whether arising from any contract, any agreement, any work of construction, repair, restoration, maintenance or removal, or otherwise affecting MCI's rights to use the ROW (collectively "Liens").

- (d) MCI's insolvency.
- (e) The occurrence of any of the foregoing by operation of law or otherwise.
- (f) The occurrence of any of the foregoing with respect to any assignee or other successor to MCI.

29.4 The assignee or transferee as approved by the City shall be equally subject to all the obligations and privileges of this License and Agreement, including any amendments, which will remain in full effect, as if the assignee or transferee were the original Licensee.

29.5 The approval of the change shall include an Assignment Agreement form (if there was an assignment) or Transfer form (if there was a stock acquisition, a merger, or other type of transfer of MCI's assets) to be signed by Assignee, Assignor and the City. MCI shall provide the City a copy of the deed, agreement, lease or other written instrument evidencing the sale, transfer or lease of the License and Agreement, certified and sworn to as correct by MCI.

29.6 Any assignment or other transfer of this License and Agreement, including any amendments, shall be binding on the assignee or transferee as if the assignee or transferee had originally executed this Agreement for the full term and shall include the following:

29.6.1 The proposed assignee or transferee has read, accepts, and agrees to be bound by the terms of this Agreement; and

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

29.6.3 MCI and the proposed assignee or transferee shall submit to City a description of the nature of the transfer.

29.6.4 MCI may execute a pledge or hypothecation or mortgage or similar instrument transferring conditional ownership of all or part of MCI's assets to a lender or creditor in the ordinary course of business provided that MCI has secured approval from the Arizona Corporation Commission, if required. In the event a lender assumes control of the assets and operation of MCI through a default of MCI in its loan obligations, the Lender may assume the rights and obligations of MCI. The Lender may not transfer or change control of this Agreement without submitting the change to the City for approval. If the Lender does continue operation on any basis at any time, the Lender shall be subject to all provisions of this Agreement. No later than thirty (30) days after assumption of control by the Lender, the Lender shall apply to the City for the right to continue assumption of control or to transfer this Agreement. Application by the Lender for approval of such assumption of control or transfer shall be subject to all provisions set forth herein on consent by the City Council and shall not be unreasonably denied or withheld. A "Lender" as discussed herein shall not include a company, person or corporation or other entities that operate cable television systems or fiber optics telecommunications systems as a principal or important business. This paragraph is intended to prohibit the intentional use of lending and/or foreclosure as a method for effecting change of control or transfer of this Agreement without City Council review and approval.

29.6.5 Notwithstanding the foregoing, prior notice, but not prior consent, shall be required for one transfer of control by MCI to any company, which is owned or controlled or under common control and with the same direct parent as MCI, and which is intended after such transfer to remain under the ownership or control of that parent or an entity under common control or with the same direct parent. However, prior to completing the transfer described above, MCI must give prior notice to the City of the proposed transfer and describe the nature of the transfer and complete information regarding the effect of the transfer on the direct and indirect ownership and control of this License and Agreement.

29.6.6 No transfer shall be valid unless MCI and the proposed transferee submit a binding agreement and warranty to the City stating that:

1. The proposed transferee has read, accepts and agrees to be bound by this License and Agreement.
2. The proposed transferee assumes all obligations, liabilities and responsibilities under this License and Agreement for the acts and omissions of MCI, known and unknown, for all purposes, and agrees that the transfer shall not permit it to take any position or exercise any right which MCI could not have exercised; and

29.7 Transfer Remedies. Any transfer without City's consent shall be void and shall not result in the transferee obtaining any rights or interests in, under or related to this License and Agreement. City may, in its sole discretion and in addition to all other lawful remedies available to City under this Agreement or otherwise, and in any combination, terminate this Agreement, collect any fees owed from MCI and/or declare the transfer to be void, all without prejudicing any other right or remedy of City under this Agreement. No cure or grace periods shall apply to transfers or assignments prohibited by this Agreement or to enforcement of any provision of this Agreement against an assignee who did not receive City's consent.

29.8 Transfer Fee. MCI shall pay to City in advance the sum of Two Thousand Dollars (\$2,000.00) as a nonrefundable fee for legal, administrative and other expenses related to every transfer (other than the sale of publicly traded stock) or to any request for a consent to transfer.

SECTION 30. No Third Party Beneficiaries

No person or entity shall be a third party beneficiary to this Agreement or shall have any right or cause of action hereunder. City shall have no liability to third parties for any approval of plans, MCI's construction of improvements, MCI's negligence, MCI's failure to comply with the provisions of this Agreement (including any absence or inadequacy of insurance required to be carried by MCI), or otherwise as a result of the existence of this Agreement.

SECTION 31. MCI Records

31.1 Recordkeeping. During the entire term of this License and Agreement, MCI shall keep records and provide information to City regarding the following:

1. The status of the construction, repair, location or relocation of MCI's Facilities.
2. Information relating to any Fiber Optic Networks on portions of the route that are not exempt from a fee imposed for occupation of the ROW.

3. Information relating to this License and Agreement and/or to City's or MCI's rights or obligations under this License and/or Agreement.

31.2 If necessary for the City to determine MCI's compliance with the terms of this License and Agreement or other applicable law, within thirty (30) days of written notice by City of a request for disclosure, MCI shall provide relevant documentation as requested by City, respond to questions, and produce relevant books and records for the City's inspection and copying. Such records shall be available to City at MCI's offices in Maricopa County, Arizona. MCI shall also require its employees, agents, and accountants to give their full cooperation and assistance in connection with City's access to such records.

31.2.1 Such documentation can include information on the type of services MCI is offering its customers (but not necessarily information disclosing any particular service being provided to a specific customer) and/or the financial information used in calculating any payments or taxes due to the City under this Agreement. If MCI determines that in order to respond to City's request for documentation, it must reasonably provide Proprietary Information, MCI shall so mark such documentation as "Confidential."

31.2.2 Proprietary Information disclosed by MCI to the City or its constituent departments shall be regarded as Proprietary as to third parties. If the City receives a request to disclose such information, the City shall notify MCI of such request and allow MCI a reasonable opportunity to defend its information from disclosure.

31.2.3 Information that is already in the public domain shall not be considered Proprietary Information. If public domain information is included with Proprietary Information on the same document, the City shall only disclose those portions within the public domain.

31.2.4 Notwithstanding any provision in this License, MCI acknowledges and understands that the City is subject to the disclosure requirements of Arizona's Public Records Law (A.R.S. § 39-121 et seq.).

31.3 Reports. Upon request and subject to any necessary confidentiality requirements, MCI shall provide to City copies of any communications and reports submitted by MCI 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.

SECTION 32. Penalties for Violation of Terms

32.1 City may pursue any remedy at law, including but not limited to injunctive relief, civil trespass, and withholding other City permits and authorizations until MCI complies with the terms of this License, this Agreement or the applicable law.

32.2 Such remedies are cumulative and may be pursued in the alternative.

SECTION 33. Liquidated Damages for Violations

33.1 MCI's obligation to pay liquidated damages does not in any way detract from MCI's indemnity and insurance obligations under this Agreement, which shall apply according to their terms in addition to MCI's obligation to pay liquidated damages.

33.2 MCI understands and agrees that failure to comply with any time and performance requirements in this Agreement or the requirements of Chapter 29 of the Tempe 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 pursuant to the authority in Section 31-A12(b)(5)(d) of the Tempe City Code. The following amounts per day or part thereof may be chargeable to the security fund for the following concerns:

33.2.1 Each failure to properly restore the public ROW or to correct related violations of specifications, code ordinance or standards within fifteen (15) business days of having been notified by the City to correct such defects -- \$500.00 per day. Such amount is in addition to any cost the City may incur to restore the ROW or correct the violation.

33.2.2 Each failure to make MCI's books and records available as required by this Agreement - \$ 250.00 per day.

33.2.3 Any unauthorized partial or total transfer of this Agreement - \$4,000.00 per transfer.

33.2.4 Each instance of any action or non-action by MCI contrary to the terms of this Agreement that is not cured after five (5) days' notice - \$ 500.00 per day.

33.2.5 Failure to provide a valid Certificate of Insurance as required by Section 26.2.2 that is not cured after five (5) days' notice - \$ 50.00 per day.

33.3 Assessment. If the City Engineer concludes that MCI may be liable for liquidated damages, the City Engineer shall issue to MCI 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. MCI shall pay the liquidated damage amount within ten (10) business days of receipt or the City shall deduct the amount from the security fund.

33.3.1 If, however, the liquidated damages exceed Five Thousand Dollars (\$ 5,000.00), then the following shall apply:

33.3.2 MCI shall have thirty (30) days of receipt of such notice to pay the liquidated damage amount or give City notice contesting the assertion of noncompliance.

33.3.3 In the event that MCI contests the City's assertion of violation or fails to respond to the City's notice of intent to assess liquidated damages, City shall schedule a public hearing to determine whether the liquidated damages were properly assessed. City shall provide MCI with at least ten (10) business days' notice of such hearing, which shall specify the time, place and purpose of the hearing. At the hearing, MCI will be given the opportunity to be heard and present evidence. If the result of the hearing is that MCI is responsible for the liquidated damage amount, then the amount determined at the hearing will be due ten (10) days after the hearing decision is announced.

33.3.4 MCI may appeal the outcome of the hearing to an appropriate court, which shall have the power to review City's decision "de novo". Such appeal to the appropriate court must be taken within sixty (60) days after the issuance of City's hearing decision. Otherwise, the outcome of the hearing shall be final and conclusive.

SECTION 34. Revocation/Termination

34.1 The License granted hereunder may be revoked and/or this Agreement terminated prior to its date of expiration by the City for the following reasons:

34.1.1 MCI fails to comply with the material terms and conditions of this Agreement or applicable law, including but not limited to failing to maintain any insurance, security fund, letter of credit and/or performance bond and fails to correct the same after notice and opportunity to cure.

34.1.2 MCI fails to make payments in the amounts and at the time specified in this Agreement after the appropriate notice.

34.1.3 MCI ceases doing business in the City.

34.1.4 MCI fails to provide current, accurate as-built plans and maps showing the location of all Facilities installed or constructed in the City.

34.1.5 MCI is or becomes insolvent or is a party to a voluntary or involuntary bankruptcy, reorganization, or receivership case or proceeding, makes an assignment for the benefit of creditors, is subject to other actions by creditors that, in the reasonable, good faith opinion of the City, threaten the financial viability of MCI as a going concern, or if there is any similar action that affects MCI's capability to perform its obligations under this License and/or Agreement.

34.1.6 MCI fails to obtain or maintain any licenses, permits, or other governmental approvals pertaining to the ROW or timely pay any taxes pertaining to the ROW.

34.1.7 A court has issued an injunction that in any way prevents or restrains MCI's use of any portion of the ROW and remains in force for a period of at least thirty (30) consecutive days.

34.1.8 MCI is unable to use any substantial portion of the ROW for a period of thirty (30) consecutive days due to the enactment or enforcement of any law or regulation or because of fire, flood, or other natural disaster or similar casualty.

34.2 Before terminating this Agreement under Sections 34.1.1, 34.1.2, 34.1.4, and 34.1.6, the City Manager or a designee, shall give prior written notice to MCI of the defect in performance and give MCI sixty (60) days within which to cure the defect in performance.

34.3 The City need not provide a sixty (60) day cure period prior to termination if the City finds that the defect in performance under this Agreement is due to intentional misconduct, is a violation of criminal law, or is a part of a pattern of repeated and persistent violations where MCI has already had notice and opportunity to cure.

34.4 The City Manager has the authority to terminate, subject to MCI's right to notice and cure where provided, this License and/or Agreement.

34.5 Hearing Prior to Revocation of License. Prior to the revocation or refusal to renew this License, the City will hold a hearing if requested by MCI.

34.6 Termination by Mutual Agreement. This License and/or Agreement may be terminated prior to its date of expiration by MCI by providing the City with ninety (90) days' written notice and only upon making arrangements satisfactory with the City Engineer to remove all MCI's above ground Facilities from public property and the ROW, unless the City Engineer agrees in writing to allow MCI to abandon part or all of its Facilities in place. If the City Engineer agrees to allow MCI to abandon its Facilities in place, the ownership of such Facilities, including everything permitted by City to be abandoned in place, shall transfer to City and MCI shall cooperate to execute any documents necessary to accomplish such transfer within thirty (30) days of such allowance of abandonment.

34.7 Notwithstanding anything in Section 34.6 above, upon termination of this Agreement, MCI shall remove all of its optical repeaters, DWDM and CWDM multiplexers, antennae, above ground fiber optic cables and/or wires, and related equipment within ninety (90) days.

SECTION 35. Non-use/Abandonment of the Facilities.

35.1 An "Abandoned Facility" will mean a Facility no longer in service or physically disconnected from a portion of the operating Facility or from any other Facility that is in use or still carries service. If MCI ceases to provide services or abandons use of any of its Facilities, upon cancellation or termination of this Agreement, MCI shall notify the City and may, subject to the City's approval, permanently abandon the Facilities in place. In such event, the City, at its option, may acquire ownership of the Facilities. In lieu of permanent abandonment, the City may require MCI, to the reasonable satisfaction of the City and without cost or expense to the City, to promptly remove the above ground Facilities and to restore the public property and ROW to a reasonable condition under the supervision of the City.

35.2 Upon permanent abandonment, if the City does not require removal, MCI shall submit to the City a proposal and instruments for transferring ownership to the City. Any such Facilities, which are not removed as required by the City within ninety (90) days of either such date of termination or cancellation or of the date the City issued a permit authorizing removal, whichever is later, automatically shall become the property of the City. MCI will notify the Arizona Blue Stake Center to record the Facilities that have been abandoned.

35.3 Title to any and all personal property installed by MCI upon the ROW that is not removed during the period set forth in Section 35.2 shall automatically vest in City.

35.4 Nothing in Section 35.1 shall be deemed to require MCI to remove Facilities that the MCI uses for the provision of services other than Telecommunications Services or Interstate Telecommunications Services, so long as such use of Facilities for the provisions of the ongoing other services is authorized by the City pursuant to this Agreement.

SECTION 36. 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 this Agreement on behalf of City is or becomes at any time while this Agreement or an extension of this Agreement is in effect an employee of or a consultant to MCI with respect to the subject matter of this Agreement. The cancellation shall be effective when MCI receives written notice of the cancellation, unless the notice specifies a later time.

SECTION 37. 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 MCI or a representative of MCI to any officer or employee of City for the purpose of influencing the outcome of the procurement or securing of this Agreement, an amendment to this Agreement, or favorable treatment concerning this 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 MCI.

SECTION 38. Condemnation

The following shall govern any condemnation of any part of or interest in the area used and/or occupied by MCI and any conveyance to City or another condemnor in avoidance or settlement of condemnation or a threat of condemnation:

1. Termination for Condemnation. This Agreement shall terminate as to the portion taken on the date that is the earlier of the date title vests in the condemnor, or the date upon which the condemnor is let into possession.
2. Power to Condemn. MCI acknowledges that City and others from time to time may sue to condemn the area used by MCI or any interest therein or rights thereto.
 - a. City reserves the right of condemnation or eminent domain over the area used and/or occupied by MCI. City does not warrant that it will not condemn the area(s) used and/or occupied by MCI during the term of this Agreement, but City does not presently have intentions to condemn such area(s).
 - b. City also reserves the right through its powers of eminent domain to acquire all or any portion of the Facilities owned by MCI in accordance with the applicable conditions set forth in the Arizona Revised Statutes. However, under no circumstances shall any valuation be made for any right or privilege granted by this Agreement should the City acquire the property of MCI.

SECTION 39. Notice

39.1 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 transmission showing a valid delivery receipt 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 Tempe:

City of Tempe
City Engineer
31 E. 5th St.
Tempe, AZ 85281
Phone: (480) 350-8200

With copies to:

Tempe City Attorney's Office
21 E. 6th St., Suite # 201
Tempe, AZ 85281
Phone: (480) 350-8227

City of Tempe - ITD
Attn: Telecommunications Policy Adm.
120 E. 5th St.
Tempe, AZ 85281
(480) 350- 8364

**MCI Communications Services Inc.
dba Verizon Business Services**

MCI Communications Services, Inc.
2400 North Glenville Dr.
Richardson, TX 75082
Phone: (972) 729-7575

With copies to:

Verizon Legal Department
2400 North Glenville Drive
Richardson, Texas 75082
Phone: (972) 729-6751
Fax: (972) 729-6927

39.2 Notices shall be deemed sufficiently given and served upon the other party if delivered by facsimile transmission (provided with respect to facsimile 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 fifth business day after deposit in U.S. Mail.

39.3 Either party may from time to time designate any other address for this purpose by written notice to the other party in the manner set forth above.

39.4 MCI shall notify the City within ten (10) business days of any change in mailing address.

SECTION 40. Governing Law

It is mutually understood and agreed that this Agreement shall be governed by the laws of the State of Arizona, both as to interpretation and performance, without giving effect to its principles of conflicts of laws. Any action at law, suit in equity, or judicial proceeding for the enforcement of this Agreement or any provision thereof shall be instituted only in the federal or state courts located within or within the jurisdiction of Maricopa County, Arizona.

SECTION 41. Partial Invalidity

If any section, paragraph, subdivision, clause, phrase or provision of this Agreement shall be adjudged invalid or unenforceable, or is preempted by federal or state laws or regulations,, the same shall not affect the validity of this Agreement as a whole or any part of the provisions of this Agreement other than the part adjudged to be invalid, unenforceable or preempted.

SECTION 42. No Warranty

42.1 The issuance of a license, permit or other authorization by the City is not a representation or warranty that such license, permit, or authorization is a legally sufficient substitute for a franchise, and is not a representation of warranty that a franchise is not required.

42.2 MCI ACKNOWLEDGES AND AGREES THAT CITY DOES NOT WARRANT THE CONDITION OR SAFETY OF ITS ROW OR THE PREMISES SURROUNDING THE SAME, AND MCI HEREBY ASSUMES ALL RISKS OF ANY DAMAGE, INJURY OR LOSS OF ANY NATURE WHATSOEVER CAUSED BY OR IN CONNECTION WITH THE USE OF ANY CITY ROW SUBJECT TO THE PROVISIONS OF THIS AGREEMENT.

SECTION 43. Non-Waiver

MCI 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 44. Remedies Not Exclusive

The remedies set forth in this License and Agreement are not exclusive. Election of one remedy does not preclude the use of other remedies.

SECTION 45. 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 MCI, such violation or non-compliance shall be excused where such violation or non-compliance is the result of acts of God, war, terrorist attack, civil disturbance, strike or other labor unrest, or other events, the occurrence of which was not reasonably foreseeable by MCI and is beyond its reasonable control.

SECTION 46. Dispute Resolution

In the event of a dispute between the parties to this Agreement regarding a provision of this Agreement, a party's performance of its obligations as stated in this Agreement or any other matter governed by the terms of this Agreement, the parties will meet in good faith to attempt to resolve the dispute. If the parties fail to resolve the dispute, then the parties agree that the dispute may be resolved through mediation. If mediation is agreed to by the parties, the parties shall mutually agree upon the services of one (1) mediator whose fees and expenses shall be borne equally by the parties. If the dispute is not resolved within a reasonable time, the parties shall be free to use other remedies such as nonbinding arbitration or litigation to resolve the dispute.

SECTION 47. 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 48. Survival of Liability

All obligations of MCI and City hereunder and all warranties and indemnities of MCI hereunder shall survive termination of this Agreement.

SECTION 49. Complete Agreement

This Agreement, including any Exhibits which are attached, are hereby incorporated into this Agreement and all of which constitutes the entire agreement between the parties with respect to the subject matter hereof and supersedes any and all prior or contemporaneous agreements whether written or oral. This Agreement cannot be modified or amended except in writing signed by both parties.

This Agreement executed this ____ day of April 2013.

City of Tempe,
an Arizona municipal corporation

MCI Communications Services, Inc.
dba Verizon Business Services
a Delaware Corporation

By: _____
Mark W. Mitchell, Mayor

By: _____

Title: _____

ATTEST:

Brigitta M. Kuiper, City Clerk

APPROVED AS TO FORM:

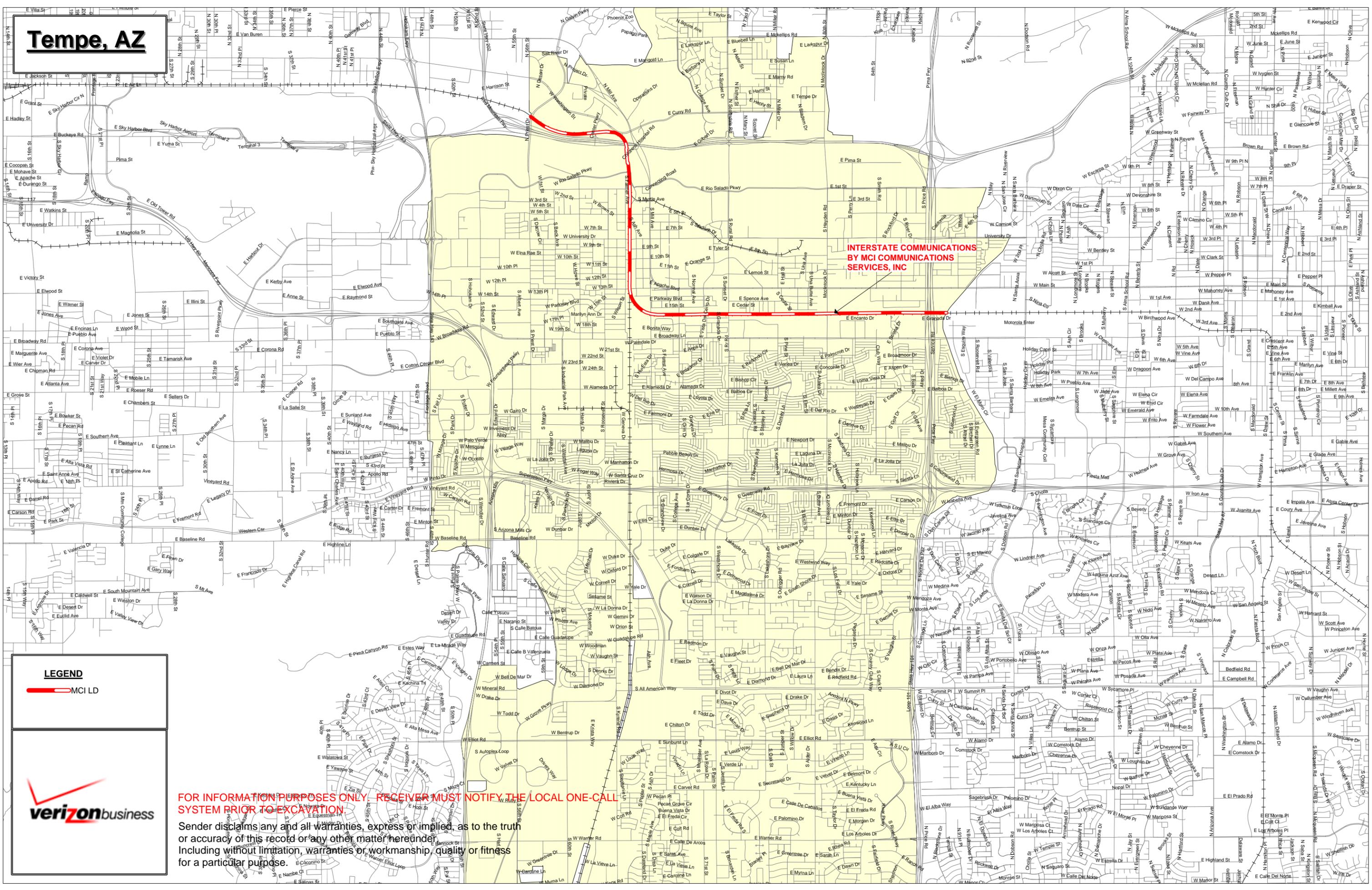
Judith R. Baumann, Interim City Attorney

Exhibit A – Route Map within Tempe

Exhibit B – Letter of Credit form

Exhibit C – Insurance Certificate

Tempe, AZ



**INTERSTATE COMMUNICATIONS
BY MCI COMMUNICATIONS
SERVICES, INC**

LEGEND

 MCI LD



verizonbusiness

FOR INFORMATION PURPOSES ONLY. RECEIVER MUST NOTIFY THE LOCAL ONE-CALL SYSTEM PRIOR TO EXCAVATION.

Sender disclaims any and all warranties, express or implied, as to the truth or accuracy of this record or any other matter hereunder. Including without limitation, warranties of workmanship, quality or fitness for a particular purpose.

EXHIBIT B
Standards for Letters of Credit

In addition to any other requirements imposed upon a letter of credit (the "Letter of Credit") issued pursuant to this Agreement, each Letter of Credit shall meet and be governed by the following additional standards and requirements:

1. Letter of Credit Requirements. The Letter of Credit shall be printed on Bank Safety Paper. The following terms and no others shall be stated on the face of the Letter of Credit:

1.1 The Letter of Credit is clean, unconditional, and irrevocable.

1.2 The Letter of Credit is payable to City upon presentation of the City's draft.

1.3 City may make partial draws upon the Letter of Credit. In that event, the issuer will return the original Letter of Credit to the City within ten (10) business days of payment.

1.4 The Letter of Credit is conditioned for payment solely upon presentation of a sight draft and a copy of the Letter of Credit.

1.5 Within ten (10) days after City's draft on the Letter of Credit is honored, City must make the original of the Letter of Credit available to the Letter of Credit Department of the issuer upon which the issuer may endorse its payments. Such presentation can be done via overnight courier.

1.6 The issuer specifies a fax number, email address and street address at which City may present drafts on the Letter of Credit as required by 1.5 above.

1.7 The Letter of Credit is valid until a specified date.

1.8 The Letter of Credit is the individual obligation of the issuer, in no way contingent upon reimbursement with respect thereto, or upon issuer's ability to perfect any lien or security interest.

1.9 The Letter of Credit will be automatically renewed for successive one (1) year periods, unless at least one hundred twenty (120) days prior to expiration the issuer notifies City in writing, by either registered or certified mail or courier, that issuer elects not to renew the Letter of Credit for the additional period. In the event of such notification, any then unused portion of the Letter of Credit shall be available by draft on or before the then current expiration date. If necessary, replacement instruments can be prepared within the (ninety) 90 days prior to expiration.

1.10 The Letter of Credit is otherwise subject to the most recent edition of the Uniform Customs and Practices for Documentary Credits published by the International Chamber of Commerce. Notwithstanding Article 36 of said Publication, in the event that one or more of the occurrences specified in Article 36 of said Publication occurs, then the bank hereby specifically agrees that this letter of credit shall be extended so as not to expire during such interruption of business and shall extend for ten days after such resumption of business.

1.11 The Letter of Credit need not be transferable.

2. Approved Forms. The form of the Letter of Credit and of drafts upon the Letter of Credit shall be as follows:

2.1 Except as approved in writing by City's Director of Finance and Technology or designee, form of the Letter of Credit shall be in the form set out below.

2.2 Except as approved in writing by City's Director of Finance and Technology or designee, the form of drafts upon the Letter of Credit shall be in the form set out below.

3. Issuer Requirements. The issuer of the Letter of Credit shall meet all of the following requirements:

3.1 The issuer shall be a federally insured financial institution with offices in Maricopa County, Arizona.

3.2 The issuer shall be a member of the Clearing House Association or a commercial bank or trust company satisfactory to City.

3.3 The issuer shall have a net worth of not less than \$500 million.

FORM OF DRAFT ON LETTER OF CREDIT

To: _____

From: Finance and Technology Director
City of Tempe
20 E. Sixth Street, 2nd Floor
Tempe, Arizona 85280

Re: MCI Communication Services Inc.
dba Verizon Business Services
Contract No. 2013 -__

Date: _____, 20__

Ladies and Gentlemen:

Pursuant to your Letter of Credit No. _____, the City of Tempe hereby demands cash payment in the amount of _____ (\$_____).

Please make your payment to the City of Tempe in the form of a wire deposit (and indicate the amount is coming from the letter of credit issued to MCI Communication Services Inc. dba Verizon Business Services to:

If such deposit cannot be accomplished immediately for any reason, please make your payment in the form of a cashier's check issued by your institution and delivered to me at the address listed above.

I certify that I am the Finance and Technology Director of the City of Tempe.

If there is any imperfection or defect in this draft or its presentation, please inform me immediately at 480-350-8504 so that I can correct it. Also, please immediately notify the City Attorney at 480-350-8227.

Thank you.

City of Tempe, Finance and Technology Director



CERTIFICATE OF LIABILITY INSURANCE

DATE(MM/DD/YYYY)
07/11/2012

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. 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).

PRODUCER Aon Risk Services Northeast, Inc. New York NY Office 199 Water Street New York NY 10038-3551 USA	CONTACT NAME: PHONE (A/C. No. Ext): (866) 283-7122 FAX (A/C. No.): (847) 953-5390 E-MAIL ADDRESS:	
	INSURER(S) AFFORDING COVERAGE	
INSURED MCI Communications Services Inc. dba Verizon Business Services 140 West Street New York NY 10007-2109 USA	INSURER A: National Union Fire Ins Co of Pittsburgh 19445	
	INSURER B: New Hampshire Ins Co 23841	
	INSURER C:	
	INSURER D:	
	INSURER E:	
	INSURER F:	

Holder Identifier :

COVERAGES **CERTIFICATE NUMBER: 570047026963** **REVISION NUMBER:**

THIS IS TO CERTIFY THAT 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. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS. **Limits shown are as requested**

INSR LTR	TYPE OF INSURANCE	ADDL INSR	SUBR WVD	POLICY NUMBER	POLICY EFF (MM/DD/YYYY)	POLICY EXP (MM/DD/YYYY)	LIMITS
A	GENERAL LIABILITY <input checked="" type="checkbox"/> COMMERCIAL GENERAL LIABILITY CLAIMS-MADE <input checked="" type="checkbox"/> OCCUR GENL AGGREGATE LIMIT APPLIES PER: <input checked="" type="checkbox"/> POLICY <input type="checkbox"/> PROJECT <input type="checkbox"/> LOC			GL4406483	06/30/2012	06/30/2013	EACH OCCURRENCE \$1,000,000 DAMAGE TO RENTED PREMISES (Ea occurrence) \$2,000,000 MED EXP (Any one person) PERSONAL & ADV INJURY \$1,000,000 GENERAL AGGREGATE \$2,000,000 PRODUCTS - COMP/OP AGG \$2,000,000
A	AUTOMOBILE LIABILITY <input checked="" type="checkbox"/> ANY AUTO <input type="checkbox"/> ALL OWNED AUTOS <input type="checkbox"/> SCHEDULED AUTOS <input type="checkbox"/> HIRED AUTOS <input type="checkbox"/> NON-OWNED AUTOS			CA 498-28-12 AOS CA 498-28-13 MA CA 498-28-14 VA	06/30/2012	06/30/2013	COMBINED SINGLE LIMIT (Ea accident) \$1,000,000 BODILY INJURY (Per person) BODILY INJURY (Per accident) PROPERTY DAMAGE (Per accident)
A	<input checked="" type="checkbox"/> UMBRELLA LIAB <input checked="" type="checkbox"/> OCCUR <input type="checkbox"/> EXCESS LIAB <input type="checkbox"/> CLAIMS-MADE DED RETENTION			13273226	06/30/2012	06/30/2013	EACH OCCURRENCE \$5,000,000 AGGREGATE \$5,000,000
B	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY ANY PROPRIETOR / PARTNER / EXECUTIVE OFFICER/MEMBER EXCLUDED? (Mandatory in NH) If yes, describe under DESCRIPTION OF OPERATIONS below			WC061967935 AOS WC061967936 CA	06/30/2012	06/30/2013	<input checked="" type="checkbox"/> WC STATUTORY LIMITS <input type="checkbox"/> OTHER E.L. EACH ACCIDENT \$1,000,000 E.L. DISEASE-EA EMPLOYEE \$1,000,000 E.L. DISEASE-POLICY LIMIT \$1,000,000

Certificate No : 570047026963

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (Attach ACORD 101, Additional Remarks Schedule, if more space is required)

MCI Communications Services, Inc. License Agreement granted for Rights-of-way use in the City of Tempe, AZ to provide communication services. Licensee's insurance coverage shall be primary as respects the City, its officials, employees, and volunteers. Any insurance or self insurance maintained by the City, its officials, employees, or volunteers shall be in excess of the Licensee's insurance and shall not contribute to it. Any failure to comply with reporting provisions of the policies shall not affect coverage provided to the City, its officials, employees, or volunteers. Licensee's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability. Worker's Compensation and Employer's Liability Includes Waiver of Subrogation. Includes bodily injury, property

CERTIFICATE HOLDER**CANCELLATION**

City of Tempe Attn: Telecommunications 53 South Priest Drive Building "G" Tempe AZ 85281 USA	SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.
	AUTHORIZED REPRESENTATIVE <i>Aon Risk Services Northeast, Inc.</i>

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ADDITIONAL REMARKS SCHEDULE

AGENCY Aon Risk Services Northeast, Inc.		NAMED INSURED MCI Communications Services Inc.	
POLICY NUMBER See Certificate Number: 570047026963			
CARRIER See Certificate Number: 570047026963	NAIC CODE	EFFECTIVE DATE:	

ADDITIONAL REMARKS

THIS ADDITIONAL REMARKS FORM IS A SCHEDULE TO ACORD FORM,

FORM NUMBER: ACORD 25 **FORM TITLE:** Certificate of Liability Insurance

Additional Description of Operations / Locations / Vehicles:

damage, personal injury, products, completed operations, and blanket contractual Commercial General liability. The City, its officials, employees, and volunteers are included as additional insured as respects liability arising out of activities performed by or on behalf of Licensee, including the insured's general supervision of the Licensee; products and completed operations of the Licensee; premises owned, occupied or used by Licensee, or automobiles owned, leased, hired or borrowed by Licensee. The coverage shall contain no special limitations on the scope of protection afforded to the City, its officials, employees, or volunteers.



CITY OF TEMPE
REQUEST FOR COUNCIL ACTION

Council Meeting Date: 4/4/2013
Agenda Item: 5A6

ACTION: Authorize the Mayor to execute an In-Kind Dark Fiber Agreement between Zayo Group LLC and the City of Tempe.

FISCAL IMPACT: N/A

RECOMMENDATION: Staff recommends approval to authorize the Mayor to execute the agreement.

BACKGROUND INFORMATION: Zayo and/or its predecessor in interest AGL Networks LLC have received permission to occupy the City's right-of-way (ROW) since 2003. However, in addition to its fiber networks that transport telecommunications, Zayo also leases dark fiber (as had AGL). There are portions of Zayo's route within Tempe where there is solely dark fiber occupying the ROW and other portions where Zayo has leased dark fiber, but also provides its own customers with intrastate telecommunications services pursuant to its Certificate of Convenience and Necessity (CC & N). While state law exempts routes that carry intrastate telecommunication services from a fee, the City is authorized by federal law to receive fair and reasonable compensation for use of the right-of-way for non-exempt services (like dark fiber leasing). Zayo, however, contended that it should not be required to compensate the City for portions of the route that were mixed use (where Zayo serviced customers but also leased dark fiber to others). Through a separate agreement, the City will issue Zayo a telecommunication license and right-of-way use agreement (C2013-57) and the issue of compensation for use of the ROW will be addressed in this agreement through an in-kind payment of dark fiber. The City has agreed to accept eight (8) dark fibers from Zayo for a nineteen (19) mile run within Tempe for at least a twenty (20) year term. The eight dark fibers will position the City to expand its gigabit broadband network to include the PD Substation on Hardy, the Tempe Public Library, all three Water Treatment facilities, Kiwanis Rec Center, Diablo Stadium, and the Golf operations office at Ken McDonald. The agreement with Zayo is attached with the exception of Exhibits B and C which are considered confidential.

ATTACHMENT: Agreement with Exhibits A, D and E.

STAFF CONTACT: Dave Heck, Deputy Finance & Technology Director/IT (480) 350-8777

Department Director: Ken Jones, Finance & Technology Director
Legal review by: Jenae Naumann, Assistant City Attorney
Prepared by: Lisa Ernst, Sr. Management Assistant

**IN-KIND DARK FIBER AGREEMENT
BETWEEN ZAYO GROUP LLC
AND THE CITY OF TEMPE**

C2013-

This **IN-KIND DARK FIBER AGREEMENT** ("Agreement") is effective as of this ____ day of April, 2013 ("Effective Date") by and between Zayo Group, LLC, a Delaware limited liability company ("Zayo"), and the City of Tempe, an Arizona municipal corporation ("City"). Zayo and City are each referred to as a "Party" and are collectively referred to as the "Parties."

RECITALS:

- A. WHEREAS, City owns public street and alley right-of-way and public utility easements within the boundaries of the City of Tempe; and
- B. WHEREAS, Zayo owns a fiber optic communication system (the "Zayo System") in the City of Tempe between the locations and on the routes identified in Exhibit A.
- C. WHEREAS, Zayo has obtained from the Arizona Corporation Commission a certificate of convenience and necessity by Decision No.72561 dated August 24, 2011 (the "CC&N"); and
- D. WHEREAS, Zayo has previously received permission from the City to place the Zayo System in the right-of-way pursuant to License Nos. C2003-15 and C2007-163, and First Amendment C2007-163A; and
- E. WHEREAS, Zayo has more recently received permission from the City to maintain and place the Zayo System it was using to provide various services in the right-of-way pursuant to C2013-57 (collectively the "Zayo License"); and
- F. WHEREAS, Zayo currently has routes with dark fiber customers as identified in green on Exhibit A; and
- G. WHEREAS, City is authorized to regulate its streets, alley and public utility easements, and to grant, renew, deny, amend and terminate licenses for and otherwise regulate the installation, operation and maintenance of fiber optic networks and conduit within the City's boundaries pursuant to City Charter, Tempe City Code, Chapter 31A, and by virtue of federal (47 U.S.C. § 253) and state statutes (including, but not limited to A.R.S. §§ 9-581, 9-582, and 9-583), by the City's police powers, its authority over public right-of-way, and its other governmental powers and authority; and
- H. WHEREAS, the City maintains that it is entitled to fair and reasonable compensation for Zayo's use of the ROW for dark fiber leasing; and,
- I. WHEREAS, Zayo has agreed, without waiving any objection to the City's claim for compensation, to provide the City, under the terms and conditions of this Agreement an indefeasible right of use of the dark fibers along the routes and identified

below in Exhibits B and C to run concurrent with the Zayo License (including any renewals); and

Accordingly, in consideration of the mutual promises set forth below and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

ARTICLE 1 GRANT OF DARK FIBER USE

1.1 Subject to the provisions hereof, Zayo hereby agrees to provide to the City use of the communications dark fibers ("City Fibers") identified on Exhibit B.

1.2 Zayo hereby agrees to construct the access points and/or laterals set forth in Exhibit C at no cost to City. The handoff points for City Fibers at each facility identified on Exhibit B are detailed in separate drawings attached as Exhibit C.1 through C.8. Zayo is responsible for obtaining all necessary authorizations prior to any construction, however, City agrees to waive fees for permits required to extend City Fibers to locations identified in Exhibit B.

1.3 Use of the City Fibers is provided subject to the terms and conditions set forth in this Agreement. The right of the City to use the City Fibers does not include the right of City to: (a) own, control, access, repair or maintain the City Fibers, or any other property or rights of Zayo; (b) use building access facilities; or (c) gain physical access to or use any portion of the Zayo System.

1.4 City shall have exclusive control and sole responsibility for determining network and service configurations or designs, routing configurations, re-grooming, rearrangements or consolidations of channels or circuits, and all related functions with regard to City's use of the City Fibers.

1.5 City acknowledges and agrees that Zayo is not supplying to City, nor will Zayo be obligated to supply to City, any optronics or electronics or optical or electrical equipment or other facilities or equipment including, without limitation, generators, batteries, air conditioners, fire protection equipment or monitoring and testing equipment, all of which shall be the sole responsibility of City to supply. City further acknowledges and agrees that Zayo shall not be responsible for performing any work in connection with its provision of City Fibers other than as expressly set forth in this Agreement.

ARTICLE 2 CONSIDERATION AND CONDITIONS FOR GRANT

2.1 In consideration of the grant of the City Fibers by Zayo to City, City shall treat such in-kind payment as fair and reasonable compensation for use of the ROW for dark fiber leasing.

2.2 If Zayo adds additional routes during the Term of this Agreement, they will not be subject to this Agreement, unless the Parties agree in writing to add them.

2.3 If City's use of/need for the City Fibers ends during the Term, City shall continue to waive compensation for the use of the ROW for dark fiber leasing and/or sales for the entire Term of the Agreement.

2.4 City will allow Zayo access to the Vault/Manhole at the intersection of 6th Street and Forest to perform point to point testing and other required maintenance.

2.5 The City will provide Zayo with escorted access to all facilities identified on Exhibit B for the planning, construction, testing and maintenance of pull boxes and fiber termination equipment. Access must be requested 24 hours in advance for all scheduled work by contacting the Tempe NOC at 480-350-2900. Access for emergency work requires notification prior to arrival.

ARTICLE 3 PROVISION OF THE FIBERS

3.1 City and Zayo will work cooperatively to provision the City Fibers promptly following execution of this Agreement, and will endeavor to complete the provisioning within (60) days of the Effective Date.

3.2 Zayo shall test the City Fibers and shall verify that the City Fibers have been installed and are ready for use pursuant to the specifications and testing outlined in Exhibit D.

ARTICLE 4 TERM AND TERMINATION

4.1 This Agreement shall become effective on its Effective Date and City's use of the City Fibers shall extend for as long as the Fiber infrastructure occupies the ROW and/or the Zayo License is renewed. In the event that Zayo voluntarily terminates or chooses not to renew the Zayo License, the Term shall continue for a minimum of twenty (20) years.

4.2 Agreement Expiration. This Agreement shall terminate automatically upon the expiration of the Term. City may, during the Term of the Agreement, cease using all or a portion of the City Fibers and retain the option of renewing use of the City Fibers during the Term of the Agreement. If the City provides Zayo notice that it is terminating use of the City Fibers prior to the expiration of the stated Term, the Agreement shall continue, however all rights of City to use the City Fibers shall cease, all rights to use of the City Fibers and associated System Route shall revert to Zayo, and Zayo shall owe City no further duties or consideration, including any consideration previously deemed due by the City relating to the dark fiber or mixed use routes. Interim cessation of City Fiber use, conversion of all the mixed use and dark fiber routes to solely intrastate telecommunications routes lit by Zayo, or terminating use of the City Fibers shall not impact the Term of this Agreement, and City shall continue to waive all fees as provided in Article 2.1 of the Agreement.

4.3 Expiration or termination of this Agreement shall not affect the rights or obligations of either Party that have arisen before the date of termination or expiration, or pursuant to the Articles of this Agreement entitled Indemnification, Limitation of Liability, and Insurance with respect to matters or claims arising or accruing prior to the expiration or termination hereof, or pursuant to any other provisions of this Agreement that, by their sense and context, are intended to survive termination of this Agreement

ARTICLE 5 NETWORK ACCESS

5.1 Access points shall consist of the manholes, vaults or other access points listed on Exhibit B (collectively, the "Connecting Points").

5.2 **Manhole Access:** City shall allow Zayo and Zayo's contractors to enter the Connection Points to install service, LOA/CFA in this location, for Point to Point (PTP) testing and other required maintenance.

5.3 **Work:** Prior to the commencement of any work by Zayo or Zayo's Contractors within City manholes or pull boxes, Zayo shall get the proper permits for work within the ROW and notify the City. City shall not charge Zayo for utility permits that are required to install, test or maintain City Fibers. For routine access work to be performed, Zayo shall give City not less than forty-eight (48) hours prior written notice. In the event of an emergency, Zayo shall provide City with notice immediately and in any event prior to Zayo's entry. City will make reasonable efforts to allow Zayo access to a Connecting Point as promptly as the circumstances allow. City shall have the right to have an authorized representative present during Zayo's entry or work in the manhole. Notwithstanding the foregoing, the failure of City to have supervisory personnel on location at the designated work time shall not prevent Zayo from proceeding with the notified work within or access to the manhole. Zayo agrees that persons entering the manhole on Zayo's behalf shall not step on, connect anything to or otherwise come into contact with the City's or any other party's cables or any equipment located in the manhole.

5.4 City shall provide its own cable and other facilities between the Connecting Points and City's network and other equipment. City shall be responsible for obtaining any building access agreements or other agreements with building owners or other third parties that are necessary for access to the Connecting Points or other space, and for all connections to City's network at the Connecting Points.

5.5 If during the Term of this Agreement, Zayo undertakes a relocation of any segment of the Zayo System that contains any of the City Fibers, Zayo shall proceed with such relocation, including, but not limited to, the right, in good faith, to reasonably determine the extent of, the time of, and the methods to be used for such relocation; provided that: (a) any such relocation shall be constructed and the City Fibers shall be tested in accordance with the specifications set forth in Exhibit D; and (b) if the relocation is at Zayo's discretion, Zayo shall maintain the same end points of the City Fibers. Zayo must give City not less than sixty (60) days prior notice of any such relocation, if possible.

ARTICLE 6 USE OF CITY FIBERS

6.1 City represents, warrants and covenants that it will use the City Fibers in compliance with all applicable government codes, ordinances, laws, rules, and regulations.

6.2 Subject to the limitations set forth in this Agreement, City may use the City Fibers for any lawful communications purpose. City shall not use any of the fibers that are part of the Zayo System, other than the City Fibers. City shall not encumber the City Fibers, any associated Zayo property, or any rights obtained by City under this Agreement. City shall keep the Zayo System, including the City Fibers, free from any liens, rights or claims of any third party attributable to City, including, but not limited to, fiber leases or other grants of rights to use the City Fibers.

6.3 City and Zayo shall promptly notify each other of any known matters pertaining to, or the occurrence (or impending occurrence) of, any event which would likely give rise to any damage or impending damage to or loss of the Zayo System.

6.4 City shall not use its systems or the City Fibers in a way that interferes with or adversely affects the use of any other fibers within the Zayo System. The Parties acknowledge that the Zayo System includes or will include other participants, including Zayo and other owners and users of telecommunications systems.

6.5 Zayo shall not use the City Fibers during the Term of this Agreement without the express written consent of the City.

ARTICLE 7 LIMITATION OF LIABILITY

7.1 EXCEPT FOR THE INDEMNIFICATION OBLIGATIONS SET FORTH IN ARTICLE 9, THE TOTAL LIABILITY OF EITHER PARTY FOR DAMAGES ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT SHALL BE LIMITED TO THE PROVEN DIRECT DAMAGES SUFFERED BY A PARTY.

7.2 NEITHER PARTY, ITS AFFILIATES, OFFICERS, DIRECTORS, EMPLOYEES, AGENTS OR ASSIGNS SHALL BE LIABLE TO THE OTHER FOR ANY RELIANCE OR CONSEQUENTIAL, INCIDENTAL, PUNITIVE, SPECIAL, EXEMPLARY OR OTHER INDIRECT DAMAGES, INCLUDING, BY WAY OF EXAMPLE AND NOT LIMITATION, LOSS OF BUSINESS, PROFITS, DATA, OR OTHER ECONOMIC ADVANTAGE, WHETHER BY STATUTE, IN TORT, OR IN CONTRACT, EVEN IF A PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. OTHERWISE, EACH PARTY'S LIABILITY HEREUNDER WILL BE LIMITED TO ACTUAL DIRECT DAMAGES. THE FORGOING LIMITATIONS DO NOT APPLY TO THIRD PARTY CLAIMS SUBJECT TO CLAIMS FOR INDEMNIFICATION.

ARTICLE 8 MAINTENANCE

Zayo shall maintain the City Fibers provided in good operating condition for normal use as contemplated by the manufacturer(s) and in accordance with the maintenance specifications set forth in Exhibit E that is attached hereto and incorporated herein by this reference or will timely substitute replacement dark fibers for the original City Fibers if those cease being in compliance with the specifications set forth in Exhibit E. Excluding instances of negligent use or operation by the City, such substitute dark fibers shall be provided to the City at the sole cost and expense of Zayo, including all disconnect, reconnect, equipment relocation, and other costs, fees, and expenses and shall not adversely affect the use, operation, or performance of the City's network, except to the extent of interruptions permitted for relocations and shall not change any endpoints of the City Fibers, unless mutually consented to by the City and Zayo. Except as provided within this agreement, Zayo EXPRESSLY DISCLAIMS ANY EXPRESS OR IMPLIED WARRANTY BEYOND THE MANUFACTURER'S WARRANTY AS TO THE FITNESS OF THE FIBERS. Zayo makes no other warranties, written or oral, statutory, express or implied, including, without limitation, the warranty of merchantability or fitness for a particular purpose or use regarding the provided fibers.

ARTICLE 9 INDEMNIFICATION

9.1 Zayo shall indemnify, defend and hold harmless City, its employees, officers, directors, subcontractors and agents (the "City Indemnitees") from and against all third-party liability (including, but not limited to, the infringement of any third-party intellectual property right, property damage, and personal injury (including death) arising from the furnishing of Zayo City Fibers, to the extent caused by or resulting from the acts or omissions of Zayo, its employees, subcontractors or agents.

9.2 City shall indemnify, defend and hold harmless Zayo, its employees, officers, directors, subcontractors and agents (the "Zayo Indemnitees") from and against all third-party liability (including, but not limited to, the infringement of any third-party intellectual property right, property damage, and personal injury (including death)) arising from the use of the City Fibers by City to the extent caused by or resulting from the acts or omissions of City, its employees, subcontractors, or agents.

9.3 In connection with these Zayo and City indemnifications, the indemnified Party shall: (a) promptly notify the other in writing of any such claim and grant such other Party control of the defense and all related settlement negotiations, and (b) cooperate with the other Party, at the indemnified party's expense, in defending or settling such claim; provided that if any settlement results in any ongoing liability to, or prejudices or detrimentally impacts the other Party, and such obligation, liability, prejudice or impact can reasonably be expected to be material, then such settlement shall require the other Party's written consent. In connection with any such claim, the indemnified Party may have its own counsel in attendance at all public interactions and substantive negotiations at its own cost and expense.

ARTICLE 10 INSURANCE

At all times during the Term of the Agreement, City shall procure and maintain in force, at its own expense, insurance or self-insurance that it deems necessary to cover any personal injury and property damage, including without limitation death or injury to any person or persons, or damage to property arising from the use of the City Fibers. Zayo agrees to procure and maintain in force, at its own expense, the type and amounts of insurance that the City requires to secure permits and rights-of-way for the installation, operation, and maintenance of the Zayo System and the City Fibers within its jurisdiction.

ARTICLE 11 NOTICES

Notices under this Agreement shall be in writing and delivered by overnight courier (e.g., Federal Express, DHL) or 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 by the receiving Party:

If to Zayo: Zayo Group LLC
400 Centennial Parkway, Suite 200
Louisville, CO 80027
Attn: Gregg Strumberger, General Counsel

If to City:
City of Tempe
Information Technology Director
120 E. 5th St. , Second Floor
Tempe, AZ 85281
Phone: (480) 350-8364

With copies to:

Tempe City Attorney's Office
21 E. 6th St., Suite # 201
Tempe, AZ 85281
Phone: (480) 350-8227

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

ARTICLE 12 DEFAULT

12.1 A default shall be deemed to have occurred under this Agreement if a
Zayo Tempe 2013 Dark Fiber Agreement

Party:

(a) violates any applicable laws, statutes, ordinances, codes or other legal requirements and such violation(s) are not remedied within thirty (30) days after written notice thereof; or

(b) fails to perform any of its material obligations under this Agreement and such nonperformance is not remedied within thirty (30) days after written notice thereof is provided to the breaching Party (except for payment defaults for which no cure period is available).

12.2 In the event of any default hereunder, the nondefaulting Party may (subject to Article 7) pursue any legal remedies it may have under applicable law or principles of equity, including specific performance.

12.3 A waiver by either Party at any time of any of its rights as to anything herein contained shall not be deemed to be a waiver of any breach of covenant or other matter subsequently occurring.

ARTICLE 13 FIBER OWNERSHIP OPTION

If Zayo becomes insolvent or is a party to a voluntary or involuntary bankruptcy, or receivership case or proceeding, or makes an assignment of all of its assets for the benefit of creditors, then to the extent allowed by bankruptcy law, City shall be given the option to acquire title to the City Fibers at a price of One Hundred Dollars (\$100.00) per fiber mile and a written Bill of Sale shall be provided by Zayo to the City.

ARTICLE 14 FORCE MAJEURE

In no event shall a Party have any claim or right against the other for any failure of performance (other than a failure to pay) due to causes beyond its control including, but not limited to: acts of God, fire, explosion, vandalism, cable or fiber cut by a third party without permit authority and not acting at the direction of a Party, adverse weather conditions, flood or other similar occurrences; any law, order or regulation, of the government, including federal, state and local governments having or claiming jurisdiction over Zayo or of any department, agency, commission, bureau, corporation, or other instrumentality of any federal, state, or local government, or of any civil or military authority; national emergencies; unavailability of materials or rights-of-way; insurrections; riots, wars; terrorism; strikes, lock-outs, work stoppages, supplier failures, shortages; or any other cause or circumstance, whether of a similar or dissimilar nature to the foregoing, beyond the reasonable control of the affected Party.

ARTICLE 15 ASSIGNMENT AND CITY FIBER TRANSFERS

City's use of City Fibers shall be for municipal use only, and City may not, without the consent of Zayo (which may be granted or denied by Zayo in its sole discretion), assign or otherwise transfer this Agreement or its rights or obligations hereunder,

including all rights to access Network assets or facilities to any other Party, in whole or in part. Any such assignee or transferee shall agree in writing to be bound and abide by this Agreement. City may not use City Fibers to offer services to a third party that compete with Zayo nor grant to any third party an indefeasible right of use, dark fiber lease, sublease, license to use or any other right with respect to the City Fibers under this Agreement.

ARTICLE 16 REPRESENTATIONS, WARRANTIES AND ACKNOWLEDGMENTS

16.1 Each Party represents and warrants that:

(a) it has the full right and authority to enter into, execute, deliver and perform its obligations under this Agreement;

(b) this Agreement constitutes a legal, valid and binding obligation enforceable against such Party in accordance with its terms, subject to bankruptcy, insolvency, creditors' rights and general equitable principles; and

(c) its execution of and performance under this Agreement does not violate any applicable existing regulations, rules, statutes or court orders of any local, state or federal government agency, court or body.

16.2 Zayo represents and warrants to City that, in its ownership, operation and maintenance of the Zayo System, Zayo will comply with all applicable local, municipal, state or federal laws, orders and regulations. City represents and warrants to Zayo that City has, or will have at the time required under applicable law, all applicable licenses, permits, franchises, and other governmental approvals required for City to lease, own and operate the City Fibers.

ARTICLE 17 GENERAL PROVISIONS

17.1 City shall not be responsible for any Impositions which have been separately assessed, allocated to, or imposed on the City Fibers or that are imposed, based on, or otherwise measured with respect to construction services performed by Zayo for City or for any Impositions imposed on the conduit that holds the City Fibers or the cable in which the City Fibers are a part. "Impositions" means all taxes, fees, levies, imposts, duties, charges or withholdings of any nature (including, without limitation, franchise, license and permit fees) together with any penalties, fines or interest thereon arising out of the transactions contemplated by this Agreement that are imposed upon the Zayo System by any federal, state or local government or other public taxing authority.

17.2 This Agreement and each Party's respective rights and obligations under this Agreement, shall be binding on and shall inure to the benefit of the Parties hereto and each of their respective permitted successors and assigns.

17.3 The failure of either Party hereto to enforce any of the provisions of this Agreement, or the waiver thereof in any instance, shall not be construed as a general

waiver or relinquishment on its part of any such provision, but the same shall nevertheless be and remain in full force and effect.

17.4 This Agreement shall be governed by and construed in accordance with the laws of the State of Arizona, without reference to its choice of law principles. Any litigation arising out of or related to this Agreement or the subject matter of this Agreement shall be brought and maintained exclusively in the courts of Maricopa County, Arizona.

17.5 The captions or headings in this Agreement are strictly for convenience and shall not be considered in interpreting this Agreement or as amplifying or limiting any of its content. Words in this Agreement which import the singular connotation shall be interpreted as plural, and words which import the plural connotation shall be interpreted as singular, as the identity of the Parties or objects referred to may require.

(a) Unless expressly defined herein, words having well-known technical or trade meanings shall be so construed. All listing of items shall not be taken to be exclusive, but shall include other items, whether similar or dissimilar to those listed, as the context reasonably requires.

(b) Except as set forth to the contrary herein, any right or remedy of City or Zayo shall be cumulative and without prejudice to any other right or remedy, whether contained herein or not.

(c) Nothing in this Agreement is intended to provide any legal rights to anyone not an executing Party of this Agreement.

(d) This Agreement has been fully negotiated between and jointly drafted by the Parties.

(e) All actions, activities, consents, approvals and other undertakings of the Parties in this Agreement shall be performed in a reasonable and timely manner, it being expressly acknowledged and understood that time is of the essence in the performance of obligations required to be performed by a date expressly specified herein. Except as specifically set forth herein, for the purpose of this Agreement the standards and practices of performance within the telecommunications industry in the relevant market shall be the measure of a Party's performance.

17.6 This Agreement constitutes the entire and final agreement and understanding between the Parties with respect to the subject matter hereof and supersedes all prior agreements relating to the subject matter hereof, which are of no further force or effect. The Exhibits referred to herein are integral parts hereof and are hereby made a part of this Agreement. To the extent that any of the provisions of any Exhibit hereto are inconsistent with the express terms of this Agreement, the terms of this Agreement shall prevail. This Agreement may only be modified or supplemented by an instrument in writing executed by each Party and delivered to the Party relying on the writing.

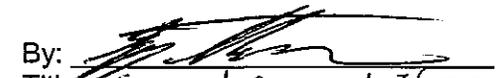
17.7 The relationship between City and Zayo shall not be that of partners, agents, or joint venturers for one another, and nothing contained in this Agreement shall

be deemed to constitute a partnership or agency agreement between them for any purposes, including, but not limited to federal income tax purposes. City and Zayo, in performing any of their obligations hereunder, shall be independent contractors or independent Parties and shall discharge their contractual obligations at their own risk subject, however, to the terms and conditions hereof.

17.8 If any term, covenant or condition contained herein is, to any extent, held invalid or unenforceable in any respect under the laws governing this Agreement, the remainder of this Agreement shall not be affected thereby, and each term, covenant or condition of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

In confirmation of their consent and agreement to the terms and conditions contained in this Agreement and intending to be legally bound hereby, the Parties have executed this Agreement as of this ____ day of April 2013.

Zayo Group LLC,
a Delaware limited liability company

By: 
Title: General Counsel, ZFT I
Gregg Strumberger

City of Tempe,
an Arizona municipal corporation

Mark W. Mitchell, Mayor

ATTEST:

Brigitta M. Kuiper, City Clerk

APPROVED AS TO FORM:

Judith R. Baumann, Interim City Attorney

- Exhibit A:** Zayo System Route
- Exhibit B:** Connecting Points and City Fiber Routes
- Exhibit C1 – C8:** Hand-Off Points for City Fibers
- Exhibit D:** Fiber Specifications; Testing Procedures
- Exhibit E:** Fiber Maintenance Specifications and Procedures

Zayo Tempe 2013 Dark Fiber Agreement

Tempe Zayo Fiber Routes

- Telecom Only
- Dark Fiber Only
- Mixed Use

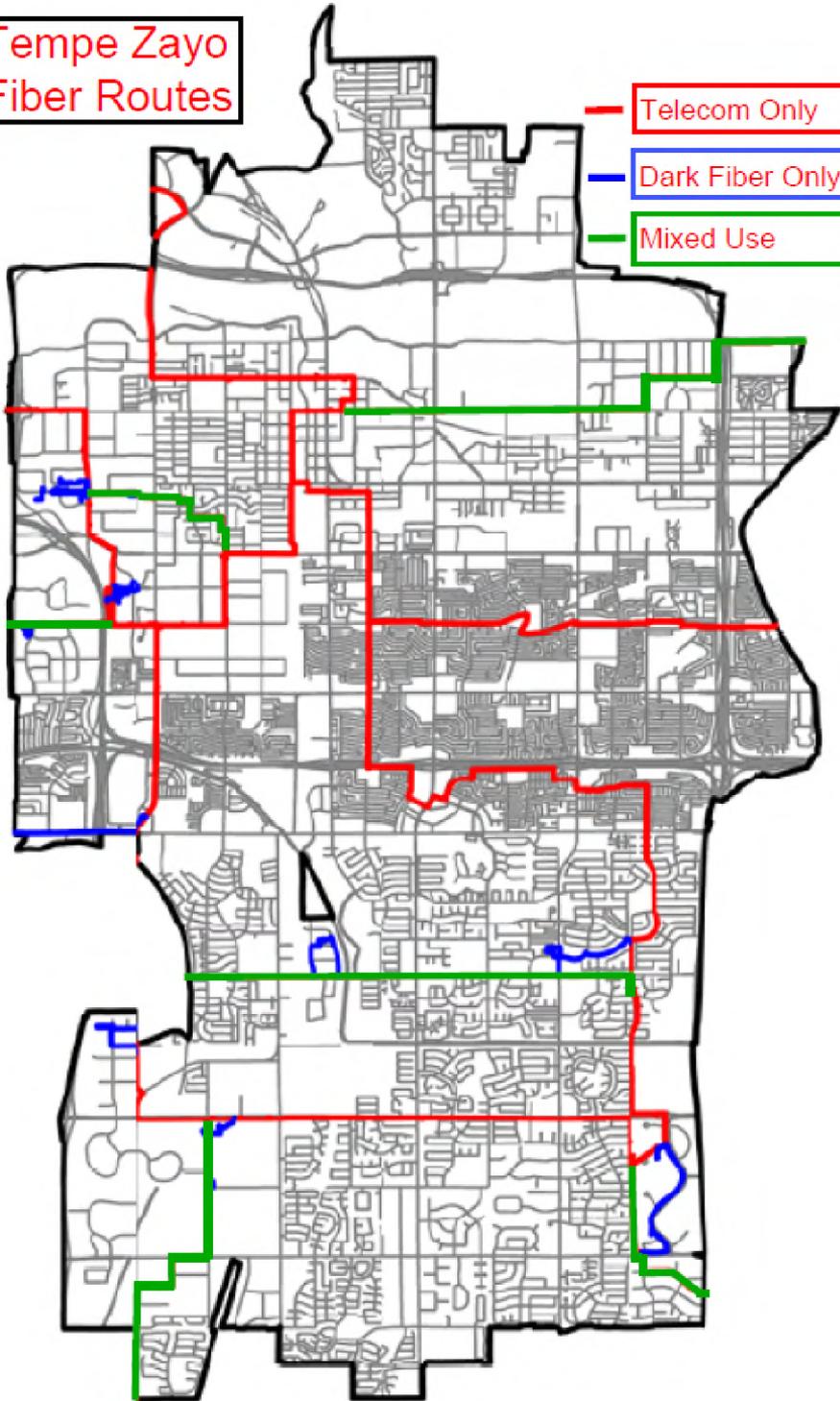


EXHIBIT D

Specifications; Testing Procedures

The intent of this Exhibit is to delineate the system specifications for the City Fibers and to describe the testing procedures that were conducted during the installation of fibers in the Zayo System.

1.0 Fiber Optic Specification

- NZDSF (Specified in ITU-T G.655) Single Mode Non-Zero Dispersion-Shifted Optical Fiber.

2.0 Testing Procedures

- 2.1. All splices will be performed with an industry accepted fusion splicing machine. Initially, Optical Time Domain Reflectometer (“OTDR”) tests will be taken from one direction. As soon as fiber connectivity has been achieved to both Regeneration/Opamp Facilities, Zayo will verify and record the continuity of all fibers. Zayo will take and record power level reading on all fiber in both directions. Zayo will bi-directionally OTDR test all fibers.
- 2.2. During the initial construction, it is only possible to measure the fiber from one direction. Because of this, splices will be qualified during initial construction with an OTDR from only one direction. The profile alignment system or light injection detection system on the fusion splicer may be used to qualify splices as long as a close correlation to OTDR data is established. The pigtailed will also be qualified at this stage using an OTDR and a minimum 1 km launch lead. All measurements at this stage in construction will be taken at 1550 nm.
- 2.3. After Zayo has completed end-to-end connectivity on the fibers, bi-directional testing will be done. These measurements must be made after the splice manhole or handhole is closed in order to check for macro-bending problems. Continuity tests will be done to verify that no fibers have been “frogged” or crossed in any of the splice points. Once the pigtailed have been spliced, loss measurements will be recorded using an industry accepted laser source and a power meter. OTDR traces will be taken and splice loss measurements will be recorded. Grantor will store OTDR traces on diskette and on data sheets. Laser Precision format will be used on all traces. Copies of all data sheets and table, and one set of diskettes will all traces will be available to City.
- 2.4. The power loss measurements shall be made at 1550 nm, and performed bi-directionally.
- 2.5. OTDR traces shall be taken in both directions at 1550 nm.
- 2.6. The splicing standards are as follows:
 - The loss value of the pigtail connector and its associated splice will not exceed 0.50 dB. This value does not include the insertion loss from its connection to the FDP. For values greater than this, the splice will be broken and respliced until an acceptable loss value is achieved. If, after five attempts is not able to produce a loss

value less than 0.50 dB, the splice will be marked as Out-of-Space (“OOS”) on the data sheet. Each splicing attempt shall be documented on the data sheet.

- During initial uni-directional OTDR testing, the objective for each splice is a loss of 0.15 dB or less. If, after three attempts, Zayo is not able to produce a loss value of less than 0.15 dB, then 0.25 dB will be acceptable. If, after two additional attempts, a value of less than 0.25 dB is not achievable, then the splice will be marked as OOS on the data sheet. Each splicing attempt shall be documented on the data sheet.
- During end-to-end testing of a span (a span shall be FDP to FDP), the objective for each splice is a bi-directional average loss of 0.15 dB or less.
- The standard for each fiber within a span shall be an average bi-directional loss of 0.10 dB or less for each splice. For example, if a given span has 10 splices, each flow shall have total bi-directional loss (due to the 10 splices) of 1.0 dB or less. Each individual splice may have a bi-directional loss of 0.15 dB or less, but the average bi-directional splice loss across the span must be 0.10 dB or less.
- The entire fiber optic cable system shall be properly protected from foreign voltage and grounded with an industry-accepted system.

2.7. The fibers shall be terminated to the FDP with Ultra SC-PC connectors, unless another type of connector is specified. The pigtailed shall be manufactured with the same glass as the backbone cable to minimize splice loss.

3.0 **Outside Plant Documentation**

City will be provided with cable running line lists and/or route maps locating City Opamp sites in MapInfo Professional format, all of which City may verify in the field. City will be provided with MapInfo Professional maps locating fiber access points (handholes, manholes, pull boxes) upon written request specifying a one (1) square mile area of need.

The following is a general discussion of currently accepted industry standards in the construction of fiber cable systems. However, the specific measurements of depth of cover, type and size of conduit systems, grounding systems specifications, and civil engineering detail will vary with constructing company, right-of-way provider, civil authority, and local conditions. Construction detail is provided as typical and for reference only.

3.1. General Outside Plant Construction Standards

3.1.1. Buried Conduit System Construction

Conduit systems are placed by means of trenching, plowing, jack and bore, mini-bore, or directional bore, depending on local conditions. Conduit systems may consist of polyvinyl chloride pipe (PVC), high-density polyethylene pipe (HDPE), or steel pipe of varying grades depending on the type of cable protection required and local code. In cases where steel pipe is used (e.g., bores under rail or roads), innerduct is placed inside the pipe.

Conduits carrying one fiber cable are generally 1.25" or 1.50" in diameter, and multiple ducts of this type may be carried in larger conduits, or there may be multiple ducts together in one trench. Structured duct banks are typical in tunnel and bridge construction. Conduit systems are typically buried with a minimum of 36" of cover. In circumstances where that is not possible, steel pipe and/or concrete capping is employed to further protect the cables.

3.1.2. Fiber Access Points (Manholes, Handholes)

Fiber optic cable splice points are placed at intervals along the conduit system to provide access to the cable's fibers. These are typically fiberglass or concrete handholes buried with 24 inches of cover along the route, or manholes flush to a paved street surface. Manholes generally have a minimum loading rating of H20.

3.1.3. Buried Cable Warning Tape and Cable Route Markers

Two sets of buried cable warning tapes are generally installed longitudinally along cable routes to warn excavators of the cable system below. One line of warning tape is placed directly over the conduit system, and a second line is placed at 12" below grade. These tapes are orange in color, 3" wide, and carry the following markings at 24" intervals: "Warning: Buried Fiber Optic Cable" Company Name and Logo, with the "Call Before You Dig" (CBUD), or "One Call" 800 telephone number.

3.1.4. Buried Fiber Optic Cable Installation

Fiber cables are installed in conduit systems from the manufacturer's cable reel by pulling them in using a powered winch, by blowing them in by means of compressed air, or by a combination of those methods.

All splicing is done at handholes or manholes.

If the cable is armored, it is grounded at all splice point locations. Cable locating tone devices may also be installed in the cables themselves and in access points depending on the cable owner's standards.

EXHIBIT E

Maintenance Specifications and Procedures

1) Maintenance.

- a) Scheduled maintenance. Routine maintenance and repair of the City Fibers described in this section (“Scheduled Maintenance”) shall be performed by or under to direction of Zayo, at the reasonable discretion of Zayo. Scheduled Maintenance shall commence with respect to each segment upon the effective date of the grant of the City Fibers therein, as provided in the Agreement. Scheduled Maintenance shall include the following activities:
 - i) Patrol of Zayo System route on a regularly scheduled basis, which will not be less than bi-weekly, unless hi-rail access is necessary, in which case it will be quarterly;
 - ii) Participation in a “Call-Before-You-Dig” program and all required and related cable locates.

- b) Unscheduled Maintenance. Non-routine maintenance and repair of the City Fibers which is not included as Scheduled Maintenance (“Unscheduled Maintenance”) shall be performed by or under the direction of Zayo. Unscheduled Maintenance shall commence upon the effective date of the grant of the City Fibers therein, as provided in this Agreement. Unscheduled Maintenance shall consist of :
 - i) “Emergency Unscheduled Maintenance” in response to an alarm identification by the Zayo Operation Center, notification by Zayo or notification by any third party of any failure, interruption or impairment in the operation of the City Fibers, or an event imminently likely to cause the failure, interruption or impairment in the operation of the Zayo System related to the City Fibers.
 - ii) “Non-Emergency Unscheduled Maintenance” in response to any potential service-affecting situation to prevent any failure, interruption or impairment in the operation of the City Fibers not covered by Scheduled Maintenance in 1(a) above. City shall immediately report the need for Unscheduled Maintenance to Zayo in accordance with reasonable procedures promulgated by Zayo from time to time. Zayo will log the time of City’s report, verify the problem and dispatch personnel immediately to take corrective action.

2) Operations Center.

Zayo shall operate and maintain an Operations Center (“OC”) staffed twenty-four (24) hours a day, seven (7) days a week by trained and qualified personnel. The Zayo maintenance employees shall be available for dispatch twenty-four (24) hours a day, seven (7) days a week. Zayo shall have its first maintenance employee at the site requiring Emergency Unscheduled Maintenance activity within four (4) hours after the

time Zayo becomes aware of an event requiring Emergency Unscheduled Maintenance, unless delayed by circumstances beyond the reasonable control of Zayo. Zayo shall maintain a toll-free telephone number to contact personnel at the OC. The Zayo OC personnel shall dispatch maintenance and repair personnel along the system to handle and repair problems detected in the Zayo System; (i) through the City's remote surveillance equipment and/or upon notification by City to Zayo, or (ii) upon notification by a third party.

3) **Cooperation and Coordination**

- a) In performing its services hereunder, Zayo shall take workmanlike care to prevent impairment to the signal continuity and performance of the City Fibers. The precautions to be taken by Zayo shall include notifications to City. In addition, Zayo shall reasonably cooperate with City in sharing information and analyzing the disturbances regarding the cable and/or fibers. In the event that any Scheduled or Unscheduled Maintenance hereunder requires a traffic roll or reconfiguration involving cable, fiber, electronic equipment, or regeneration or other facilities of the City, the City shall, at the reasonable request of Zayo, make such personnel of City available as may be necessary in order to accomplish such maintenance, which personnel shall coordinate and cooperate with Zayo in performing such maintenance as required of Zayo hereunder.
- b) Zayo shall notify City at least ten (10) business days prior to the date in connection with any Planned Service Work Period ("PSWP") of any Scheduled Maintenance and as soon as possible after becoming aware of the need for Unscheduled Maintenance. City shall have the right to request to be present during the performance of any Scheduled Maintenance or Unscheduled Maintenance so long as this requirement does not interfere with the ability of Zayo to perform its obligation under the In-Kind Dark Fiber Agreement. In the event that Scheduled Maintenance is canceled or delayed for whatever reason as previously notified, Zayo shall notify City at the earliest opportunity of Zayo, and will comply with the provisions of the previous sentence to reschedule any delayed activity.

4) **Facilities.**

- a) Zayo shall maintain the Zayo System in a manner which will permit City's use, in accordance with the terms and conditions of the In-Kind Dark Fiber Agreement, of the City Fibers and the Associated Property required to be provided under the terms of the In-Kind Dark Fiber Agreement.
- b) City will be solely responsible for providing and paying for any and all maintenance of all electronic, optronic and other equipment, materials and facilities used by City in connection with the operation of the City Fibers, none of which is included in the maintenance services to be provided hereunder.

5) **Cable/Fibers.**

- a) Zayo shall perform appropriate Scheduled Maintenance on the cables contained in the Zayo System in accordance with then current preventive maintenance procedures of Zayo which shall not substantially deviate from standard industry practice.
- b) Zayo shall maintain sufficient capability to teleconference with City during and Emergency Unscheduled Maintenance in order to provide regular communications during the repair process. When correcting or repairing cable discontinuity or damage, including but not limited to in the event of Emergency Unscheduled Maintenance, Zayo shall use reasonable efforts to repair traffic-affecting discontinuity within four (4) hours after the Zayo representatives arrival at the problem site. In order to accomplish such objective, it is acknowledged that the repairs so affected may be temporary in nature. In such event, within twenty-four (24) hours after completion of any such Emergency Unscheduled Maintenance, Zayo shall commence its planning for permanent repair, and thereafter promptly shall notify City of such plans, and shall implement such permanent repair within an appropriate time thereafter. Restoration of open fibers on fiber strands not immediately required for service shall be completed on a mutually agreed-upon schedule.
- c) The Zayo representatives that are responsible for initial restoration of a cut cable shall carry on their vehicles the typically appropriate equipment that would enable a temporary splice, with the objective of restoring operating capability in as little time as possible. Zayo shall maintain and supply an inventory of spare cable in storage facilities supplied and maintained by Zayo at strategic locations to facilitate timely restoration.

6) **Planned Service Work Period (PSWP).**

Scheduled Maintenance which is reasonable expected to produce any signal discontinuity must be coordinated between the parties. Generally, this work should be scheduled after midnight and before 6:00 a.m. local time. Major system work, such as fiber rolls and hot cuts, will be scheduled for PSWP weekends. A calendar showing approved PSWP will be agreed upon in the last quarter of every year for the year to come. The intent is to avoid jeopardy work on the first and last weekends of the month and high-traffic holidays.

7) **Restoration.**

- a) Zayo shall respond to any interruption of service or failure of the City Fibers to operate in accordance with the specifications set forth in Exhibit D (in any event, an "Outage") as quickly as possible (allowing for delays caused by circumstances beyond the reasonable control of Zayo) in accordance with the procedures set forth herein.

- b) When restoring a cut cable in the Zayo System, the parties agree to work together to restore all traffic as quickly as possible. Zayo, promptly upon arriving on the site of the cut, shall determine the course of action to be taken to restore the cable and shall begin restoration efforts. Zayo shall splice fibers tube by tube or ribbon by ribbon or fiber bundle by fiber bundle, rotating between tubes or ribbons operated by the parties having an interest in the cable, including City, Zayo and all future fiber users of the system (collectively, the “Interest Holders”), in accordance with the following described priority and rotation mechanics; provided that, lit fibers in all buffer tubes or ribbons are spliced and all traffic restored. In general, priority among Interest Holders affected by a cut shall be determined on a rotating restoration-by-restoration and Segment-by-Segment basis, to provide fair and equitable restoration priority to all Interest Holders. Zayo will provide upon Segment completion a System-wide rotation mechanism on a Segment-by-Segment basis so that the initial rotation order of the Interest Holders in each Segment is varied (from earlier to later in the order), such that as restorations occur, each Interest Holder has approximately equivalent rotation order positions across the Zayo System. Additional participants in the Zayo System that become Interest Holders after the date hereof shall be added to the restoration rotation mechanism. Except as provided above, if Zayo affords itself or any other Interest Holder any preferential treatment regarding the restoration of its lit fibers as compared with the sequence or timing of restoration of other Interest Holders’ lit fibers, then City shall receive similar preferential treatment.
- c) The goal of emergency restoration splicing shall be to restore service as quickly as possible. This may require the use of some type of mechanical splice, such as the “3M FiberLock” to complete the temporary restoration. Permanent restorations will take place as soon as possible after the temporary splice is complete.

8) **Subcontracting.**

Zayo may subcontract any of the maintenance services hereunder; provided that Zayo shall require the contractor(s) to perform in accordance with the requirement and procedures set forth herein. The use of any such subcontractor shall not relieve Zayo of any of its obligation hereunder.

9) **Fiber Replacement.**

In the event all or any part of the City Fibers shall require replacement or substitution such replacement or substitution shall be made as soon as reasonably practical by Zayo.

10) **Operation and Maintenance Fees:**

Scheduled Maintenance. There will no annual Operation and Maintenance Fee, unless and until the Parties agree to one in writing.



**CITY OF TEMPE
REQUEST FOR COUNCIL ACTION**

**Council Meeting Date: 4/4/2013
Agenda Item: 5A7**

ACTION: Authorize the Mayor to execute a Wired Telecommunications License and Right-of-Way Use Agreement between the City of Tempe and Zayo Group, LLC.

FISCAL IMPACT: Zayo will pay transaction privilege tax on its intrastate telecommunications gross revenue and as fair and reasonable compensation for occupation and use of the right-of-way for dark fiber leasing, Zayo will provide an in-kind payment of dark fiber to the City on the terms and conditions outlined in a separate agreement.

RECOMMENDATION: Staff recommends approval to authorize the Mayor to execute the agreement.

BACKGROUND INFORMATION: The City issued a telecommunications license to Zayo Fiber Solutions LLC (formerly known as AGL Networks LLC) on January 13, 2011 under a First Amendment to Agreement between AGL Networks, LLC and the City of Tempe for the Placement and Use of Facilities in the City's Right-of-Way and Public Places for a Metropolitan Optical Network ("First Amendment"). The First Amendment also defined the terms of a settlement agreement with Zayo regarding the fees that were owed under the original agreement. Zayo's license expired on September 19, 2012 and went into a 90 day holdover term that expired December 18, 2012. Zayo's facilities carry intrastate telecommunications as well as other services. In addition to providing lit services to its own customers, Zayo also leases dark fiber to customers. Under Sections 31A-10(a) and 31A-14 of the Tempe City Code, Zayo needs to have a license and agreement in order to continue providing services and/or do any work in the right-of-way. Execution of this agreement for a five-year term will allow Zayo to get permits again and continue to use the right-of-way for its business.

ATTACHMENT: Agreement with Exhibits A, B and C.

STAFF CONTACT: Jenae Naumann, Assistant City Attorney, (480) 350-8402

Department Director: Don Bessler, Public Works Director
Legal review by: Jenae Naumann, Assistant City Attorney
Prepared by: Donna Rygiel, Engineering Contract Supervisor

**WIRED TELECOMMUNICATIONS LICENSE AND
RIGHT-OF-WAY USE AGREEMENT
BETWEEN THE CITY OF TEMPE
AND ZAYO GROUP, LLC**

Contract No. C2013-57

This Wired Telecommunications License ("License") and Right-of-Way Use Agreement ("Agreement") is effective as of this ___ day of April, 2013, by and between the City of Tempe, an Arizona municipal corporation ("City") and Zayo Group, LLC ("Zayo"), a Delaware limited liability company.

RECITALS

WHEREAS, City owns public street and alley right-of-way and public utility easements within the boundaries of the City of Tempe; and

WHEREAS, Zayo has obtained from the Arizona Corporation Commission a certificate of convenience and necessity by Decision No. 72561 dated August 24, 2011 (the "CC&N"); and

WHEREAS, Zayo has previously received permission from the City to place Facilities in the right-of-way pursuant to License Nos. C2003-15 and C2007-163 and First Amendment C2007-163A; and

WHEREAS, Zayo desires the ability to be able to install future Facilities within the right-of-way and/or operate, maintain and repair existing Facilities within a portion of the right-of-way, subject to the requirements of this License and Agreement; and

WHEREAS, Zayo has applied to City for permission to continue using the right-of-way to maintain its existing Fiber Optic Networks; and

WHEREAS, Zayo seeks an agreement to occupy the right-of-way and use the right-of-way for non-telecommunication services; and

WHEREAS, Zayo also desires to obtain from the City a telecommunications license to provide Telecommunication Services; and

WHEREAS, City is authorized to regulate its streets, alley and public utility easements, and to grant, renew, deny, amend and terminate licenses for and otherwise regulate the installation, operation and maintenance of such Facilities within the City's boundaries pursuant to City Charter, Tempe City Code, Chapter 31A, and by virtue of federal (47 U.S.C. § 253) and state statutes (including, but not limited to A.R.S. §§ 9-581, 9-582, and 9-583), by the City's police powers, its authority over public right-of-way, and its other governmental powers and authority; and

WHEREAS, City wants to reserve rights to construct and use and allow others to construct and use all manner of additional improvements in the right-of-way; and

WHEREAS, Zayo agrees to provide and maintain accurate maps showing the location of all Facilities owned or used by Zayo on both public and private property within City, and to comply with such other mapping requirements as City may establish from time to time; and

WHEREAS, Zayo will secure the appropriate licenses, encroachment and other permits required by the City Code for the placement of its Facilities placed in the City's boundaries; and

WHEREAS, Zayo has agreed to comply with public property use requirements that City has established and may establish from time to time,

NOW THEREFORE, for and in consideration of the foregoing, the amounts hereinafter to be paid by Zayo, and the covenants and agreements contained herein to be kept and performed by Zayo, and for other good and valuable consideration, the City hereby grants to Zayo a telecommunication license ("License") and permission to use the public right-of-way pursuant to the terms and conditions set forth herein.

SECTION 1. Definitions

ACC means the Arizona Corporation Commission.

A.R.S. means Arizona Revised Statutes.

Backbone means a high-speed network that interconnects smaller, independent networks and is the through-portion of a transmission network (not the spurs that branch off).

Cable Services and Cable System shall have the same meaning as defined in Chapter 10 of the Tempe City Code.

Call means the operations required to set up or establish, maintain, and terminate or release a connection through a telephone network in support of a communication between two or more stations. A call comprises a sequence of events that begins when an end user at an originating station initiates a call request to a switch that may work in conjunction with other switches to establish a connection to an end user at a destination station, and concludes when one party (user) terminates the connection.

Claim(s) means and includes losses, claims, damages, suits, actions, payments, judgments, demands, expenses and costs, including, but not limited to, attorney's fees incurred through all appeals.

Coarse Wavelength Division Multiplexing ("CWDM") is a variation of WDM that carries four to eight wavelengths per fiber or more that is designed for short to medium-haul networks (regional and metropolitan areas).

Commercial Mobile Radio Services means two-way voice commercial mobile radio service as defined by the FCC in 47 U.S.C. § 157.

Common Carrier means a private company offering interstate or foreign communication by wire or radio or the interstate or foreign transmission of energy to the general public on a non-discriminatory basis.

Conduit means a pipe of either metal, ceramic or plastic that is designed to protect buried cables.

Conduit System means any combination of Ducts, Conduits, manholes and handholes joined to form an integrated whole.

Contractor means any person, firm, partnership, corporation, association or other organization, or a combination of any of them, that performs services or provides goods relating to this Agreement. Contractor shall include any subcontractor hired and/or used by Zayo Contractors for the performance of services or provision of goods relating to this Agreement.

Dark Fiber means fiber optic strands that the Provider has not connected to transmission equipment.

Dense Wavelength Division Multiplex ("DWDM") is a variation of WDM but with much higher bandwidth and density. Using DWDM, up to 80 or more separate wavelengths or channels of data can be multiplexed on a single optical fiber. Each channel carries a time division multiplexed (TDM) signal. Since each channel can carry up to 2.5 Gbps, up to 200 billion bits per second can be delivered by the optical fiber simultaneously.

Duct means a single enclosed tube, pipe or channel for enclosing and carrying cables, wires, and other facilities.

Equipment means any tangible asset used to install, repair, or maintain Facilities in any ROW.

Facilities means the plant, equipment, and property used in the provision of communication and telecommunication services and not owned by the City, including but not limited to poles, wires, pipe, conduits, pedestals, antenna, and other appurtenances placed in, on, or under Public Highways.

FCC means the Federal Communications Commission.

Fiber Optic Network is a communication system consisting of an optical transmitter to convert an electrical signal into an optical signal to send into the optical fiber, a cable containing bundles of multiple optical fibers that is routed through underground conduits and buildings, multiple kinds of amplifiers, and an optical receiver to recover the signal as an electrical signal.

Information Service means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.

Innerduct means a pathway created by subdividing a Duct into smaller channels.

Intrastate Call means a call in a conventional circuit-switched network that originates and terminates in a single state.

Interstate Call means a call in a conventional circuit-switched network that originates in one state and terminates in a different state (or country).

Interstate Telecommunications Services Provider means a Telecommunications Corporation that places underground or above ground Facilities in the Public Highway for interstate telecommunications services.

Interstate Traffic means a communication or transmission that originates in any state, territory, possession of the United States, or the District of Columbia and terminates in another state, territory, possession, or the District of Columbia.

Manhole means an enclosure, usually below ground level and entered through a hole on the surface covered with a cast iron or concrete manhole cover, which personnel may enter and use for the purpose of installing, operating and maintaining cable and fiber in a Conduit.

Multichannel Video System includes:

- (a) A "cable system," as the term is defined in title VI of the federal Communications Act of 1934, providing service within the City;
- (b) An "Open Video System," as the term is defined in title VI of the federal Communications Act of 1934, 47 U.S.C. § 573 and implementing regulations (47 CFR § 76.1500), providing service within the City;
- (c) Any other system providing Multichannel Video Programming Services within the City, where the service is transmitted in whole or in part via wires or lines that are in or cross any ROW within the City. The preceding sentence shall apply whether the provider owns, leases or otherwise obtains the right to use the wires or lines, including wires or lines of a telecommunications provider used pursuant to tariff or otherwise for that purpose;
- (d) Any other system providing Multichannel Video Programming Services within the City where a license or similar permission or approval from the City is required under applicable law,

For purposes of this License, "Multichannel Video Programming Services" means multiple channels of video programming where some or all of the video programming is generally considered comparable to programming provided by a television broadcast station or by a direct to home satellite service. Multichannel Video Programming Services specifically includes, but is not limited to, "cable service" as the term is used in Title VI of the Federal Communications Act of 1934.

Parties shall collectively mean the City of Tempe and Zayo Group, LLC.

Point of Presence (POP) means a telecommunications facility where network equipment is located to be used to connect customers to a network backbone.

Provider means a Telecommunications Corporation that constructs, installs, operates or maintains telecommunications Facilities in the City Public highways.

Public Emergency means any condition which, in the opinion of City officials, poses an immediate threat to the lives or property of the citizens of Tempe 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.

Public Highway means the roads, streets and alleys and all other dedicated public ROW and public utility easements of the City.

Public Service Corporation means a corporation engaged in furnishing gas, oil, or electricity for light, fuel, or power; or in furnishing water for irrigation, fire protection, or other public purposes; or in furnishing, for profit, hot or cold air or steam for heating or cooling purposes; or engaged in collecting, transporting, treating, purifying and disposing of sewage through a system, for profit; or in transmitting messages or furnishing public telegraph or telephone service, and all corporations other than municipal, operating as common carriers. However, a message transmitting company is only a public service corporation if it is a common carrier.

Right-of-way ("ROW") shall have the same meaning as Public Highway.

Service Lateral means an underground facility that is used to transmit, distribute, or furnish communications from a common source to an end-use customer.

Telecommunications means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received. **However, the term does not include commercial mobile radio services, pay phone services, interstate services, cable services, information services, or the sale and/or leasing of dark fiber for transmission purposes.**

Telecommunications Corporation means any Public Service Corporation to the extent that it provides telecommunications services in this state.

Telecommunications Services means the offering of telecommunications for a fee directly to the public, or to such users as to be effectively available directly to the public, regardless of the facilities used.

Wavelength Division Multiplexer ("WDM") means a device that combines optical signals from multiple different single-wavelength end devices onto a single fiber. WDM carries two to four wavelengths per fiber.

SECTION 2. Permission to Use Right-of-Way

2.1 Subject to the provisions of this Agreement, the Tempe City Code, the City Tempe Charter, and Arizona and federal law, City hereby grants to Zayo permission to use the designated portions of the right-of-way ("ROW") subject to and conditioned upon Zayo's full, timely, complete and faithful performance of all obligations to be performed or required hereunder by Zayo, and Zayo hereby accepts the terms and conditions of this License and Agreement.

2.2 Zayo's use and occupation of the ROW shall in all respects conform to all and each of the following provisions:

2.2.1 Permitted Uses. Zayo shall use the portions of the ROW solely for the uses allowed under this License and Agreement and shall conduct no other activity at or from those designated portions of the ROW as described below. The permitted uses are limited to the following:

2.2.1.1 Constructing, maintaining, repairing and operating the Facilities as described in this Agreement.

2.2.1.2 To the extent that any Fiber Optic Networks within the routes within the City carry intrastate and/or interstate Calls as referenced by A.R.S. §§ 9-582 and 9-583, the City hereby grants Zayo a revocable and nonexclusive Telecommunications License ("License") to run concurrently with the term of this Agreement. The permission granted herein shall be limited to the 142,905 linear feet (l.f.) of trench containing fiber filled Conduit with Fiber Optic Networks that transport intrastate Telecommunications as shown on the red route on Exhibit A, which is incorporated into this Agreement. This License also covers the Fiber Optic Network(s) Zayo uses to transport intrastate Telecommunications on the six "mixed use" routes of 70,460 l.f. as shown by the green routes on Exhibit A. The green routes are deemed "mixed use" because these routes contain Dark Fiber that Zayo has leased to third parties for private use.

2.2.1.3 Zayo is also allowed to have its Conduits and leased Dark Fiber(s) in the ROW at the locations shown on the blue routes on Exhibit A.

2.2.1.3 Such additional related uses for which City may give or retract consent from time to time. Such additional uses may only be conducted following City's giving to Zayo notice of such consent. City may terminate or impose conditions and limitations on such consent from time to time in City's sole and absolute discretion.

2.3 All other uses of the ROW are prohibited. Zayo may not allow third parties to use the Facilities for any use that Zayo itself does not have the authority under this License and Agreement to use the Facilities for.

2.3.1 The Telecommunications License granted by this Agreement does not allow Zayo to provide one-way transmissions by anyone directly to customers or any other type of video programming or other programming or transmission that may be subject to a cable television license or franchise. This License does not allow a Multichannel Video System and/or the providing of Multichannel Video Programming Services.

2.3.2 If Zayo ever obtains or seeks federal, state or local approval to provide a cable system or open video system ("Video Services") over the Fiber Optic Networks, this License and Agreement shall remain in effect according to its terms and Zayo shall continue to pay any fee required by this Agreement, regardless of any legal or regulatory provisions, permits or other processes or rules that might now or hereafter provide otherwise.

2.3.3 Without limiting the other amendment or waiver provisions of this License and Agreement, no change to or waiver of this Agreement's provisions regarding Video Services is effective without a formal amendment to this Agreement executed by City after approval by the City Council. City has not promised any such amendment or waiver. This Agreement does not prohibit the parties from entering into other agreements regarding the Fiber Optic Networks or Conduit Systems, should both parties desire to do so in their sole and absolute discretion.

2.4 The authority to install and construct any Conduit System and/or Fiber Optic Networks on City property granted herein authorizes Zayo only to install such fiber as is necessary to construct and operate the infrastructure described in this Agreement in order to provide the authorized Services and does not authorize Zayo to install or construct any Facilities not expressly provided for in this Agreement.

2.5 To the extent that Zayo occupies the ROW with empty conduit and/or Dark Fiber and/or uses the City's ROW to provide services other than the telecommunication services as defined by A.R.S. § 9-581, such use and/or occupation of the ROW is subject to the terms and conditions of this Agreement and any applicable fees, permits and laws.

2.6 Zayo shall comply with all applicable laws as amended from time to time, including but not limited to, the Tempe City Code and the City Charter and Arizona and federal law in the exercise and performance of its rights and obligations under this Agreement. If it is necessary for Zayo to comply with any law or regulation of the FCC or the ACC to engage in the business activities anticipated by this Agreement, Zayo 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.

SECTION 3. Non-Exclusive Rights/Priority Rights

3.1 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.

3.2 Any and all rights granted to Zayo shall be subject to the prior and continuing right of City to use the ROW exclusively or concurrently, with any other person or persons, and to manage City's own Facilities. Any and all rights granted to Zayo shall also be subject to all deeds, easements, dedications, conditions, covenants, restrictions, encumbrances, and claims to title which may affect public property. Nothing in this License shall be construed to grant, convey, create or vest a perpetual real property interest in land to Zayo, including any fee or leasehold interest, easement, or any franchise rights.

3.3 Any right or privilege claimed pursuant to this Agreement by Zayo for any use of any public ROW shall be subordinate to: A) any prior or subsequent lawful occupancy or use thereof by the City or any other governmental entity; B) any prior lawful occupancy or use thereof by any other person; C) and to any prior easements therein, provided

however, that nothing herein shall extinguish or otherwise interfere with property rights established independently of this Agreement.

3.4 There is hereby reserved to City every right and power required pursuant to this Agreement to be herein reserved or provided by any lawful ordinance or the Charter of the City, and Zayo by its execution of this Agreement agrees to be bound thereby and to comply with any lawful action or lawful requirements of the 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 lawful governmental right or power of City.

3.5 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 Zayo, by virtue of Zayo's use of their property or facilities be included in the computation of any use agreement fees owed by such parties to the City.

3.6 Nothing in this Agreement shall be construed to prevent the City from abandoning, altering, improving, repairing, or maintaining its Facilities and/or the ROW, and for that purpose to require Zayo, at no expense to the City, to remove, relocate or abandon in place Zayo's Facilities in order to accommodate the activities of the City. The City shall not be liable for lost revenues sustained by Zayo, however caused, because of damage, modification, alteration, or destruction of its Facilities in the ROW, when such costs or lost revenues result from the construction, operation, and/or maintenance of City facilities and/or the ROW, provided that the activities resulting in such costs or lost revenues are conducted in accordance with applicable laws and regulations.

SECTION 4. Notice of Other Users

4.1 Zayo may enter into contracts with unrelated third parties ("Users") in the ordinary course of Zayo's business for use of the Conduit Systems and/or Fiber Optic Networks within the portions of the ROW subject to this Agreement. Such contracts ("User Contracts") shall be subject to all requirements and provisions of this Agreement and the following:

- 4.1.1 No person shall transmit voice, video or data over the Fiber Optic Networks or otherwise use the Conduit System(s) except under a User Contract with Zayo.
- 4.1.2 Such Users shall not perform any construction, maintenance, repair or other work of any kind in the ROW related to the Fiber Optic Networks or Conduit System(s) and the identity of such Users must be disclosed to the City upon request, but such information will be considered Confidential and Proprietary under Section 31.2.3. All User Contracts shall prohibit such Users from performing any construction, maintenance, repair or other work of any description in the ROW related to the Fiber Optic Networks or Conduit System(s), unless such Users have an agreement with the City.

4.1.3 In the event the User Contract provides for the User to construct, install, operate or maintain any portion of the Fiber Optic Networks or Conduit System(s) within the route in the ROW, no such arrangement shall proceed until the User enters into an Agreement with the City for use of the City's ROW.

4.2 Zayo shall cause to comply with this Agreement all persons using the ROW through or under Zayo or this Agreement. Zayo is responsible for any violations of this Agreement by persons using the ROW through or under Zayo or this Agreement.

SECTION 5. Description of the Services and Routes

5.1 Zayo uses its Fiber Optic Network to provide data and Internet services, voice services, and video transmissions that are not considered Multichannel Video Programming Services, video services provided by an Open Video System, or cable services.

5.2 Zayo's CC&N only authorizes it to provide facilities-based local exchange and resold and facilities-based intraLATA and interLATA private line telecommunication services in Arizona.

5.3 Zayo currently leases Dark Fiber to customers within its routes in the City.

5.4 Total linear footage for Zayo's current routes within the City for its Conduit Systems and Fiber Optic Networks is 254,475 linear feet (l.f.).

SECTION 6. Regulatory Conditions Relating to Right-of-Way Usage

For purposes of this Agreement, whenever work is done in the ROW relating to any of the Facilities, Zayo agrees that it is solely responsible for the acts, errors, omissions, and any negligence of any or all of its Contractors and that the obligations of Sections 6 and 7 are imposed on both Zayo and any of its Contractors, who will be considered Zayo's agents and for whom Zayo will be responsible. Zayo will ensure that Zayo and its agents comply with Public ROW use requirements as follows:

6.1 Registration. Zayo agrees to register with the City by completing an application or renewal application form and the paying the applicable application fee.

6.2 Notice of Changes. Zayo shall file a proposed amendment to the registration before it makes any change that would render the registration information incomplete or inaccurate. A change of Zayo's name or address must be filed at least sixty (60) days prior to the date the change becomes effective; a change in the telephone number must be filed ten (10) days before the change becomes effective; and in the case of a change in the Facilities (by addition, subtraction or modification or movement), the change in Facilities must be filed at least sixty (60) days before work commences on the Facilities unless the relocation was ordered by the City. In the case of a change in services, the change must be noticed thirty (30) days before the earlier of the date the service commences, or Zayo begins marketing the service.

6.3 Zayo is completely responsible for ensuring that its Facilities are constructed, installed, operated and/or maintained in accordance with the Tempe City Code and

established practices with respect to such public ROW and easements such as the proper permits being applied for prior to commencing any work and that the terms and conditions of such permits are strictly followed.

6.4 Zayo's use of the public ROW and easements under the control of the City shall be according to plans approved by the City Engineer, provided that such approval shall not be unreasonably withheld or delayed.

6.5 The Facilities to be constructed, installed, operated, maintained, upgraded and removed hereunder, shall be so located or relocated as to interfere as little as possible with traffic or other authorized uses within said public ROW and easements. Any phases of construction and/or installation relating to traffic control, backfilling, compaction and paving, as well as the location or relocation of said Facilities shall be subject to regulation by the City Engineer.

6.6 Zayo and its agents shall be subject to the City's exercise of such police, regulatory and other powers as it now has or may later obtain, and Zayo may not waive the application of the same. City shall have continuing jurisdiction and supervision over any Facilities located within or on public ROW. Daily administrative, supervisory, and enforcement responsibilities shall be delegated and entrusted to the City Manager or designee to interpret, administer and enforce the provisions of this License and Agreement.

SECTION 7. Plan Approval, Permits, and Inspection

7.1 No Facilities shall be installed, constructed, located on, or attached to any property within the City until Zayo has applied for and received approval for permits from the City Engineer. Zayo shall be solely responsible for any and all acts, errors, omissions and negligence of its Contractor(s) who are involved in the installation, construction, maintenance, repair, location, relocation and any other activity involving Zayo's Facilities subject to this License and Agreement. Additionally, Zayo and its Contractor(s) shall comply with all other provisions of the Tempe City Code, including but not limited to Chapter 25 regarding off-site construction, Chapter 29 regarding streets and sidewalks, and other applicable City and/or Maricopa County regulations. All rights hereunder are granted under the express condition that the City shall have the power at any time to impose lawful restrictions and limitations upon, and to make regulations as to Zayo's use of the public ROW as may be deemed best for the public interest, safety, or welfare to the same extent that such restrictions and limitations are applied to all non-governmental users of the public ROW.

7.2 Zayo shall submit the applicable 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. Zayo and/or its Contractor(s) shall abide by all stipulations of all licenses and permits issued. If Zayo desires to change the location of any portion of the Conduit System(s) and/or Fiber Optic Network(s), including any related Facilities or equipment, from that set forth in the initial Permit Application, Zayo shall apply for and obtain approval for an amendment to the permit prior to installation or construction.

7.3 The City may issue reasonable policy guidelines to all licensees/users to establish procedures for determining how to control issuance of engineering permits to multiple licensees/users for the same one mile segments of their Facilities. Zayo agrees to cooperate with the City in establishing such policy and comply with the procedures established by the City Engineer or designee to coordinate the issuance of multiple engineering permits in the same one mile segments.

7.4 City will approve or deny such applications based on the availability of space at the location sought by Zayo, safety and other considerations in accordance with the City's Code, applicable ROW construction regulations and other applicable law. Zayo and/or its Contractor(s) agree to comply with the terms of any City-issued licenses and permits.

7.5 Any new Conduit or other Facilities placed in the ROW will be constructed using industry standard horizontal directional drilling and trenching construction methods. Other material placed in the ground may include concrete manholes, generally 4x4x4, pull boxes/handholes (#7s and #9s) and HDPE couplings and elbows, fiber optic cable, splice cases, tracer wire, grounding material, mule tape, jet string and conduit plugs. Zayo and/or its Contractor(s) will install any new Conduit and access points (manholes/pull boxes) using industry standard practices and in full compliance with Uniform Standard Specifications and Details for Public Works Construction sponsored and distributed by the Maricopa Association of Governments as amended (hereinafter referred to as "MAG"), the City's supplements to MAG, and the City of Tempe Utility Permit and Construction Manual.

7.6 If Zayo desires to change the components of any of the Fiber Optic Network, written approval of such change must be obtained from a representative of the City Engineer.

7.7 The City shall have the right to inspect all construction or installation work performed subject to the provisions of this License and to make such tests as it shall find necessary to meet City standards as set forth in the City of Tempe Utility Permit and Construction Manual and the MAG Uniform Standard Specifications and Details for Public Works Construction and the City of Tempe Supplements thereto and to ensure compliance with the terms of this License and other pertinent provisions of law.

7.8 Any new Conduit system(s) and/or Fiber Optic Network(s) shall be installed in multiple phases as agreed upon by Zayo and the City. If portions of this project will take place on the major arterial streets in City, Zayo and City will work to minimize the inconvenience to the citizens of City and others who use those major arterial streets impacted by the project by developing segments of the project to be completed in sequence.

7.9 Any Conduit systems and/or Fiber Optic Network(s) 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, existing utilities or other authorized uses over, under or through said streets and public ways. Zayo shall not install, operate, or allow the use of equipment, methodology or technology that may or would interfere with the optimum effective use or operation of City's existing or future fire, emergency or other communications equipment, methodology or technology (i.e., voice or other data carrying receiving or transmitting equipment). If such interference should occur, Zayo

shall immediately discontinue using the equipment, methodology or technology that causes the interference until Zayo takes corrective measures to alter the Fiber Optic Network(s) to eliminate such interference. Any such corrective measures shall be made at no cost to City. Zayo shall be responsible to ensure compliance with this Agreement by all persons using the ROW through or under Zayo or this Agreement.

7.10 Co-location. Zayo's installation of the Facilities shall be reasonably coordinated with other utilities and City to accommodate opportunities for common installation along with Zayo's route as set forth in this Agreement. All installations of cable and/or fiber shall be in Conduit or Innerduct as reasonably approved by the City Engineer. Provided, however, nothing herein shall require Zayo to incur any material additional expense to accommodate common installations.

7.11 Although the exact placement and location of any additional Facilities shall be determined by City through the permit process, Zayo has expressed its intent and City has expressed its desire to have any Facilities installed outside of the paved street areas whenever such location is feasible and reasonable. Further, if it is the intent and desire of Zayo for the Conduit System to be placed by horizontal directional drilling under such streets when feasible and reasonable, bore profiles based on vacuum pothole information shall be part of the engineered plans submitted to the City. Arterial streets shall not be bored unless approved by the City Engineer. In the event that a street opening in new pavement or resurfaced pavement cannot be avoided, Zayo agrees to pay a surcharge fee to cover damages and early deterioration will be assessed for cutting new or resurfaced pavements less than seven years old as per Tempe City Code Section 29-19 and Appendix A.

7.12 Zayo shall also provide and identify a representative, such as a project manager, who shall be the contact person for the City during any construction periods.

7.13 Prior to the start of any construction work, Zayo shall notify all adjacent or affected residents or businesses at least forty-eight (48) hours in advance of any street, alley, sidewalk, and driveway closures and make suitable arrangements to have all vehicles moved to a satisfactory location outside the closed area.

7.13.1 If an emergency requires activity without such written notice, Zayo shall use reasonable best efforts to provide timely actual notice to the owners or other persons having lawful control of the adjoining property. Upon request, Zayo shall promptly furnish to City documentation of such permission from such other affected property owner.

7.14 Whenever Zayo or its Contractors shall cause any opening or alteration to be made for any purpose in any public streets, or public places, the opening or alteration shall be completed and restored with due diligence within seven (7) business days. Zayo shall upon the completion of the opening or alteration, restore the property, improvements or landscaping disturbed by Zayo or its Contractors to a condition substantially comparable to the condition before the opening or alteration and the restoration shall be performed with due diligence within a reasonably prompt time.

7.15 Traffic Control.

7.15.1 All traffic shall be regulated in accordance with MAG; the City of Tempe Barricade Manual, latest edition, available through the City of Tempe Traffic Engineering; the Manual on Uniform Traffic Control Devices (MUTCD); and any Special Provisions included herein.

7.15.2 At the time of the pre-construction conference, Zayo shall designate an American Traffic Safety Services Association (ATSSA) certified individual who is well qualified and experienced in construction traffic control and safety, to be responsible for implementing, monitoring, and altering traffic control measures as necessary to insure that traffic is carried through the work area in an effective manner and that motorists, pedestrians, bicyclists, and workers are protected from hazard and accidents. At the same time, the City shall designate a representative who will be responsible to see that all traffic control and traffic control alterations are implemented per these traffic control specifications.

7.15.3 Zayo shall have the full responsibility and liability for traffic control for work performed by Zayo or their Contractors. Zayo shall submit a Traffic Control Plan to Traffic Engineering for approval one week prior to beginning work under this Agreement. It shall be noted that Traffic under this Agreement shall include all motor vehicles, bicyclists, and pedestrians. Zayo shall not begin construction until the Traffic Control Plan is approved by the City. An approved Traffic Control Plan shall be maintained onsite during all phases of construction, otherwise construction will cease until the Traffic Control Plan is approved.

7.15.4 During construction it may be necessary to alter traffic control as approved by Traffic Engineering. Alterations to traffic control shall be in accordance with the latest edition of Part VI of the Manual on Uniform Traffic Control Devices: "Traffic Control for Streets and Highway Construction and Maintenance Operations"; the latest edition of the City of Phoenix Traffic Control Manual; or the City of Tempe Barricade Manual, latest edition. The most restrictive manual shall apply. Zayo shall pay any and all applicable barricade fees.

7.15.5 In the event Zayo or its Contractor(s) damages any traffic signal equipment, traffic signal conduit, loop detectors and/or circuits, it shall have them repaired immediately at its expense by an electrical Contractor that has had traffic signal experience which is pre-approved by the City. Any damage caused by Zayo or its Contractor(s) or subcontractors that is repaired by the City will be billed to Zayo at two times the cost.

7.15.6 Pedestrian access shall be maintained along the length of the project at all times per the requirements of the ADA and as approved by Traffic Engineering.

7.15.7 Speed limits shall be strictly enforced.

7.15.8 For more information, please contact the City of Tempe Traffic Engineering.

7.16 Clean Up. Zayo and/or its Contractor(s) shall, during construction and upon completion of the work, remove all temporary construction facilities, debris, and unused materials provided for in the work, and put the work site of the work and public ROW in a safe, neat and clean condition.

7.17 Safety. Zayo and Zayo's Contractor(s) shall be solely and completely responsible for the conditions of any job site where the infrastructure is being placed, including safety of all persons (including employees) and property during performance of the work. This requirement shall apply continuously and not be limited to normal working hours. Safety provisions shall conform to all applicable federal (including OSHA), state, county, and local laws, ordinances, codes, and regulations. Where any of these are in conflict, the more stringent requirement shall be followed. Zayo's failure to thoroughly familiarize itself with the aforementioned safety provisions shall not relieve Zayo from compliance with these provisions.

7.18 Blue Stake. Zayo and its Contractor(s) 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 Zayo's Facilities upon receipt of a locate call or as promptly as possible, but in no event later than two working days. A copy of the agreement or proof of membership shall be filed with the City Engineer.

SECTION 8. Hazardous Substances

Zayo's and its Contractor(s)' activities upon or about the ROW shall be subject to the following regarding any hazardous or toxic substances, waste or materials, or any substance now or hereafter subject to regulation under the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. §§ 9601, et. seq., the Arizona Hazardous Waste Management Act, A.R.S. §§ 49-901, et. seq., the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901, et. seq., or the Toxic Substances Control Act, 15 U.S.C. § 2601, et. seq. or any other federal, state, county or local law pertaining to hazardous substances, waste or toxic substances and their reporting requirements (collectively "Toxic Substances");

1. Zayo and/or its Contractor(s) shall not produce, dispose, transport, treat, use or store any Toxic Substances upon or about the ROW. The prohibitions of the preceding sentence only shall not apply to:
 - a. Ordinary gasoline, diesel fuel or other fuels or lubricants necessary for ordinary use in motor vehicles and ordinary construction machinery permitted upon the ROW. Such materials must be properly and lawfully contained in ordinary quantities in ordinary tanks and receptacles that are permanently installed in such vehicles and machinery, or small portable tanks that are being used for fueling permitted construction machinery.
 - b. Electric backup batteries.
2. Zayo and/or its Contractor(s) shall dispose of any Toxic Substances away from the ROW as required by law and as reasonably required by City.
3. Zayo and/or its Contractor(s) shall not use the ROW in a manner inconsistent with regulations issued by the Arizona Department of Environmental Quality,

or in a manner that would require a permit or approval from the Arizona Department of Environment Quality or any other governmental agency. The preceding sentence does not prohibit ordinary permits for control of dust during construction permitted by this Agreement.

4. In addition to and without limitation of any other indemnities or obligations, Zayo shall pay, indemnify, defend and hold City harmless against any loss or liability incurred by reason of any Toxic Substance on or affecting the portion of the ROW used that is attributable to or caused by Zayo, its Contractor(s) or anyone using the ROW under this Agreement.
5. Zayo and/or its Contractor(s) shall immediately notify City of any Toxic Substance at any time discovered or existing upon the ROW. Zayo is not responsible for Toxic Substances that may exist at the ROW if Zayo's Contractors and/or any other persons using the ROW under this Agreement did not do any of the following:
 - a. Participate in the Toxic Material coming to the ROW
 - b. Fail to immediately report the Toxic Material to City
 - c. Participate in spreading or otherwise disturbing the Toxic Material
 - d. Exacerbate the effects of the Toxic Material or the difficulty or cost of dealing with the Toxic Material
6. Zayo understands the hazards presented to persons, property and the environment by dealing with Toxic Substances. Zayo acknowledges the possibility that the ROW may contain actual or presumed asbestos and other Toxic substances containing materials.
7. Within twenty-four (24) hours after any violation by Zayo and/or by its Contractor(s) of this Agreement pertaining to Toxic Substances, Zayo shall give City notice reporting such violation.

SECTION 9. On-Call Assistance

Zayo shall be available to staff employees of any City department having jurisdiction over Zayo'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 Network. City may contact by telephone the Network Operations Center operator at the following phone number 1-888-217-6323 or 1-612-230-6323 regarding such problems or complaints, and may use that number in order to reach Zayo at any time for any emergency matter. Zayo shall use reasonable efforts to respond to any issues within the time frames specified in its service level agreements. Zayo shall make arrangements with a local entity to handle any necessary problems or complaints that require a physical presence.

SECTION 10. Mapping Requirement

10.1 Zayo shall maintain As-Built Drawings of its Facilities located within the ROW and furnish a copy both electronically in an ESRI-compatible mapping format (or in a mapping format compatible with the current City electronic mapping format as specified by the City) and in hard copy form. Upon completion of new or relocation construction of underground Facilities in the ROW, Zayo shall create and maintain precise, up-to-date

maps of any of its Conduit System and/or Fiber Optic Network routes and any above ground equipment located in the ROW and precise and verifiable horizontal and vertical location information and will make this information available to the City upon the installation of any new Facilities. Zayo will also provide surface-location marking of any of Zayo's Facilities that are located underground within any public ROW within ten (10) business days of installation.

10.2 If complete updates are not provided in a compatible format, Zayo shall pay the actual, reasonable costs the City incurs to update the City's electronic mapping format due to the location or relocation of Zayo's Facilities.

10.3 In the event Zayo fails to supply records in the City specified format and there is a cost to the City in converting Zayo-provided files, Zayo will be responsible for the conversion costs and will pay such costs within thirty (30) days of the date of the bill from the City invoicing the amount due.

SECTION 11. Relocation

11.1 Zayo shall relocate at no expense to the City any Facilities or other encroachment installed or maintained in, on or under any public place or ROW, as may be necessary to facilitate any public purpose any City project whenever directed to do so by City. However, to the extent that the City receives funds from any third parties or government entities for a project that requires the relocation of Facilities owned, operated and/or maintained by the Zayo, the City shall allocate such funds to the relocation of Zayo's Facilities. If more than one licensee is required to relocate for the same project, and is eligible for reimbursement, any such funds shall be distributed on a pro rata basis based on the total relocation costs of each of the licensees eligible for such reimbursement. Zayo shall not hold the City liable for failure to request or file a claim for any funds for the relocation of the Zayo's Facilities. 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 any applicable issued permits. Zayo shall comply with any and all requirements of Sections 31A-31, 31A-32, and 31A-34 of the Tempe City Code. Within ninety (90) days after service of notice by the City, Zayo shall remove the designated portions of the Facilities, or in the event that, by the nature of the removal such removal cannot be performed within the ninety-day period, Zayo shall take reasonable steps to remove the Facilities and diligently prosecute the removal to completion, and, if requested, restore the sidewalks and other ROW to a condition comparable to the condition before the construction of the public improvement at no cost and expense to the City.

11.2 Zayo agrees to obtain a permit as required by this Agreement prior to removing, abandoning, relocating or reconstructing of any portion of its Conduit System(s) or Fiber Optic Network(s) on public property or ROW. Notwithstanding the foregoing, City understands and acknowledges there may be instances when Zayo is required to make repairs that are of an emergency nature or in connection with an unscheduled disruption of the Facilities. Zayo will maintain any annual permits required by the City for such maintenance and emergency repairs. Zayo will notify City before the repairs and will apply for and obtain the necessary permits in a reasonable time after notification.

11.3 If the City needs to perform any part of the necessary relocation or removal work that has not been done within the time required by the City, it shall be entitled to seek

payment for such relocation costs by drawing upon the letter of credit or security fund required by this Agreement pursuant to Section 25.

SECTION 12. Expansion or Extension of the Current Use Area

12.1 Any further expansion and/or extension of Zayo's Fiber Optic Network and or empty Conduit placement outside the current route(s) shall require written approval from the City Engineer, who may, refer the matter to the City Council for approval, provided that such consent, by either the City Engineer, or the City Council, shall not be unreasonably withheld or delayed.

12.2 Zayo agrees that such further expansions and/or extensions beyond the current route(s) shall be at all times governed by the terms and conditions of this Agreement.

12.3 Requests for expansions and/or extensions should identify the route, number of conduits, size of conduits, fiber count and intended use.

SECTION 13. Damage to Public Property.

13.1 In addition to any indemnity obligation under this License and Agreement, whenever the installation, use, maintenance, removal, or relocation of any of Zayo's Facilities is required or permitted under this Agreement, and such installation, removal or relocation damages or disturbs the surface or subsurface of any ROW or public property or the public improvement located thereon, therein, or thereunder, however such damage or disturbance was caused. Zayo, at its sole cost and expense, shall promptly restore the surface or subsurface of the ROW or public property and/or repair or replace the surface, subsurface and/or public improvement therein, or thereunder, in as good a condition as before in accordance with applicable laws, normal wear and tear excepted, reasonably satisfactory to the City Engineer. If Zayo does not repair the damage or disturbance as just described, then City shall have the option, upon ten (10) days prior written notice to Zayo, to perform or cause to be performed such reasonable and necessary work on behalf of Zayo and to charge Zayo for the actual costs incurred by the City at City's standard rates.

13.2 Notwithstanding the notice provision above, in the event of a Public Emergency, the City shall have the right to immediately perform, without prior written notice to Zayo, such reasonable and necessary work on behalf of Zayo to repair and return public property to a safe and satisfactory condition in accordance with applicable laws, normal wear and tear excepted, reasonably satisfactory to the City Engineer. The City shall provide written notice to Zayo of the repairs as soon as practicable after the work has begun. Zayo agrees that any severed City-owned Conduit and/or fiber must be completely repaired or replaced to the nearest splice point. If the City needs to perform any part of the necessary repairs, relocation and/or removal work, it shall be entitled to seek payment for such repairs, relocation and/or removal costs from Zayo and may draw upon a bond and/or letter of credit or security fund required by this Agreement in full or partial satisfaction of such costs, if payment is not made by Zayo as required by Section 13.3 below.

13.3 Upon the receipt of a demand for payment by City, Zayo shall, within thirty (30) days, reimburse City for any undisputed costs.

13.4 For any pavement cuts by Zayo, Zayo 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 29 of the Tempe City Code and the fees established by the City pursuant thereto. Zayo agrees to pay within thirty (30) days from the date of issuance of an invoice from City. Failure to do so shall entitle City to draw upon the letter of credit or security fund and/or performance bond.

SECTION 14. Public Emergency Disruption by City.

City shall have the right, because of a Public Emergency, to sever, disrupt, remove, tear out, dig-up or otherwise damage and/or destroy Facilities of Zayo without any prior notice to Zayo, if the action is deemed necessary by either the City Manager, Fire Chief, Police Chief, City Engineer, or Public Works Director or designee. In such event, neither the City nor any agent, Contractor or employee of City shall be liable to Zayo, its Contractors or its customers or their parties for any harm so caused to them or the Facilities. When practical and if possible, City will consult with Zayo in advance to assess the necessity of such actions and to minimize to the extent practical under the circumstances damage to and disruption of operation of the Fiber Optic Networks. City shall inform Zayo of any actions taken. Zayo shall be responsible for repair at its sole expense of any of its Facilities damaged pursuant to any such action taken by City.

SECTION 15. Public Safety/Public Emergency.

15.1 If any of Zayo's Facilities or activities present any immediate hazard or impediment to the public, to the City, to other improvements or activities within or outside of the route area(s), or to City's ability to safely and conveniently operate the ROW or perform City's utility, public safety and/or other public health, safety and welfare functions, then Zayo shall immediately remedy the hazard, comply with City's request to secure the route area, and otherwise cooperate with City at no expense to City to remove any such hazard or impediment.

15.2 In the event of a Public Emergency, neither the City nor any agent, Contractor or employee of the City shall be liable to Zayo or its Contractors or its customers or other third parties for any harm so caused to them by the reasonable actions of the City or its agents, Contractors or employees in responding to such public emergency. When practical and if possible, City will consult with Zayo in advance to assess the necessity of such actions and to minimize, to the extent practical under the circumstances, damage to and disruption of either the public property involved or the Facilities involved.

SECTION 16. Contractors

16.1 The specific independent Contractors identified and used by Zayo for the construction activities to expand and extend Zayo's Facilities and Service Area will need to be approved by the City Engineer or designee prior to issuance of each construction permit, such approval shall not be unreasonably withheld, delayed, conditioned or denied. Any Contractors performing construction work within the ROW or public easements shall comply with licensing requirements of the Arizona General Contractors.

16.2 Zayo shall include all independent Contractors under its insurance policies or shall furnish separate certificates and endorsements for each independent Contractor. All

coverages for independent Contractors shall be subject to all the requirements stated herein for Zayo.

SECTION 17. Legal Workers

If, and to the extent A.R.S. § 41-4401 is applicable to this Agreement, Zayo shall comply with laws regarding workers as follows:

17.1 Zayo warrants to City that Zayo and all of its Contractors will comply with all federal immigration laws and regulations that relate to their employees and that there is compliance with the E-Verify Program under A.R.S. § 23-214(A).

17.2 A breach of the foregoing warranty by Zayo shall be deemed a material breach of this Agreement that is subject to penalties up to and including termination of this Agreement.

17.3 City retains the legal right to inspect the papers of any employee of Zayo Contractor who works pursuant to this Agreement to ensure that they are complying with the warrant given above.

17.4 City may conduct random verification of Zayo's Contractors employment records to ensure compliance with the warranty given above.

17.5 Zayo shall indemnify, defend and hold City harmless for, from and against all losses and liabilities arising from any and all violations of the warranty given above.

SECTION 18. Effective Date and Validity of Agreement

18.1 This Agreement is effective upon signature by Zayo and the execution of it by the Tempe City Council.

18.2 Zayo shall acknowledge that as a condition of acceptance of this Agreement, Zayo was required to be represented throughout the negotiations of the Agreement by its own attorneys and Zayo had the opportunity to consult with its own attorneys about its rights and obligations regarding the Agreement. Zayo 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, Zayo acknowledges and accepts the right and authority of City to execute this Agreement and to enforce the terms herein.

SECTION 19. Term of Agreement

19.1 Any and all of Zayo's rights that may exist under the Original Agreement are hereby terminated.

19.2 The original term of this License and Agreement shall terminate 11:59 p.m. on the date prior to the date that is the fifth (5th) annual anniversary of this Agreement, which is the date of approval of this Agreement by the City Council, unless sooner terminated as set forth in this Agreement.

SECTION 20. Modification, Renewal, Extension

20.1 If Zayo wishes to renew its License and continue using the ROW, then at least one hundred and eighty (180) days prior to the expiration of this License and Agreement, Zayo shall apply to the City for a new License and Agreement in accordance with the then existing federal, state, and local laws.

20.2 Zayo shall pay to City the applicable fee at the time of the submission of the application.

20.3 City shall have the right to renegotiate any of the terms from the prior agreement that may be required by applicable federal, state or local law or regulations. Zayo understands that the City may adopt future code amendments and/or fee schedules relating to Facilities located within the ROW, which may replace in its entirety the current fees and other costs imposed upon Zayo under this Agreement. Zayo acknowledges the right of the City to adopt and implement such lawful code amendments and/or fee schedules.

20.4 If Zayo's Facilities remain in the ROW, and Zayo continues to use such Facilities beyond the expiration of the license term and pay the annual fees, the License can be considered to be in a "Holdover Term," subject to the terms and conditions of this Agreement. Such Holdover Term, however, shall not exceed 60 days beyond the expiration of the term, and no permits will be issued to Zayo by the City until a new License has been approved by the City Council.

20.5 Failure by Zayo to have a valid License and Agreement to use the ROW by the expiration of the Holdover Term shall result in immediate withdrawal and revocation of any existing permits issued by the City to Zayo and the liquidated damages amount set forth in Section 33 shall apply. If, however, Zayo has timely filed its application and is in active negotiations with the City prior to the expiration of the License and Agreement, the City may, in its discretion, grant, extend, or take no action on permits issued to Zayo prior to the expiration of the Agreement.

SECTION 21. Payments

21.1 By entering into this Agreement, neither party waives any current or future rights reserved under the Telecommunications Act of 1996, including but not limited to, those rights set forth in Sections 253(c), reserving the City's right to manage the public ROW and to require fair, non-discriminatory and reasonable compensation from Zayo for use of the public ROW.

21.2 Zayo shall be solely responsible for payments to City as follows:

21.2.1 Application Fee – Zayo shall pay City an application fee for the administrative costs involved in the issuance of a telecommunications license, which shall be due at the time of the submittal of the application.

21.2.2 Transaction Privilege Tax - If Zayo only and exclusively uses the ROW for Intrastate Telecommunication Services as defined by A.R.S. § 9-581 and the Tempe City Code, then no Use Fee as per Section 21.2.4 will be due. However,

Zayo will owe transaction privilege tax on any qualifying activities under Tempe City Code Sec. 16-450 and 16-470.

21.2.3 ROW Usage Fee for Provision of Interstate Telecommunication Services

– A Fiber Optic Network in the ROW that carries interstate traffic between and among Zayo’s interstate points of presence exclusive of the Fiber Optic Network used by the local network and the portion of the interstate network that carries intrastate calls is subject to an annual fee based on the number of linear feet of trench in the ROW. The annual fee is Two Dollars and One Cent (\$2.01) per linear foot, which shall be adjusted annually as provided in Section 21.2.3.1.

21.2.3.1 Commencing on July 1, 2013 and on each July 1 through the fifth year of the term, the linear foot fee shall be escalated annually by the United States Department of Labor, Bureau of Labor Statistics, Consumer Price Index-All Urban Consumers, West Region for All Items (CPI) average percentage as calculated at the end of the prior calendar year. If there is no increase in the CPI, the fee shall remain what it was for the prior year.

21.2.3.2 As of the date of this Agreement, Zayo represents that there is no portion of the route where the Fiber Optic Networks transport solely interstate telecommunication services as defined in A.R.S. § 9-583 that would be subject to this fee.

21.2.3.3 Should Zayo own, install, maintain, operate, or acquire Fiber Optic Networks that do qualify for the annual footage fee, Zayo shall immediately notify the City in writing of the number of linear feet and the location, so that the annual fee may be calculated.

21.2.3.4. Any such annual fee shall be due and payable within 30 days of the receipt of an invoice from the City advising Zayo of the amount due. Such a fee shall be prorated from the date of the invoice until the anniversary date of this Agreement. Thereafter, upon each anniversary of this Agreement, the annual fee will be adjusted as provided by Section 21.2.3.1 above, and payment made by as required by Section 21.3.

21.2.4 Compensation for Use of ROW –Such compensation shall be offset by the value of the dark fiber provided under the terms and conditions of the In-Kind Dark Fiber Agreement Between Zayo Group LLC and the City of Tempe executed contemporaneously with this Agreement.

21.3 For any annual payment(s) owed, Zayo shall make such payment(s) to the City within five (5) business days of the effective date of this Agreement and by the anniversary of such effective date thereof for the duration of the term.

21.4 Arrearage – The arrearage fee owed from September 20, 2012 through the date of this Agreement will be offset by the cost of construction of network laterals and handoff locations provided by Zayo to the City pursuant to the In-Kind Dark Fiber Agreement referenced in Section 21.2.4 above.

21.5 Permit Fees – Zayo shall pay all applicable construction permit fees to place Facilities in the ROW, which includes charges for encroachment permit applications, issuance, inspection, testing, plan review and any other fees adopted by City and applicable to persons doing work and/or encroaching in the City's ROW pursuant to Tempe City Code 29-19. If, at the request of Zayo, the needs of Zayo's work requires after hours or nighttime work outside of normal business hours, Zayo shall reimburse the City according to the Section 29-19 fee schedule in place.

21.6 Damage Fees – Zayo shall pay any reasonable costs associated with any damage caused to the ROW or public property Tempe City Code Sections 29-18 and 29-19.

21.7 Pro-rated Fees – Within thirty (30) days after the issuance of a permit for the installation of additional footage of Conduit(s) and/or fiber, if such installation subjects Zayo to an annual fee pursuant to Section 21.2.3 or Section 21.2.4 above (if applicable), Zayo will pay a pro-rated portion of the annual fee, as adjusted, per linear foot for that section of its expanded route. The prorated annual fee shall be determined by multiplying the annual footage fee, as adjusted, for the year of payment, by a fraction, the numerator of which is the number of full months between the month of issuance of the permit and the next following anniversary date of this Agreement and the denominator of which is twelve (12).

21.7.1 In the event, Zayo cancels or returns a permit and does not construct or install Facilities, which had been approved by such a permit, the footage fees previously paid for ROW or public property used or occupied by Zayo shall be applied as a credit toward any annual fee or refunded to Zayo by City.

21.8 Any checks should reference the contract number and be sent to:

City of Tempe
Attn: Telecommunications Policy Administrator
120 E. 5th St., 2nd Floor
Tempe, AZ 85281

21.9 Zayo agrees that if it fails to pay any amounts owed to the City by the time prescribed for payment, Zayo shall pay interest on the amounts owed, at the rate of one percent (1%) per month.

SECTION 22. In-Kind Payment as an Offset to Fees Owed

Except for the in-kind compensation referenced in Section 21.2.4 as an offset to use of the ROW for dark fiber leasing, this Agreement does not currently provide for any in kind payments by Zayo. However, for fees owed under Section 21.2.3 above, the Parties may agree in writing to an in kind payment of fiber(s) and/or conduit(s) to offset such fees or transaction privilege taxes owed through an addendum to this Agreement.

SECTION 23. Taxes

Zayo shall pay any applicable city, county and state transaction privilege and use tax. Such taxes are in addition to any non-tax amounts owed by Zayo pursuant to Section

21. Zayo consents to the disclosure of any and all information reported on Zayo's transaction privilege tax returns by authorizing and allowing the City's tax collector to release such information to the City Manager or designees.

SECTION 24. Performance Bond

24.1 Prior to receiving any permit to construct, install, maintain or perform any work on public property that requires a permit from the City pursuant to applicable City codes, Zayo shall cause to be filed and maintain until either completion of the construction or termination of this Agreement as determined by Zayo, a faithful performance bond in favor of City in the sum of One Hundred Thousand Dollars (\$100,000.00) or the amount of the construction costs (whichever is greater) to guarantee that Zayo shall observe, fulfill and perform each and every term of this Agreement. In case of any breach of any condition of this Agreement, any amount of the sum in the bond, up to the whole thereof, may be forfeited to compensate City for any damages it may suffer by reason of such breach. Said bond shall be acknowledged by Zayo, as principal, and shall be issued by a surety with an AM Best rating of A-VII or better for the last four quarters. City and Zayo agree that the process and procedure for drawing upon, curing, and replenishing the performance bond shall be the same as set forth below for the security fund and/or letter of credit.

24.2 If Zayo has completed the above construction and wants the bond released, the City will need to inspect and approve the construction prior to such release. However, a performance bond will be required for each subsequent or additional construction project and/or work on public property.

SECTION 25. Security Fund

25.1 Upon application for continued use of the ROW, but no later than five (5) business days before this Agreement is submitted to the City Council for approval, Zayo shall provide either a cash deposit or domestic irrevocable standby letter of credit to the City Engineer in the initial amount of One Hundred Thousand Dollars (\$ 100,000.00) as a security fund that is in compliance with the standards and form set forth in Exhibit B or its equivalent. Said cash deposit or letter of credit shall be maintained with the City for the term of this Agreement as security for the faithful performance by Zayo of all the provisions of this Agreement, and compliance with all lawful orders, permits and directions of any department or office of the City having jurisdiction over its acts or defaults under this Agreement and any permit issued pursuant thereto, and the payments by Zayo of any fees, claims, liens and taxes due the City which arise by reason of the construction, operation or maintenance of the Facilities. City shall have the full power of withdrawal of funds from the cash deposit put into the security fund account or letter of credit except that all interest accrued on any cash deposit shall be payable to Zayo on demand. No withdrawals shall be made from the security fund account without the prior written approval of the City Manager and prior written notice of intent to withdraw to Zayo. Zayo currently satisfies the security fund requirement with the AboveNet deposit of approximately \$ 63,000.00 (since Zayo Group now owns AboveNet) and a separate Certificate of Deposit in favor of the City of Tempe in the approximate amount of \$ 57,000.00.

25.2 Within twenty (20) days after notice to Zayo that any amount has been withdrawn by City from the security fund account or letter of credit, Zayo shall deposit a sum of

money sufficient to restore such security fund account to the original amount or present to the City an additional irrevocable letter of credit in said amount so that the total amount of funds available to the City is \$ 100,000.00.

25.3 If Zayo fails, within ten (10) business days of a notice of intent to draw on either the security fund account or on the letter of credit, to either dispute the notice in writing; or pay City any taxes or fees due and unpaid; or fails to repay to City, within such ten (10) business days of such notice, any damages, costs or expenses which City shall be compelled to pay by reason of any act or default of Zayo in connection with this Agreement; or fails, within thirty (30) days of such notice of failure by City to dispute the notice in writing, or comply with any provision of this Agreement which City reasonably determines can be remedied by an expenditure of funds from the cash deposit in the security fund account or letter of credit, City may immediately withdraw the amount thereof, with interest from the security fund account. Upon such withdrawal, City shall notify Zayo of the amounts and date thereof.

25.4 Any funds that City erroneously or wrongfully withdraws shall be returned to Zayo, with interest of 1.0% per month, within thirty (30) business days of such a determination.

25.5. The rights reserved to City, with respect to the security fund account and/or letter of credit, are in addition to all other rights of City whether reserved by this Agreement or authorized by law, and no action, proceeding or exercise of a right with respect to such security fund account or letter of credit shall affect any other right City may have.

SECTION 26. Insurance

26.1 Minimum Limits of Insurance. Zayo shall at all times during the term of this Agreement, at its own cost and expense, carry and maintain for the mutual benefit of the City and Zayo, general public liability insurance against claims for bodily injury, death or property damage, products/completed operations and personal and advertising injury, which insurance shall cover claims as may be occasioned by the operations, act, omission or negligence of Zayo or its officers, agents, representatives, employees or servants during all times that this License and Agreement is in effect. Insurance limits are inclusive of umbrella coverage. Zayo shall maintain limits no less than those stated herein for each type of insurance.

26.2 General Requirements. Zayo's insurance of the types and amounts required in this section shall be from 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.

26.2.1 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.

26.2.2 The insurance coverage, except workers' compensation and professional liability, required by this Agreement, shall name City, its agents, representatives, directors, officials, and employees, as additional insureds, and shall specify that insurance afforded Zayo shall be primary insurance, and that any self-insured retention and/or insurance coverage carried by City or its employees shall not

contribute to the coverages provided by Zayo. This provision and the naming of the City as an additional insured shall not be construed as giving rise to responsibility or liability of the City for applicable deductible amounts under such policy(ies).

26.2.3. The insurance policies 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 Zayo's acts, errors, mistakes, omissions, work or service.

26.2.4. 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 Zayo 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. City, at its option, may require Zayo to secure payment of such deductibles or self-insured retentions by a surety bond or an irrevocable letter of credit. Self-insured retentions of up to \$1,000,000 (One Million Dollars) shall be accepted.

26.2.5 All policies 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.

26.2.6 Zayo shall be responsible for ensuring that the City is notified within thirty (30) days of the occurrence of any reduction in the insurance coverage amounts, cancellation or expiration of any of the policies as required by this License and Agreement.

26.2.7 Zayo shall include all Contractors as additional insureds under its policies or shall furnish separate certificates and endorsements for each subcontractor. All coverages for Contractors shall be subject to all the requirements stated herein for Zayo.

26.2.8 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.

26.3. Proof of Insurance-Certificates of Insurance.

26.3.1. Prior to or upon execution of this Agreement, Zayo shall furnish to City Certificates of Insurance issued by Zayo's agent or broker, 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 26.2.2 and shall be attached as Exhibit C to this Agreement.

26.3.2. If a policy does expire during the life of this Agreement, a renewal certificate must be sent to the City ten (10) business days prior to the expiration date.

26.3.3. All Certificates of Insurance shall identify the policies in effect on behalf of Zayo, 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 copy to:
City of Tempe
Attn: City Engineer
31 E. 5th St.
Tempe, AZ 85281

26.3.4. 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 Zayo of any deficiencies in such policies and endorsements, and such receipt shall not relieve Zayo from, or be deemed a waiver of City's right to insist on, strict fulfillment of Zayo's obligations under this Agreement.

26.4 Required Coverage.

26.4.1 Such insurance shall protect Zayo from claims set forth below that may arise out of or result from the operations of Zayo under this Agreement and for which Zayo may be legally liable, whether such operations be by Zayo or by a consultant or Contractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts may be legally liable. Coverage under the policy will be at least as broad as Insurance Services Office, Inc., policy form CG 00 01 10 01 and CG 20 37 07 04 or equivalent thereof, including but not limited to severability of interest and waiver of subrogation clauses.

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

26.4.3 Claims for damages insured by usual personal and advertising injury liability coverage;

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

26.4.5 Claims involving contractual liability insurance applicable to Zayo's obligations under the Indemnification Agreement.

26.5 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 20 10 10 01 and CG 20 37 07 04, and shall include coverage for Zayo's completed operations and products.

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

Zayo shall maintain Worker's Compensation insurance to cover obligations imposed by federal and state statutes having jurisdiction over Zayo'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, Zayo will require the Contractor to provide Worker's Compensation and Employer's Liability to at least the same extent as required of Zayo.

26.7. Automobile Liability.

If Zayo owns and/or operates vehicles in Arizona, Zayo 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 Zayo's work. Coverage shall be at least as broad as coverage Symbol 1, "any auto", (Insurance Service Office, Inc. Policy Form CA 0001 0306, or any replacements thereof). Such insurance shall include coverage for pollution for upset/overturn/collision of the automobile(s) and loading and offloading 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.

SECTION 27. Indemnity.

27.1 Zayo acknowledges that it has liability for any and all of its Facilities installed in the public ROW, for its use of the ROW and for its exercise of its rights under this License and Agreement directly or through its Contractor(s), except to the extent of intentional acts or gross negligence on the part of the City. To the fullest extent permitted by law, Zayo, shall defend, indemnify and hold harmless the City, or its officials, boards, commissions, agents or employees, individually and collectively, from and against any and all Claims as defined in Section 1 arising out of or alleged to have resulted from or materially related to the acts, errors, mistakes, omissions of Zayo, its employees, agents, or any tier of Contractors or any other person for whose acts, errors, mistakes, or omissions Zayo may be legally liable. This defense and indemnification requirement includes 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 Zayo, its agents, employees or representatives to fulfill Zayo's obligations under this Agreement, whether resolution of the above Claim(s) proceeds to judgment or not. The provisions of this paragraph shall survive termination of this Agreement. This Section applies even if the party seeking damages makes a Claim against the City or brings a Claim against the City based on vicarious liability or non-delegable duty.

27.2 Zayo further agrees to indemnify and hold harmless the 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 with Zayo under City or other applicable law.

27.3 In the event that any notice of claim is served or litigation is commenced, City may, but is not required to, tender the defense of the litigation to Zayo, who shall immediately defend the litigation. If the City tenders the defense to Zayo, Zayo shall have the right to retain counsel of its own choice, to settle all or any part of the litigation on terms acceptable to Zayo (and, where such terms directly obligate or affect City, acceptable to City). Zayo 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 Zayo or its insurance carrier.

27.3.1 The parties shall promptly notify each other in writing of any claims, demands, or lawsuits which may involve the City and provide copies of all relevant accident reports, incident reports, statements or other documents relevant to or which may lead to relevant materials or information, in the possession of the other party, its employees, agents, subcontractors, and/or others, promptly upon request.

27.3.2 Both parties agree to make their employees, agents, and Contractors available to the other party to gather any relevant information relating to an incident in which claims, demands, or lawsuits arise from.

27.4 It is the purpose of this section 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 Zayo against any and all Claims. The sole exception shall be an express determination by a court of competent jurisdiction upon full adjudication of the case that the damages arose only from City's sole gross negligence or intentional acts. Only in this event may Zayo then commence an action against City for damages related to that portion judicially determined to be City's fault.

27.5 The provisions of Section 27 shall not be dependent or conditioned upon the validity of this License, but shall be and remain a binding right and obligation of the City and Zayo, even if part or all of this License is declared null and void in a legal or administrative proceeding. It is the intent of Zayo and the City upon the effective date of this License, that this Section serves as any such declaration and shall be a binding obligation of and inure to the benefit of Zayo and the City and their respective successors and assigns, if any. Any failure by Zayo shall be considered a material breach of this License and Agreement.

27.6. The amount and type of insurance coverage requirements set forth in this Agreement will in no way be construed as limiting the scope of the indemnity in this Section 27.

27.7 As a condition to City's executing this Agreement, Zayo specifically agrees that to the extent any provision of this paragraph is not fully enforceable against Zayo for any reason whatsoever, this paragraph shall be deemed automatically reformed to the minimal extent necessary to cause it to be enforceable to the fullest extent permitted by law.

SECTION 28. Limitation of Liability

28.1 The City and its officers, agents, elected or appointed officials, employees, departments, boards and commissions, shall not be liable to Zayo or to its affiliates or customers for any interference with or disruption in the operations of Zayo's Fiber Optic Networks or the provision of services, or for any damages arising out of or materially related to Zayo's use of the ROW, except to the extent of intentional misconduct or gross negligence on the part of the City its officers, agents, elected or appointed officials, employees, departments, boards and commissions.

28.2 Zayo also agrees that it shall have no recourse whatsoever against the City or its officials, boards, commissions, agents or employees for any loss, costs, expense or damages arising out of or materially related to any provision or requirement of the City because of the enforcement of this License and Agreement or because of defects in this License or Tempe City Code Chapter 31A.

28.3 Zayo shall assume the risk of, and hereby relinquishes any claim against the City in connection with any final, non-appealable determination by a court of competent jurisdiction that the City lacked the current statutory authority under Arizona law to issue this License.

SECTION 29. Transferability of License and Agreement

29.1 This License is personal to Zayo.

29.2 Except as otherwise provided in this Agreement, the rights, privileges and License granted herein shall not be sold, sublet, assigned, conveyed or otherwise transferred, nor shall any of the rights or privileges therein granted or authorized be leased, assigned, sold, conveyed or otherwise transferred, either in whole or in part, nor shall title thereto, either legal or equitable, or any right, interest or property therein, pass to or vest in any person, except Zayo, either by act of Zayo or operation of law, without the express written consent of the City, which consent shall not be unreasonably withheld or delayed. Prior to any proposed transfer of any kind becoming final, Zayo shall seek the consent of the City to the proposed transfer. Approval by the City to a transfer does not constitute a waiver or release of any of the rights of the City under the Tempe City Code or this Agreement, whether arising before or after the date of transfer.

29.3 "Transfer" transactions shall mean all of the following transactions, circumstances and conditions and to all persons claiming pursuant to such transactions, circumstances and conditions:

1. Any voluntary or involuntary assignment, conveyance or transfer of the ROW or any interest therein or any rights under this Agreement, in whole or in part.
2. Any assignment by Zayo of any interest in this Agreement for the benefit of creditors, voluntary or involuntary.
3. Any voluntary or involuntary pledge, lien, mortgage, security interest, judgment, claim or demand, whether arising from any contract, any agreement, any work of construction, repair, restoration, maintenance or removal, or otherwise affecting Zayo's rights to use the ROW (collectively "Liens").

4. Zayo's insolvency.
5. The occurrence of any of the foregoing by operation of law or otherwise.
6. The occurrence of any of the foregoing with respect to any assignee or other successor to Zayo.

29.4 The new Licensee as approved by the City shall be equally subject to all the obligations and privileges of the original License and Agreement, including any amendments, which will remain in full effect, as if the new Licensee were the original Licensee.

29.5 The approval of the change shall include an Assignment Agreement form (if there was an assignment) or Transfer form (if there was a stock acquisition, a merger, or other type of transfer of Zayo's assets) to be signed by Assignee, Assignor and the City. Prior to any assignment or transfer, Zayo shall provide City a copy of the deed, agreement, lease or other written instrument evidencing the sale, transfer or lease of the License and Agreement, certified and sworn to as correct by Zayo.

29.6 Any assignment or other transfer of License and Agreement, including any amendments, shall be binding on the assignee or transferee as if the assignee or transferee had originally executed the Agreement for the full term and shall include the following:

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

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

29.6.3 Zayo and the proposed transferee shall submit to City a description of the nature of the transfer.

29.6.4 Zayo may execute a pledge or, hypothecation or mortgage or similar instrument transferring conditional ownership of all or part of Zayo's assets to a lender or creditor in the ordinary course of business provided that Zayo has secured approval from the Arizona Corporation Commission, if required. In the event a lender assumes control of the assets and operation of Zayo through a default of Zayo in loan obligations, the Lender may assume the rights and obligations of Zayo. The Lender may not transfer or change control of the Agreement without submitting the change to the City for approval. If the Lender does continue operation on any basis at any time, the Lender shall be subject to all provisions of the Agreement. No later than 30 days after assumption of control by the Lender, the Lender shall apply to the City for the right to continue assumption of control or to transfer the Agreement. Application by the Lender for approval of such assumption of control or transfer shall be subject to all provisions set forth herein on consent by the City Council and shall not be unreasonably denied or upheld. A "Lender" as discussed herein shall not include a company, person or corporation or other entities that operate cable television systems or fiber optics telecommunications systems as a principal or important business. This paragraph is intended to prohibit the intentional use of lending

and/or foreclosure as a method for effecting change of control or transfer of the Agreement without City Council review and approval.

29.6.5 Notwithstanding the foregoing, prior notice, but not prior consent shall be required for one transfer of control of Zayo to any company which is owned or controlled or under common control and with the same direct parent as Zayo, and which is intended after such transfer to remain under the ownership or control of that parent or an entity under common control or with the same direct parent, provided that no transfer shall be valid unless Zayo and the proposed transferee submit a binding agreement and warranty to the City stating that:

1. The proposed transferee has read, accepts and agrees to be bound by the License and Agreement.
2. The proposed transferee assumes all obligations, liabilities and responsibilities under the License and Agreement for the acts and omissions of Zayo, known and unknown, for all purposes, and agrees that the transfer shall not permit it to take any position or exercise any right which Zayo could not have exercised; and
3. The transfer will not substantially diminish the financial resources available to Zayo.

29.6.5.1 However, prior to completing the transfer described above, Zayo must give prior notice to the City of the proposed transfer and describe the nature of the transfer and complete information regarding the effect of the transfer on the direct and indirect ownership and control of the License and Agreement.

29.7 Transfer Remedies. Any transfer without City's consent shall be void and shall not result in the transferee obtaining any rights or interests in, under or related to this License and Agreement. City may, in its sole discretion and in addition to all other lawful remedies available to City under this Agreement or otherwise, and in any combination, terminate this Agreement, collect any fees owed from Zayo and/or declare the transfer to be void, all without prejudicing any other right or remedy of City under this Agreement. No cure or grace periods shall apply to transfers or assignments prohibited by this Agreement or to enforcement of any provision of this Agreement against an assignee who did not receive City's consent.

29.8 Transfer Fee. Zayo shall pay to City in advance the sum of Two Thousand Dollars (\$ 2,000.00) as a nonrefundable fee for legal, administrative and other expenses related to every transfer (other than the sale of publicly traded stock) or to any request for a consent to transfer, whether or not City grants such request.

SECTION 30. No Third Party Beneficiaries

No person or entity shall be a third party beneficiary to this Agreement or shall have any right or cause of action hereunder. City shall have no liability to third parties for any approval of plans, Zayo's construction of improvements, Zayo's negligence, Zayo's failure to comply with the provisions of this Agreement (including any absence or

inadequacy of insurance required to be carried by Zayo), or otherwise as a result of the existence of this Agreement.

SECTION 31. Zayo's Records

31.1 Recordkeeping. During the entire term of this License and Agreement, Zayo shall keep records and provide information to City regarding the following:

1. The status of the construction, repair, location or relocation of Zayo's Facilities.
2. Information relating to any Fiber Optic Networks on portions of the route that are not exempt from a fee imposed for occupation of the ROW.
3. Information relating to this License and Agreement and/or to City's or Zayo's rights or obligations under this License and/or Agreement.

31.2 If necessary for the City to determine Zayo's compliance with the terms of this License and Agreement or other applicable law, within ten (10) days of written notice by City of a request for disclosure, Zayo shall provide relevant documentation as requested by City, respond to questions, and produce relevant books and records for the City's inspection and copying. Such records shall be available to City at Zayo's offices in Maricopa County, Arizona. Zayo shall also require its employees, agents, and accountants to give their full cooperation and assistance in connection with City's access to such records.

31.2.1 Such documentation can include information on the type of services Zayo is offering its customers (but not necessarily information disclosing any particular service being provided to a specific customer) and/or the financial information used in calculating any payments or taxes due to the City under this Agreement. If Zayo determines that in order to respond to City's request for documentation, it must reasonably provide Proprietary Information, Zayo shall so mark such documentation as "Confidential."

31.2.2. Proprietary Information disclosed by License shall mean any document or material clearly identified as "Confidential." Such Proprietary Information shall include, but not be limited to any customer names and lists, financial information, technical information, or other information clearly identified as "Confidential" pertaining to services provided to its customers.

31.2.3 Proprietary Information disclosed by Zayo to the City or its constituent departments shall be regarded as Proprietary as to third parties. If the City receives a request to disclose such information, the City shall notify Zayo of such request and allow Zayo a reasonable opportunity to defend its information from disclosure.

31.2.4 Information that is already in the public domain shall not be considered Proprietary Information. If public domain information is included with Proprietary Information on the same document, the City shall only disclose those portions within the public domain.

31.2.5 Notwithstanding any provision in this License, Zayo acknowledges and understands that the City is subject to the disclosure requirements of Arizona's

Public Records Law (A.R.S. § 39-121 et seq.).

31.3 Reports. Upon request and subject to any necessary confidentiality requirements, Zayo shall provide to City copies of any communications and reports submitted by Zayo 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.

SECTION 32. Penalties for Violation of Terms

32.1 City may pursue any remedy at law, including but not limited to injunctive relief, civil trespass, and withholding other City permits and authorizations until Zayo complies with the terms of the License, Agreement or the applicable law.

32.2 Such remedies are cumulative and may be pursued in the alternative.

SECTION 33. Liquidated Damages for Violations

33.1 Zayo's obligation to pay liquidated damages does not in any way detract from Zayo's indemnity and insurance obligations under this Agreement, which shall apply according to their terms in addition to Zayo's obligation to pay liquidated damages.

33.2 Zayo understands and agrees that failure to comply with any time and performance requirements in this Agreement or the requirements of Chapter 29 of the Tempe 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 pursuant to the authority in Section 31-A12(b)(5)(d) of the Tempe City Code. The following amounts per day or part thereof may be chargeable to the security fund for the following concerns:

33.2.1 Each failure to properly restore the public ROW or to correct related violations of specifications, code ordinance or standards within fifteen (15) business days of having been notified by the City to correct such defects -- \$500.00 per day. Such amount is in addition to any cost the City may incur to restore the ROW or correct the violation.

33.2.2 Each failure to make Zayo's books and records available as required by this Agreement - \$ 250.00 per day.

33.2.3 Any unauthorized partial or total transfer of this Agreement - \$4,000.00 per transfer.

33.2.4 Each instance of any action or non-action by Zayo contrary to the terms of this Agreement that is not cured after five (5) days' notice - \$ 500.00 per day.

33.2.5 Failure to provide a valid Certificate of Insurance as required by Section 26.2.2 that is not cured after five (5) days' notice - \$ 50.00 per day.

33.4 Assessment. If the City Engineer concludes that Zayo may be liable for liquidated damages, the City Engineer shall issue to Zayo 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. Zayo shall pay the liquidated damage amount within ten (10) business days of receipt or the City shall deduct the amount from the security fund.

33.4.1 If, however, the liquidated damages exceed Five Thousand Dollars (\$ 5,000.00), then the following shall apply:

33.4.2 Zayo shall have thirty (30) days of receipt of such notice to pay the liquidated damage amount or give City notice contesting the assertion of noncompliance.

33.4.3 In the event that Zayo contests the City's assertion of violation or fails to respond to the City's notice of intent to assess liquidated damages, City shall schedule a public hearing to determine whether the liquidated damages were properly assessed. City shall provide Zayo with at least ten (10) business days' notice of such hearing, which shall specify the time, place and purpose of the hearing. At the hearing, Zayo will be given the opportunity to be heard and present evidence. If the result of the hearing is that Zayo is responsible for the liquidated damage amount, then the amount determined at the hearing will be due ten (10) days after the hearing decision is announced.

33.4.4 Zayo may appeal the outcome of the hearing to an appropriate court, which shall have the power to review City's decision "de novo". Such appeal to the appropriate court must be taken within sixty (60) days after the issuance of City's hearing decision. Otherwise, the outcome of the hearing shall be final and conclusive.

SECTION 34. Revocation/Termination

34.1 The License granted hereunder may be revoked and/or the Agreement terminated prior to its date of expiration by the City for the following reasons:

34.1.1 Zayo fails to comply with the material terms and conditions of the Agreement or applicable law, including but not limited to failing to maintain any insurance, security fund, letter of credit, and/or a performance bond.

34.1.2 Zayo fails to make payments in the amounts and at the time specified in this Agreement after the appropriate notice.

34.1.3 Zayo ceases doing business in the CITY.

34.1.4 Zayo fails to provide current, accurate as-built plans and maps showing the location of all Facilities installed or constructed in the City.

34.1.5 Zayo is or becomes insolvent or is a party to a voluntary or involuntary bankruptcy, reorganization, or receivership case or proceeding, makes an assignment for the benefit of creditors, is subject to

other actions by creditors that, in the reasonable, good faith opinion of the City, threaten the financial viability of Zayo as a going concern, or if there is any similar action that affects Zayo's capability to perform its obligations under this License and/or Agreement.

34.1.6 Zayo fails to obtain or maintain any licenses, permits, or other governmental approvals pertaining to the ROW or timely pay any taxes pertaining to the ROW.

34.1.7 A court has issued an injunction that in any way prevents or restrains Zayo's use of any portion of the ROW and remaining in force for a period of at least thirty (30) consecutive days.

34.1.8 Zayo is unable to use any substantial portion of the ROW for a period of thirty (30) consecutive days due to the enactment or enforcement of any law or regulation or because of fire, flood, or other natural disaster or similar casualty.

34.2 Before terminating the Agreement under Sections 34.1.1, 34.1.2, 34.1.4, and 34.1.6, the City Manager or a designee, shall give prior written notice to Zayo of the defect in performance and give Zayo sixty (60) days within which to cure the defect in performance.

34.3 The City need not provide a sixty (60) day cure period prior to termination if the City finds that the defect in performance under the Agreement is due to intentional misconduct, is a violation of criminal law, or is a part of a pattern of repeated and persistent violations where Zayo has already had notice and opportunity to cure.

34.4 The City Manager has the authority to terminate, subject to Zayo's right to notice and cure where provided, this License and/or Agreement.

34.5 Hearing Prior to Revocation of License. Prior to the revocation or refusal to renew the License, the City will hold a hearing if requested by Zayo.

34.6 Termination by Mutual Agreement. This License and/or Agreement may be terminated prior to its date of expiration by Zayo by providing the City with ninety (90) days written notice and only upon making arrangements satisfactory with the City Engineer to remove all Zayo's Facilities from public property and the ROW, unless the City Engineer agrees in writing to allow Zayo to abandon part or all of its Facilities in place. If the City Engineer agrees to allow Zayo to abandon its Facilities in place, the ownership of such Facilities, including everything permitted by City to be abandoned in place, shall transfer to City and Zayo shall cooperate to execute any documents necessary to accomplish such transfer within thirty (30) days of such allowance of abandonment.

34.7 Notwithstanding anything in Section 34.6 above, upon termination of this Agreement, Zayo shall remove all of its optical repeaters, DWDM and CWDM multiplexers, antennae, fiber optic cables, wires, and related equipment within ninety (90) days.

SECTION 35. Non-use/Abandonment of the Facilities.

35.1 An "Abandoned Facility" will mean a Facility no longer in service or physically disconnected from a portion of the operating Facility or from any other Facility that is in use or still carries service. If Zayo ceases to provide services or abandons use of any of its Facilities, upon cancellation or termination of the Agreement, Zayo shall notify the City and may, subject to the City's approval, permanently abandon the Facilities in place. In such event, the City, at its option, may acquire ownership of the Facilities. In lieu of permanent abandonment, the City may require Zayo, to the reasonable satisfaction of the City and without cost or expense to the City, to promptly remove the Facilities and to restore the public property and ROW to a reasonable condition under the supervision of the City.

35.2 Upon permanent abandonment, if the City does not require removal, Zayo shall submit to the City a proposal and instruments for transferring ownership to the City. Any such Facilities, which are not removed as required by the City within ninety (90) days of either such date of termination or cancellation or of the date the City issued a permit authorizing removal, whichever is later, automatically shall become the property of the City. Zayo will notify the Arizona Blue Stake Center to record the Facilities that have been abandoned.

35.3 Title to any and all personal property installed by Zayo upon the ROW that is not removed during the period set forth in Section 35.2 shall automatically vest in City.

35.4 Nothing in Section 35.1 shall be deemed to require Zayo to remove Facilities that the Zayo uses for the provision of services other than Telecommunications Services or Interstate Telecommunications Services, so long as such use of Facilities for the provisions of the ongoing other services is authorized by the City pursuant to this Agreement.

SECTION 36. 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 Zayo receives written notice of the cancellation, unless the notice specifies a later time.

SECTION 37. 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 Zayo or a representative of Zayo 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 Zayo.

SECTION 38. Condemnation

The following shall govern any condemnation of any part of or interest in the area used and/or occupied by Zayo and any conveyance to City or another condemnor in avoidance or settlement of condemnation or a threat of condemnation:

1. Termination for Condemnation. This agreement shall terminate as to the portion taken on the date that is the earlier of the date title vests in the condemnor, or the date upon which the condemnor is let into possession.
2. Power to Condemn. Zayo acknowledges that City and others from time to time may sue the power to condemn the area used by Zayo or any interest therein or rights thereto.
 - a. City reserves the right of condemnation or eminent domain over the area used and/or occupied by Zayo. City does not warrant that it will not condemn the area(s) used and/or occupied by Zayo during the term of this Agreement, but City does not presently have intentions to condemn such area(s).
 - b. City also reserves the right through its powers of eminent domain to acquire all or any portion of the Facilities owned by Zayo in accordance with the applicable conditions set forth in the Arizona Revised Statutes. However, under no circumstances shall any valuation be made for any right or privilege granted by this Agreement should the City acquire the property of Zayo.

SECTION 39. NOTICE

39.1 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 showing a valid delivery receipt 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 TEMPE:

City of Tempe - City Engineer
31 E. 5th St.
Tempe, AZ 85281
Phone: (480) 350-8200

With copies to:

Tempe City Attorney's Office
21 E. 6th St., Suite # 201
Tempe, AZ 85281
Phone: (480) 350-8227

City of Tempe - ITD
Attn: Telecommunications Policy Adm.
120 E. 5th St.
Tempe, AZ 85281
(480) 350- 8364

Zayo:

Zayo Group LLC
400 Centennial Parkway
Suite 200

Louisville, CO 80027
Phone: (303) 381-4666

39.2 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 fifth business day after deposit in U.S. Mail.

39.3 Either party may from time to time designate any other address for this purpose by written notice to the other party in the manner set forth above.

39.4 Zayo shall notify the City within ten (10) business days of any change in mailing address.

SECTION 40. Governing Law

It is mutually understood and agreed that this Agreement shall be governed by the laws of the State of Arizona, both as to interpretation and performance. Any action at law, suit in equity, or judicial proceeding for the enforcement of this Agreement or any provision thereof shall be instituted only in the courts located within Maricopa County, Arizona.

SECTION 41. Partial Invalidity

If any section, paragraph, subdivision, clause, phrase or provision of this Agreement shall be adjudged invalid or unenforceable, or is preempted by federal or state laws or regulations,, the same shall not affect the validity of this Agreement as a whole or any part of the provisions of this Agreement other than the part adjudged to be invalid, unenforceable or preempted.

SECTION 42. No Warranty

42.1 The issuance of a license, permit or other authorization by the City is not a representation or warranty that such license, permit, or authorization is a legally sufficient substitute for a franchise, and is not a representation of warranty that a franchise is not required.

42.2 ZAYO ACKNOWLEDGES AND AGREES THAT CITY DOES NOT WARRANT THE CONDITION OR SAFETY OF ITS ROW OR THE PREMISES SURROUNDING THE SAME, AND LEVEL 3 HEREBY ASSUMES ALL RISKS OF ANY DAMAGE, INJURY OR LOSS OF ANY NATURE WHATSOEVER CAUSED BY OR IN CONNECTION WITH THE USE OF ANY CITY ROW.

SECTION 43. Non-Waiver

Zayo 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 44. Remedies Not Exclusive

The remedies set forth in this License and Agreement are not exclusive. Election of one remedy does not preclude the use of other remedies.

SECTION 45. 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 Zayo, 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 Zayo and is beyond its reasonable control.

SECTION 46. Dispute Resolution

In the event of a dispute between the parties to this Agreement regarding a provision of this Agreement, a party's performance of its obligations as stated in this Agreement or any other matter governed by the terms of this Agreement, the parties will meet in good faith to attempt to resolve the dispute. If the parties fail to resolve the dispute, then the parties agree that the dispute may be resolved through mediation. If mediation is agreed to by the disputing parties, the disputing parties shall mutually agree upon the services of one (1) mediator whose fees and expenses shall be borne equally by the disputing parties. If the dispute is not resolved within a reasonable time, the disputing parties shall be free to use other remedies such as nonbinding arbitration or litigation to resolve the dispute.

SECTION 47. Exhibits

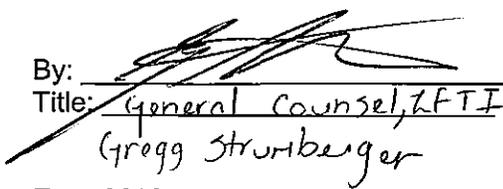
All Exhibits referred to in this Agreement and any addenda, attachments, and schedules which may, from time to time, be referred to in any duly executed amendment to this Agreement are by such reference incorporated in this Agreement and shall be deemed a part of this Agreement.

SECTION 48. Survival of Liability

All obligations of Zayo and City hereunder and all warranties and indemnities of Zayo hereunder shall survive termination of this Agreement.

This Agreement executed this ____ day of April 2013.

Zayo Group LLC,
a Delaware limited liability company

By: 
Title: General Counsel, LFTI
Gregg Strumberger

Zayo 2013

City of Tempe,
An Arizona municipal corporation

Mark W. Mitchell, Mayor

ATTEST:

Brigitta M. Kuiper, City Clerk

APPROVED AS TO FORM:

Judith R. Baumann, Interim City Attorney

Exhibit A – Map of Zayo’s Telecom Routes

Exhibit B - Letter of Credit form

Exhibit C – Certificate of Insurance

Tempe Zayo Fiber Routes

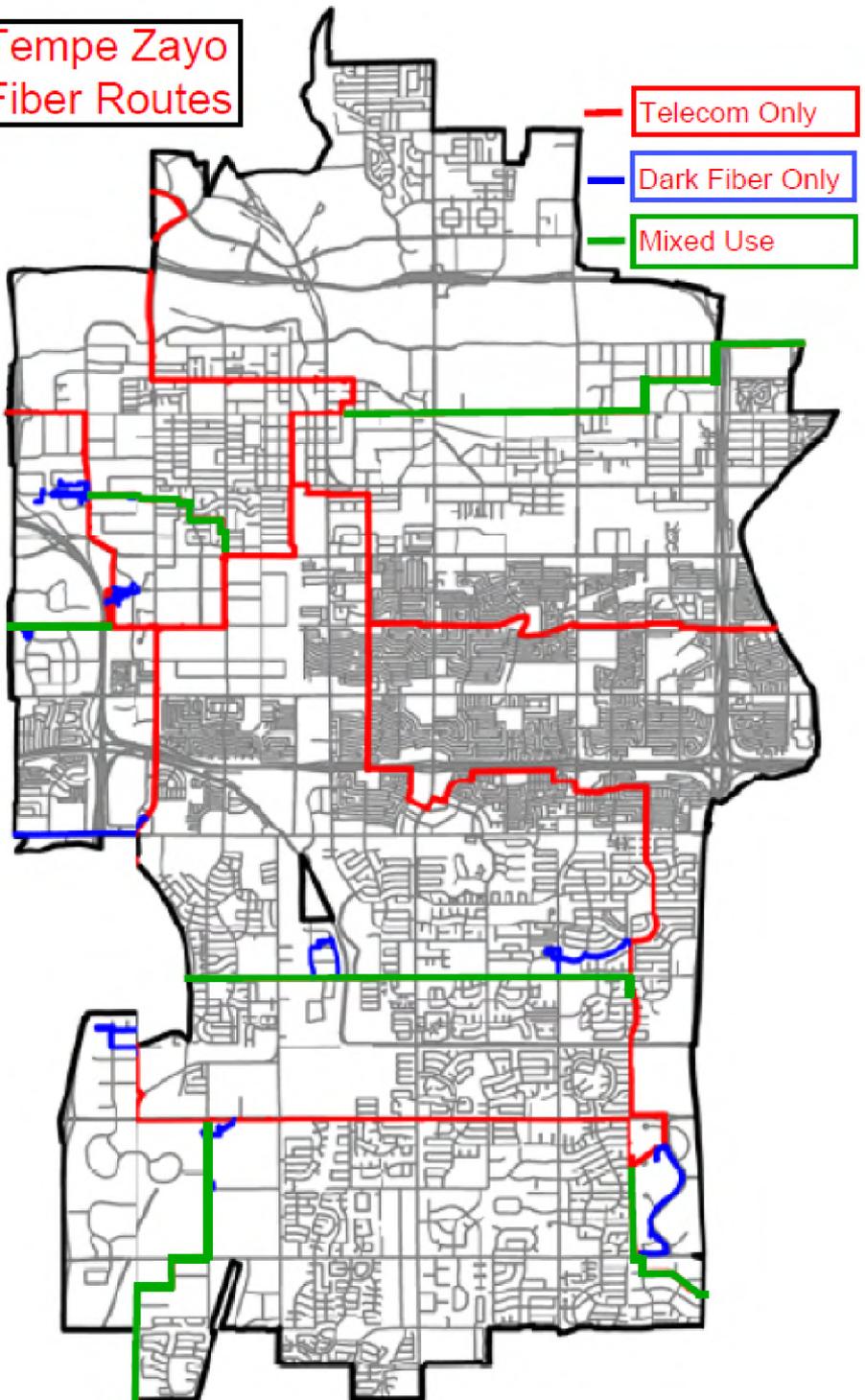


EXHIBIT B
Standards for Letters of Credit

In addition to any other requirements imposed upon a letter of credit (the “Letter of Credit”) issued pursuant to this Agreement, each Letter of Credit shall meet and be governed by the following additional standards and requirements:

1. Letter of Credit Requirements. The Letter of Credit shall be printed on Bank Safety Paper. The following terms and no others shall be stated on the face of the Letter of Credit:

1.1 The Letter of Credit is clean, unconditional, and irrevocable.

1.2 The Letter of Credit is payable to City upon presentation of the City’s draft.

1.3 City may make partial draws upon the Letter of Credit. In that event, the issuer will return the original Letter of Credit to the City within ten (10) business days of payment.

1.4 The Letter of Credit is conditioned for payment solely upon presentation of a sight draft and a copy of the Letter of Credit.

1.5 Within ten (10) days after City’s draft on the Letter of Credit is honored, City must make the original of the Letter of Credit available to the Letter of Credit Department of the issuer upon which the issuer may endorse its payments. Such presentation can be done via overnight courier.

1.6 The issuer specifies a fax number, email address and street address at which City may present drafts on the Letter of Credit as required by 1.5 above.

1.7 The Letter of Credit is valid until a specified date.

1.8 The Letter of Credit is the individual obligation of the issuer, in no way contingent upon reimbursement with respect thereto, or upon issuer’s ability to perfect any lien or security interest.

1.9 The Letter of Credit will be automatically renewed for successive one (1) year periods, unless at least one hundred twenty (120) days prior to expiration the issuer notifies City in writing, by either registered or certified mail or courier, that issuer elects not to renew the Letter of Credit for the additional period. In the event of such notification, any then unused portion of the Letter of Credit shall be available by draft on or before the then current expiration date. If necessary, replacement instruments can be prepared within the (ninety) 90 days prior to expiration.

1.10 The Letter of Credit is otherwise subject to the most recent edition of the Uniform Customs and Practices for Documentary Credits published by the International Chamber of Commerce. Notwithstanding Article 36 of said Publication, in the event that one or more of the occurrences specified in Article 36 of said Publication occurs, then the bank hereby specifically agrees that this letter of credit shall be extended so as not to expire during such interruption of business and shall extend for ten days after such resumption of business.

1.11 The Letter of Credit need not be transferable.

2. Approved Forms. The form of the Letter of Credit and of drafts upon the Letter of Credit shall be as follows:

2.1 Except as approved in writing by City’s Director of Finance and Technology or designee, form of the Letter of Credit shall be in the form set out below.

2.2 Except as approved in writing by City's Director of Finance and Technology or designee, the form of drafts upon the Letter of Credit shall be in the form set out below.

3. Issuer Requirements. The issuer of the Letter of Credit shall meet all of the following requirements:

3.1 The issuer shall be a federally insured financial institution with offices in Maricopa County, Arizona.

3.2 The issuer shall be a member of the Clearing House Association or a commercial bank or trust company satisfactory to City.

3.3 The issuer shall have a net worth of not less than \$500 million.

FORM OF LETTER OF CREDIT

Date _____, 2013

Letter of Credit No.: _____

Finance and Technology Director
City of Tempe
20 E. Sixth Street, 2nd Floor
Tempe, AZ 85281

Dear Sir or Madam:

We hereby establish our clean, unconditional and irrevocable Letter of Credit in your favor at the request and for the account of Zayo Group LLC in the aggregate amount of One Hundred Thousand Dollars (\$100,000.00), available upon presentation of your draft in the form attached hereto as **Schedule "1"**.

We will honor each draft presented to us at any of our letter of credit office locations in compliance with the terms of this Letter of Credit. Partial draws are permitted. Each draft must be accompanied by a copy of this Letter of Credit. Within ten (10) days after we honor your draft, you must make the original of this Letter of Credit available to us at our designated letter of credit department located at _____ upon which we may endorse our payment. If there is still an amount available under the original letter of credit, such original letter of credit will be returned to the City of Tempe at the address above within ten (10) days of payment. Drafts and the original and/or copy of the letter of credit may be presented by any of the following means:

1. By fax to (____) _____ - _____.
2. By email to _____.
3. By hand or overnight courier service delivery to:

This Letter of Credit is valid until _____, 2014, and shall thereafter be automatically renewed for successive one (1) year periods, unless at least one hundred twenty (120) days prior to expiration we notify you in writing, by either registered or certified mail, that we elect not to renew the Letter of Credit for such additional period. In the event of such notification, any then unused portion of the Letter of Credit shall be available upon your presenting to us your draft on or before the then current expiration date.

This Letter of Credit is subject to the most recent edition as of the date of this Letter of Credit of the Uniform Customs and Practices for Documentary Credits published by the International Chamber of Commerce. Notwithstanding Article 36 of said Publication, in the event that one or more of the occurrences specified in Article 36 of said Publication occurs, then the bank hereby specifically agrees that this letter of credit shall be extended so as not to expire during such interruption of business and shall extend for ten days after such resumption of business. This Letter of Credit is not assignable. All questions arising in connection with this letter of credit shall be determined according to the laws of the state of Arizona.

By _____ (bank name) _____, a _____
_____ (bank officer's signature) _____
_____ (bank officer's name printed) _____
Its _____ (bank officer's title) _____
Phone: _____ (bank officer's phone number) _____

FORM OF DRAFT ON LETTER OF CREDIT

To: _____

From: Finance and Technology Director
City of Tempe
20 E. Sixth Street, 2nd Floor
Tempe, Arizona 85280

Re: Zayo Group LLC
Contract No. 2013 -__

Date: _____, 20__

Ladies and Gentlemen:

Pursuant to your Letter of Credit No. _____, the City of Tempe hereby demands cash payment in the amount of _____ (\$_____).

Please make your payment to the City of Tempe in the form of a wire deposit (and indicate the amount is coming from the letter of credit issued to Zayo Group LLC to:

If such deposit cannot be accomplished immediately for any reason, please make your payment in the form of a cashier's check issued by your institution and delivered to me at the address listed above.

I certify that I am the Finance and Technology Director of the City of Tempe.

If there is any imperfection or defect in this draft or its presentation, please inform me immediately at 480-350-8504 so that I can correct it. Also, please immediately notify the City Attorney at 480-350-8227.

Thank you.

City of Tempe, Finance and Technology Director



CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY)
08/07/2012

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. 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).

PRODUCER Willis of Colorado, Inc. c/o 26 Century Blvd. P.O. Box 305191 Nashville, TN 37230-5191	CONTACT NAME:	PHONE (A/C, NO, EXT): 877-945-7378	FAX (A/C, NO): 888-467-2378
	E-MAIL ADDRESS: certificates@willis.com		
INSURED Zayo Group, LLC 400 Centennial Parkway, Ste. 200 Louisville, CO 80027	INSURER(S) AFFORDING COVERAGE		NAIC#
	INSURER A: The Travelers Indemnity Company		25658-001
	INSURER B:		
	INSURER C:		
	INSURER D:		
INSURER E:			
INSURER F:			

COVERAGES CERTIFICATE NUMBER: 18329180 REVISION NUMBER:

THIS IS TO CERTIFY THAT 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. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSR LTR	TYPE OF INSURANCE	ADD'L SUBR INSRD WVD	POLICY NUMBER	POLICY EFF (MM/DD/YYYY)	POLICY EXP (MM/DD/YYYY)	LIMITS
A	GENERAL LIABILITY <input checked="" type="checkbox"/> COMMERCIAL GENERAL LIABILITY CLAIMS-MADE <input checked="" type="checkbox"/> OCCUR GEN'L AGGREGATE LIMIT APPLIES PER: <input type="checkbox"/> POLICY <input type="checkbox"/> PROJECT <input type="checkbox"/> LOC		H6309B867518IND12	8/1/2012	8/1/2013	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
A	AUTOMOBILE LIABILITY <input checked="" type="checkbox"/> ANY AUTO ALL OWNED AUTOS <input type="checkbox"/> SCHEDULED AUTOS <input checked="" type="checkbox"/> HIRED AUTOS <input checked="" type="checkbox"/> NON-OWNED AUTOS		BA5121N52012TEC BA1C48502012TEC	8/1/2012 8/1/2012	8/1/2013 8/1/2013	COMBINED SINGLE LIMIT (Ea accident) \$ 1,000,000 BODILY INJURY (Per person) \$ BODILY INJURY (Per accident) \$ PROPERTY DAMAGE (Per accident) \$
A	<input checked="" type="checkbox"/> UMBRELLA LIAB <input checked="" type="checkbox"/> OCCUR EXCESS LIAB <input type="checkbox"/> CLAIMS-MADE DED <input type="checkbox"/> RETENTION \$		CUP5121N520TIL12	8/1/2012	8/1/2013	EACH OCCURRENCE \$ 5,000,000 AGGREGATE \$ 5,000,000
	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? (Mandatory in NH) If yes, describe under DESCRIPTION OF OPERATIONS below	Y/N N/A				WC STATUTORY LIMITS <input type="checkbox"/> OTHER <input type="checkbox"/> E.L. EACH ACCIDENT \$ E.L. DISEASE - EA EMPLOYEE \$ E.L. DISEASE - POLICY LIMIT \$

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (Attach Acord 101, Additional Remarks Schedule, if more space is required)
Additional Named Insured Includes: AboveNet Communications, Inc.

City Tempe, its officials, employees, and volunteers are 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.

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, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.
	AUTHORIZED REPRESENTATIVE <i>David C. Benson</i>

**CITY OF TEMPE
REQUEST FOR COUNCIL ACTION****Council Meeting Date: 4/4/2013
Agenda Item: 5B1**

ACTION: Approve the renewal of a one-year contract with Express Scripts, formerly known as Medco Health Solutions, to provide a pharmacy network for eligible City employees and dependents overseen by the Human Resources Department.

FISCAL IMPACT: Total cost of this contract will not exceed \$3,000,000 during the one-year renewal period. Sufficient funds will be appropriated in the Health Fund – cost centers 4167 and 4169 - for the anticipated expenditures in the upcoming fiscal year.

RECOMMENDATION: Approve the renewal of the contract.

BACKGROUND INFORMATION: (T08-124-01) City Council originally approved the award of a contract to Medco Health Solutions (now known as Express Scripts) on May 15, 2008 to provide a pharmacy network which provides prescription services for over the counter and mail-order prescriptions. The contract was issued for an initial two-year period with four one-year renewal options. This renewal request is for the final available renewal option.

Since no further renewals are available under this contract, a solicitation will be issued during the fourth quarter of 2013 to begin the selection process for a Pharmacy Benefits Manager. The successful candidate will begin providing services to the City on July 1, 2014.

Contractor Performance

The performance of Express Scripts was rated by the Human Resources Department on the following criteria:

Criteria	Score
Personnel are responsive, cooperative and available	A
Overall quality of products or services delivered	A
Timeliness of performance	A
Quality of follow-up in resolving complaints or problems	A
Firm's promptness in submitting accurate invoices	A

A = Exceeds Standards; B = Meets Standards; C = Below Standards

Renewal Cost

There is no change in the discount structure associated with this renewal request.

ATTACHMENTS: None

STAFF CONTACT(S): Renie Broderick, Human Resources Director, (480) 350-8407

Department Director: Ken Jones, Finance & Technology Department Director
Legal review by: David Park, Assistant City Attorney
Prepared by: Tony Allen, CPPB, Procurement Officer

CITY OF TEMPE
REQUEST FOR COUNCIL ACTION

Council Meeting Date: 4/4/2013
Agenda Item: 5B2

ACTION: Approve the one-year renewal of a contract with Allegiance Benefit Plan Management, Inc./CIGNA for a Preferred Provider Organization medical network, Exclusive Provider Organization medical network, Flexible Spending Account administration and Consolidated Omnibus Budget Reconciliation Act administration services for eligible City employees and dependents overseen by the Human Resources Department.

FISCAL IMPACT: Total cost of this one year renewal will not exceed \$17,000,000 during the one-year contract period beginning July 1, 2013. Sufficient funds will be appropriated in the Health Fund – cost centers 4167 and 4169 – for the anticipated expenditures in the upcoming fiscal year. The City of Tempe medical plans are self-funded – the total costs of the program includes administrative expenses (approximately \$615,000 this renewal period) and the actual medical claims incurred by the covered members. To limit the City’s liability, stop loss insurance is purchased to cap the City’s exposure on large claims.

RECOMMENDATION: Approve the renewal of the contract.

BACKGROUND INFORMATION: (T10-085-01) City Council originally approved the award of a contract to Allegiance Benefit Plan Management, Inc./CIGNA for a Preferred Provider Organization (PPO) medical network, Exclusive Provider Organization (EPO) medical network, Flexible Spending Account (FSA) administration and Consolidated Omnibus Budget Reconciliation Act (COBRA) administration services for eligible City employees and dependents on March 25, 2010 for an initial one-year period with nine one-year renewal options. This renewal request is for the third of nine available renewal options.

Contractor Performance

The performance of Allegiance/CIGNA was rated by the Human Resources Department as follows:

Criteria	Score
Personnel are responsive, cooperative and available	A
Overall quality of products or services delivered	A
Timeliness of performance	A
Quality of follow-up in resolving complaints or problems	A
Firm’s promptness in submitting accurate invoices	A

A = Exceeds Standards; B = Meets Standards; C = Below Standards

Cost

The rates for administrative services were established by the original contract for this renewal period – there is no rate change from the prior year.

ATTACHMENTS: None

STAFF CONTACT(S): Renie Broderick, Human Resources Director, (480) 350-8407

Department Director: Ken Jones, Finance & Technology Department Director
Legal review by: David Park, Assistant City Attorney
Prepared by: Tony Allen, CPPB, Procurement Officer

**CITY OF TEMPE
REQUEST FOR COUNCIL ACTION**

**Council Meeting Date: 4/4/2013
Agenda Item: 5B4**

ACTION: Approval of a one-year contract renewal with JPMorgan Chase Bank, N.A. for lockbox services for the expedited collection of payments due the City for alarm permits, business sales tax, licensing payments and utilities.

FISCAL IMPACT: Total cost of this contract will not exceed \$124,000 during the one-year renewal period. Sufficient funds are available in cost centers 1831 (General Fund) and 1841 (Water and Wastewater Fund) for the anticipated expenditures in the current fiscal year.

RECOMMENDATION: Approve the renewal of the contract.

BACKGROUND INFORMATION: (FS11-041-01) City Council originally approved the award of contract to JPMorgan Chase Bank, N.A. on March 24, 2011 for an initial two-year period with four one-year renewal options. This renewal request is the first of four available renewal options.

This contract was cooperatively issued, evaluated and awarded by the Cities of Tempe and Chandler, with Tempe serving as the lead agency.

The purpose of this contract is to provide lockbox services which include the expedited collection of payments for alarm permits, business sales tax, licensing payments, and utilities.

The City's goal is to accelerate revenue collection by decreasing the time it takes to receive and process payments.

Contractor Performance

The performance of the company was rated by the Finance and Technology Department as follows:

Evaluation Criteria	Scoring for JPMorgan Bank, N.A.
Personnel are responsive, cooperative and available	A
Overall quality of products or services delivered	A
Timeliness of performance	A
Quality of follow-up in resolving complaints or problems	A
Firm's promptness in submitting accurate invoices	A

A = exceeds standards, B=meet standards, and C= below standards

JPMorgan Chase Bank, N.A. has agreed to renew with no price increase.

ATTACHMENTS: N/A

STAFF CONTACT(S): Jerry Hart, Finance & Technology Department Deputy Director - Finance, (480) 350-8505

Department Director: Ken Jones, Finance & Technology Department Director

Legal review by: David Park, Assistant City Attorney

Prepared by: Ted Stallings, CPPB, Procurement Officer

**CITY OF TEMPE
REQUEST FOR COUNCIL ACTION****Council Meeting Date: 4/4/2013
Agenda Item: 5B5**

ACTION: Approve the utilization of a six-month State of Arizona contract with Knowledge Services for information technology consulting and temporary staffing services to be used on an as needed basis for the Finance and Technology Department.

FISCAL IMPACT: Total cost of this contract shall not exceed \$200,000 during the six-month contract period. Sufficient funds have been appropriated in various City-wide operating and capital improvement cost centers for the anticipated expenditures in the current fiscal year.

RECOMMENDATION: Approve the utilization of the contract.

BACKGROUND INFORMATION: (ADSP012-031581) The State of Arizona competitively solicited and subsequently award a contract for information technology consulting services to Knowledge Services. The solicitation contained cooperative language allowing its use by other governmental agencies.

Knowledge Services will provide, on an as needed basis, consulting and temporary staffing services for the support and development of the City's software applications.

By pooling the purchase power of a large group (State agencies, participating agencies and school districts) the State of Arizona was able to secure competitive prices for consulting and temporary staffing services.

ATTACHMENTS: N/A

STAFF CONTACT(S): Cyndy Lawshe, Information Technology Manager, (480) 262-6059

Department Director: Ken Jones, Finance & Technology Department Director

Legal review by: David Park, Assistant City Attorney

Prepared by: Ted Stallings, CPPB, Procurement Officer

**CITY OF TEMPE
REQUEST FOR COUNCIL ACTION****Council Meeting Date: 4/4/2013
Agenda Item: 5B6**

ACTION: Approve the utilization of a State of Arizona contract with Aerflex Wichata, Inc. for a one time purchase of radio diagnostic and testing equipment to be used by the Finance and Technology Department.

FISCAL IMPACT: Total cost of this purchase shall not exceed \$72,000. Sufficient funds have been appropriated in cost center 5501989 (Radio System Replacement) for the anticipated expenditures in the current fiscal year.

RECOMMENDATION: Approve the utilization of the contract.

BACKGROUND INFORMATION: (ADSP013-036884) The State of Arizona competitively solicited and subsequently awarded a contract for two-way radios and equipment to Aerflex Wichata, Inc. The solicitation contained cooperative language allowing its use by other governmental agencies. By pooling the purchase power of a large group (State agencies, participating agencies and school districts) the State of Arizona was able to secure competitive prices.

This equipment will be used for the maintenance of radio equipment and testing of bi-directional antenna systems.

ATTACHMENTS: N/A

STAFF CONTACT(S): Mark Wittenburg, IT Manager, (480) 350-8364

Department Director: Ken Jones, Finance & Technology Department Director
Legal review by: David Park, Assistant City Attorney
Prepared by: Ted Stallings, CPPB, Procurement Officer

CITY OF TEMPE
REQUEST FOR COUNCIL ACTION**Council Meeting Date: 4/4/2013**
Agenda Item: 5B7

ACTION: Approve the award of a one-year contract with four, one-year renewal options to Sun Valley Vending, Inc. to provide snack and soda vending services throughout the City.

FISCAL IMPACT: There is no cost to the City in utilization of this contract. Most snack & soda machines are operated as a convenience for City employees, however, there are some machines, primarily located at recreational facilities, which are commission based with the proceeds paid to the City. The anticipated total revenue generated for the vendor during the one-year term of this contract will not exceed \$70,000.

RECOMMENDATION: Approve the contract award.

BACKGROUND INFORMATION: (RFP13-093) The City of Tempe issued a Request for Proposal (RFP) to establish a contract to provide snack and soda vending services. The City currently has approximately 75 machines located at facilities Citywide.

Type	Quantity
Snack	28
Coke	9
Pepsi	4
Multi Product	34
Total	75

Evaluation Process

Only a single submittal was received which was from the City's current provider. A review was performed by the Procurement office to insure that adequate notice was supplied to potential vendors and to determine the reason for the absence of more submittals.

The City issued 32 notifications to registered vendors and a "notice of solicitation opportunity" was published in the newspaper – there were a total of 14 downloads including three (3) "bid notice" organizations that list the opportunity on their individual websites.

The majority of the RFP downloads were initiated by catering firms that were not capable of providing vending services. The non-submitting vending firms were contacted to see why they had not responded to the City's solicitation. The root cause is the historically low revenue associated with municipal vending services throughout the Valley. Since most machines are provided as a service to employees, and actual usage being fairly low, there seems to be little market demand to attract new firms for City of Tempe business.

The single submittal was reviewed and it was determined that pricing offered is fair and consistent with the current contract and commission offered on revenue generating machines will be 15%. Additionally, Sun Valley Vending has offered to share electrical costs to operate the machines when the individual machine revenue exceeds \$100 monthly (2% on snacks and 5% on drinks) making the new contract a more favorable deal for the City.

The RFP specifically requested that vendors provide product mixes that include both traditional and healthy snack and drink alternatives. The responding firm has indicated the capacity to provide the product mix and included suggested mixes for various machines. The City intends to recommend that the vendor implement this program, however, it will be up to the people patronizing the machines to work directly with the vendor to customize a mix that is better suited to their particular area.

Summary

Sun Valley Vending, the incumbent firm, has provided satisfactory service to the City in the past and the pricing model offered is favorable to the City; therefore, it is recommended that a contract be awarded to Sun Valley Vending.

ATTACHMENTS: 13-093 Sun Valley Vending Submittal

STAFF CONTACT(S): Michael Greene, Central Services Administrator, (480) 350-8516

Department Director: Ken Jones, Finance & Technology Department Director

Legal review by: David Park, Assistant City Attorney

Prepared by: Tony Allen, CPPB, Procurement Officer

Vendor's Offer
Form 201-B (RFP)
"Return this Section with your Response"

It is required that Offeror complete, sign and submit the original of this form to the City Procurement Office with the proposal response. An unsigned "Vendor's Offer", late proposal response and/or a materially incomplete response will be considered nonresponsive and rejected.

Offeror is to type or legibly write in ink all information required below.

Company Name: <u>Sun Valley Vending INC.</u>			
Company Mailing Address: <u>901 N. MARY ST.</u>			
City: <u>Tempe</u>	State: <u>ARIZONA</u>	Zip: <u>85281</u>	
Contact Person: <u>Greg Durst</u>	Title: <u>GM</u>		
Phone No.: <u>480 894 2457</u>	FAX: <u>480 894 2116</u>	E-mail: <u>Sed + pops (@prodigy.NET</u>	
<u>Company Tax Information:</u>			
Arizona Transaction Privilege (Sales) Tax No.: <u>07-226373-D</u> or			
Arizona Use Tax No.: _____			
Federal I.D. No.: <u>86-0385461</u>			
City & State Where Sales Tax is Paid: <u>Tempe</u> , <u>ARIZONA</u>			
If a Tempe based firm, provide Tempe Transaction Privilege (Sales) Tax No.: <u>16247</u>			

THIS PROPOSAL IS OFFERED BY

Name of Authorized Individual (TYPE OR PRINT IN INK) Greg Durst
Title of Authorized Individual (TYPE OR PRINT IN INK) General Manager

REQUIRED SIGNATURE OF AUTHORIZED OFFEROR (MUST SIGN IN INK)

By signing this Vendor's Offer, Offeror acknowledges acceptance of all terms and conditions contained herein and that prices offered were independently developed without consultation with any other Offeror or potential Offeror. In accordance with A.R.S. 35-393, et seq., the Offeror hereby certifies that it does not have scrutinized business operations in Iran or Sudan. Failure to sign and return this form with proposal response will be considered nonresponsive and rejected.

Greg J. Durst
Signature of Authorized Offeror

2/27/2013
Date

(H/RFP 3-2008)

Proposal Questionnaire

Bidder shall submit answers to the following questions. Responses will be utilized in determination of contract award.

1. Provide the address of the facility that will supply services to the City of Tempe.

Sun Valley Vending Inc.
901 N. Mary St.
Tempe, AZ 85281

2. Describe your company and its history

We have done business for over 38 years here in Tempe. We employ 22 people living and doing business in the City Of Tempe. We run 7 routes with one specialty route for cold food and Coffee. We cover almost all Maricopa County and service over 500 different addresses Valley wide. (See Attached Cover Letter with a little description of our business. #1)

3. Please provide contact information for the primary account representative and a backup contact for the City of Tempe.

Name	Phone	Cell Phone	E-Mail
Greg Durst	480-894-2457 (ext. 107)	480-797-9714	Greg@sunvalleyvending.com
Mark Young	480-894-2457 (ext. 108)	602-768-7648	markyoungsvv@prodigy.net

4. Will you work with the City to optimize machine locations to maximize profits?

Yes, we have serviced several locations that are below their potential. If we can review and approve machines that would be both beneficial and more profitable for the City and us we are all for maximizing profits. For example since we are looking at revenue sharing and profits for the City we have an idea that could provide water only for all of the light rail tram stops. This would generate revenue for the City and us while providing thirsty tram riders and people waiting for a ride the benefit of bottled water if they don't already have it with them. We also would like to review the many locations that could use the convenience of vending to optimize profits with the City's approval.

5. Will you work with the City to develop a satisfactory mix of healthy and traditional products for sale in machines?

Yes, we have a healthy list that is constantly revised with new product choices for those that want to have a healthy selection. Even online @ sunvalleyvending.com we have a page with healthy selections that customers may chose the desired products and selections. If a customer wants to name a mix of healthy vs. regular products they can name for example 30% off the Healthy list and we will provide the mix with top sellers. (See Attached Healthy Choice list for those that want to pick out what is in their machines. #2 & 3)

6. What type of products can you offer to the City?

We carry all the name brand products from Coke, Pepsi and Kalil bottling Companies. Most of our machines can mix all three Bottler's products. Also, on the snacks and food choices we carry all recognized product lines from Hershey's, M&M Mars, Nestles, Nabisco, Quaker Oats, Frito Lay, Poore Brothers, and many others. We carry over 800 items in our warehouse alone to merchandise properly the products desired from our many different Customers. (See Attached Product Choice list for those that want to pick out what is in their machines. #2 & #3)

7. Based on experience in the business, provide a sample of the mix you would suggest – include information on service size and associated retail pricing.

Snack Machine			
Product	Size	Retail Pricing	
		With Commission	No Commission
Chips- small single serve	1.0 oz.	\$.65	\$.50
Gum/Mints		\$.65	\$.50
Chips- LSS- Large single serve	1.5 oz.	\$1.00	\$.75
Cookies/ Crackers		\$.75	\$.60
Big/ Bag Cookies		\$.85	\$.65
Granola bars		\$1.00	\$.75
Candy		\$1.00	\$.80
Poptarts		\$1.00	\$.75
Popcorn		\$1.00	\$.75
Pastries		\$1.25	\$1.00
Healthy bars/ Nuts		\$1.00	\$.75
Energy Bars		\$2.00	\$1.50
Salads		\$n/a	\$2.00
		\$	\$
Other Products- Specified***		\$	\$
SEE ATTACHED #4		\$	\$
		\$	\$
(Above snack commission= 15%)		\$	\$
		\$	\$
		\$	\$
		\$	\$
		\$	\$

Soda Machine			
Product	Size	Retail Pricing	
		With Commission	No Commission
Cans- Kalil products	12 ounce	\$.75	\$.60
Cans- Pepsi products	12 ounce	\$.75	\$.60
Cans- Coke products	12 ounce	\$.75	\$.60
Bottles Carbonated-PepsiCokeKalil	20 ounce	\$1.50	\$1.25
Water Arrowhead- (Multiproduct)	16 ounce	\$1.00	\$.60
Water- Aquafina, Dasanti	20 ounce	\$1.25	\$1.00
Sports Drinks- Gatorade, PowerAde	20 ounce	\$1.50	\$1.25
Vitamin Waters, Sobe Life Water	16-20ounce	\$2.00	\$1.50
Brew teas and Bottles Juices	16 ounce	\$2.00	\$1.50
Fruit Juice- V-8 Cans(Multiproduct)	11.5 ounce	\$1.25	\$1.00
Starbucks Frappuccino's (Pepsi)	11.5 ounce	\$2.25	\$2.00
Energy Drinks- Monsters (Coke)	16 ounce	\$2.50	\$2.00
Energy Drinks- Rockstars (Pepsi)	16 ounce	\$2.50	\$2.00
		\$	\$
(Above drink commissions= 15%)		\$	\$
		\$	\$
Other Products- Specified***		\$	\$
SEE ATTACHED #5		\$	\$
		\$	\$
Cans All*		\$1.00	\$
Bottles All*		\$2.00	\$
(Another 15% Commission= 25%)		\$	\$
However as prices go up Sales drop*		\$	\$

-optional-
25%

10. Provide a copy of the "Machine Sales Report" that you would utilize to document sales, and commission payment, to the City.
 (See Attached Machine Sales Report #8)

11. Provide a copy of the sales summary and commission report that will be forwarded to the City each month.
 (See Attached Machine Sales Report #9)

12. Provide a timeline for implementation of your program in the City based on a tentative award date of April 1, 2013.

We service all the machines now and can comply with any of the upgrades and necessary desired changes with 60 to 90 days or sooner depending on what equipment is needed or desired adds necessary.

13. Do you agree to the Terms and Conditions of this RFP?

Yes No 1 exclusion see below

If No, explain below

We can not install electrical outlets or plumbing to existing City buildings. We can plumb out machines to exiting water lines. Also, we have adapted machines to use exiting plugs or electrical outlets.

14. List three (3) governmental or large corporate references for which you have provided similar services.

Firm or Organization	Contact Name	Phone Number
Art Institute Of Phoenix	Christina Rizzo	602-331-7539
Apollo Group/ University of Phoenix	Michele Flatt	602-557-1787
Kiwanis Recreation	Dave Bucher	480-350-5791

(See Reference sheet attached #10)

Description		
Commission to be Paid to the City	15	%
Are all your machines Energy Star Compliant?	Mix	
Monthly fee, per machine, to be paid to Tempe for Electricity – Energy Star Compliant	2% SNACKS \$ 5% DRINKS	
Monthly fee, per machine, to be paid to Tempe for Electricity – Non-Energy Star Compliant	2% SNACKS \$ 5% DRINKS	

* with 25% option on drinks.

* All new installs.

if over \$100 monthly.

if over \$100 monthly.

* Applicable Tax 1.8 %

*** State correct jurisdiction to receive sales tax on the Vendor's Offer, Form 201-B (RFP) included in this Request for Proposal.**

Less prompt payments discount terms of ___ % ___ days/ or net thirty (30) days. (To apply after receipt and acceptance of an itemized monthly statement.) For evaluation purposes, the City cannot utilize pricing discounts based upon payments being made in less than thirty (30) days from receipt of statement.

Ordering and Invoice Instructions

In order to facilitate internal control and accounting, each City Department will order and must be invoiced separately. Monthly invoices must be segregated by City Department number and mailed or delivered directly to the City Customer Department. For most materials, there will be between three (3) and six (6) ordering departments. At the time an order is placed, the Contractor must obtain the ordering department's cost center numbers for billing purposes. The use of the department's cost center numbers will be in addition to the purchase order number. Once a month, the Contractor shall submit a consolidated statement which shall itemize the invoice numbers, invoice date, invoice amounts, and the total amount billed to Accounting. Discount offering will be based upon days from receipt of the consolidated monthly statement. Invoice(s) shall not show previous balances.

Invoices shall include:

1. Listing Of All Delivery/Pickup Receipt Numbers Being Invoiced.
2. Total Cost Per Item.
3. Applicable Tax.
4. Payment Terms.
5. Blanket Purchase Order Number.

Invoices that do not follow the above minimum invoicing requirements will not be paid. Payment must be applied to only invoices referenced on check/payment stub. The City reserves the right to bill contracted vendor for researching invoices that have been paid, but not properly applied by vendor account receivables office.

CITY OF TEMPE
REQUEST FOR COUNCIL ACTION**Council Meeting Date: 4/4/2013**
Agenda Item: 5B8

ACTION: Approval of a one-year sole source contract renewal for annual software maintenance and support services with Oracle Corporation for the City's enterprise and department level applications and databases which include PeopleSoft Financials, Human Resources/Payroll, Tax and License and Utility Billing as well as other systems throughout the City.

FISCAL IMPACT: Total cost of this contract will not exceed \$789,000 during the one-year contract renewal period. Sufficient funds have been appropriated in cost centers 1841 (Water/Wastewater Fund) and 1991 (General Fund) for the anticipated expenditures in the current fiscal year.

RECOMMENDATION: Approve the renewal.

BACKGROUND INFORMATION: (T97-012-01 and IT09-062-02) Oracle Corporation is the only company that can provide software updates and support for these products. Oracle Corporation provides Oracle database and associated infrastructure management support for many of the City's Enterprise and department level business application systems, which include PeopleSoft Financials and Human Resources/Payroll applications, Training, Police Photo Catalog, Utility Billing, Tax and License, Permits, Fleet Maintenance, Library, Hansen Infrastructure Management and Engineering Geographic Information systems. The City has utilized Oracle Corporation to support a variety of software and database applications for the past 18 years.

This procurement is considered a sole source as Oracle Corporation is the only company that can provide software updates and support for this product.

This year's price represents a 0.78 percent increase from the previous year's pricing. Software maintenance renewals typically include a 3 to 10 percent price increase on average.

ATTACHMENTS: N/A

STAFF CONTACT(S): Cyndy Lawshe, Information Technology Manager, (480) 858-2044

Department Director: Ken Jones, Finance & Technology Department Director

Legal review by: Jenae Naumann, Assistant City Attorney

Prepared by: Ted Stallings, CPPB, Procurement Officer

**CITY OF TEMPE
REQUEST FOR COUNCIL ACTION****Council Meeting Date: 4/4/2013
Agenda Item: 5B9**

ACTION: Approval of a one-year sole source contract renewal for annual software maintenance and support services with The Active Network, Inc. for the City's Class software system utilized by Community Services, Public Works and other City departments.

FISCAL IMPACT: Total cost of this contract will not exceed \$72,000. Sufficient funds have been appropriated in cost centers 1991 and 2521 (General Fund), and 2513 and 2517 (Golf Fund) for the anticipated expenditure in the current fiscal year.

RECOMMENDATION: Approve the renewal.

BACKGROUND INFORMATION: (T05-157-01) In May of 2005, the City Council approved a cooperative contract award for the purchase of the Active Network Class software system used for class registration, reservations, point of sale and online services for the Community Services and other City departments. A new module was purchased approximately two years (2) years ago for the City's golf courses that is used to manage patron tee times and a point of sale system that processes transactions for purchases made in the pro shop and restaurant.

The Class software system is a proprietary system that was developed and implemented by The Active Network, Inc. and thus requires the continued use of their technical expertise for annual software maintenance and end-user and IT technical support services.

This procurement is considered a sole source as The Active Network is the only company that can provide software updates and support for this product.

This year's price represents an approximate 7 percent increase from the previous year's pricing, as the City purchased additional licenses, thus increasing annual maintenance and support costs.

ATTACHMENTS: N/A

STAFF CONTACT(S): Dave Heck, Finance and Technology Department Deputy Director - Technology, (480) 350-8777

Department Director: Ken Jones, Finance & Technology Department Director
Legal review by: David Park, Assistant City Attorney
Prepared by: Ted Stallings, CPPB, Procurement Officer



CITY OF TEMPE
REQUEST FOR COUNCIL ACTION

Council Meeting Date: 4/4/2013
Agenda Item: 5C1

ACTION: Introduce and hold the first public hearing to adopt an ordinance approving the conveyance of certain real property owned by the City, which is located near Fifth Street and Farmer Avenue, to Farmer Arts, LLC, and authorizing the Mayor to execute the requisite documents. The second and final public hearing is scheduled for April 18, 2013. (Ordinance No. 2013.18)

FISCAL IMPACT: The City will receive various public amenities described in the Development Agreement (enhanced streetscape and linear park). The Developer is required to pay all costs, expenses and fees associated with the opening and closing of Escrow and be responsible for the perpetual maintenance of all public amenities.

RECOMMENDATION: Adopt Ordinance No. 2013.18.

BACKGROUND INFORMATION: Farmer Arts LLC and the City of Tempe are parties to a Development and Disposition Agreement (C2007-98) that allows the conveyance of City property to Farmer Arts LLC on compliance with certain conditions. The Developer has previously taken title to two of the 4 development parcels located within Parcel 1 and Tract A.



ATTACHMENTS: Ordinance, Notice and Special Warranty Deed

STAFF CONTACT: Lisa Collins, Interim Community Development Director (480) 350-8989

Department Director: Lisa Collins, Interim Community Development Director
Legal review by: Cynthia McCoy, Assistant City Attorney
Prepared by: Alex Smith, Acting Economic Development Manager

ORDINANCE NO. 2013.18

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF TEMPE, ARIZONA, APPROVING THE CONVEYANCE TO FARMER ARTS, LLC, OR ITS ASSIGNEE, OF CITY-OWNED PROPERTY LOCATED AT 5TH STREET AND FARMER AVENUE, AND AUTHORIZING THE MAYOR TO EXECUTE A DEED AND RELATED DOCUMENTS NECESSARY TO CONSUMMATE SUCH CONVEYANCE.

WHEREAS, the City and Farmer Arts, LLC (“Developer”), are parties to that certain Development and Disposition Agreement dated May 31, 2007, as amended (the “Development Agreement”), with respect to the conveyance and development of certain real property owned by the City, and described in the Development Agreement (the “Property”);

WHEREAS, the Property has been split into various parcels, and as permitted by the Development Agreement, Developer has requested that the City convey Development Parcel 2 (as defined in the Development Agreement) to Developer or its assignee; and

WHEREAS, Developer has represented to City that all conditions required to be satisfied by Developer prior to the conveyance have been or will be satisfied prior to the conveyance.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF TEMPE, ARIZONA, as follows:

Section 1: That the conveyance to Developer or its assignee, of Parcels 1 and 2 of the Property is hereby approved subject to compliance with the terms and conditions of the Development Agreement, and the Mayor is authorized to execute such documents as are necessary to consummate the conveyance, including without limitation a deed in the form specified in the Development Agreement.

Section 2: Pursuant to City Charter, Section 2.12, this ordinance will be effective thirty (30) days after adoption.

**PASSED AND ADOPTED BY THE CITY COUNCIL OF THE CITY OF
TEMPE, ARIZONA, this _____ day of _____, 2013.**

Mark W. Mitchell, Mayor

ATTEST:

Brigitta M. Kuiper, City Clerk

APPROVED AS TO FORM:

Judith R. Baumann, Interim City Attorney

WHEN RECORDED, RETURN TO:

Squire Sanders (US) LLP
1 East Washington, Suite 2700
Phoenix, Arizona 85004
Attention: Jim Gibson, Esq.

**NOTICE AND CONSENT
UNDER
DEVELOPMENT AND DISPOSITION AGREEMENT
(Development Parcel 2 - Fifth and Farmer)**

C2007-98

THIS NOTICE AND CONSENT UNDER DEVELOPMENT AND DISPOSITION AGREEMENT (this “**Notice**”) is made and entered into as of the ____ day of May, 2013, by and between the CITY OF TEMPE, an Arizona municipal corporation (“**City**”) and FARMER ARTS, LLC, an Arizona limited liability company (“**Developer**”).

RECITALS

A. City and Developer are parties to that certain Development and Disposition Agreement (Fifth and Farmer) (C2007-98) dated May 31, 2007 and recorded in Document No. 2007-0727441, Maricopa County Recorder; as amended by that certain First Amendment to Development and Disposition Agreement (Fifth and Farmer) dated November 19, 2009 and recorded in Document No. 2010-0077487, Maricopa County Recorder; and as amended by that certain Second Amendment to Development and Disposition Agreement dated November 4, 2010 and recorded in Document No. 2010-0991120, Maricopa County Recorder (collectively, the “**Agreement**”). Capitalized terms not otherwise defined herein shall have the meanings given them in the Agreement.

B. The Agreement pertains to certain real property located in the City of Tempe, Maricopa County, Arizona (the “**Property**”) including, but not limited to, Lot 2 of Farmer Arts District – Parcel 1, according to Book 1070 of Maps, page 15, records of Maricopa County, Arizona (“**Development Parcel 2**”).

C. Concurrently with the recordation of this Notice, City and Developer are closing escrow on Development Parcel 2 in accordance with the terms of the Agreement (the “**Closing**”). Following the Closing, Developer intends to (i) transfer and convey ownership of Development Parcel 2 to Farmer Arts Lot 2, LLC, an Arizona limited liability company (or a similar name, if the foregoing name is not available) (the “**Transfer**”).

D. Pursuant to Section 11.2 of the Agreement, Developer is required to obtain the City's prior written approval, which approval shall not be unreasonably withheld, before Developer sells, assigns, conveys, alienates or otherwise transfers the Property or any portion of the Property subject to the Agreement.

E. City and Developer desire to enter into this Notice to evidence City's acknowledgement, consent and approval of the Transfer, if and to the extent such City consent and approval is required under Section 11.2 of the Agreement.

AGREEMENT

NOW, THEREFORE, for good and valuable consideration, receipt whereof is hereby acknowledged, City and Developer hereby agree as follows:

1. Incorporation of Recitals. The above Recitals are incorporated herein and made a part hereof.

2. Transfer. After Closing in accordance with the terms of the Agreement, Developer shall have the right to transfer and convey ownership of Development Parcel 2 to Farmer Arts Lot 2, LLC, an Arizona limited liability company (or a similar name, if the foregoing name is not available).

3. Acknowledgement, Consent and Approval. By signing below, City acknowledges, consents to and approves of the Transfer described in this Notice.

4. General Terms. All terms, covenants, conditions and provisions of the Agreement are hereby reinstated, ratified, affirmed and remain in full force and effect, subject to the terms of this Notice. This Notice may be executed in counterparts, each of which shall be deemed an original and all of which together shall be deemed one and the same instrument.

[SIGNATURES FOLLOWING PAGE]

IN WITNESS WHEREOF, the undersigned have caused this Notice to be executed as of the day and year first above written.

CITY OF TEMPE, an Arizona
municipal corporation

By: _____
Andrew B. Ching
Interim City Manager

APPROVED AS TO FORM:

City Attorney

STATE OF ARIZONA)
) ss.
County of Maricopa)

The foregoing instrument was acknowledged before me this _____ day of May, 2013 by Andrew B. Ching, the Interim City Manager of the City of Tempe, an Arizona municipal corporation.

Notary Public

My commission expires:

FARMER ARTS, LLC, an Arizona
limited liability company

By: Marshall Urban Development
Company, an Arizona
corporation
Its: Manager

By: _____
Name: Todd Marshall
Title: President

STATE OF ARIZONA)
) ss.
County of Maricopa)

The foregoing instrument was acknowledged before me this ____ day of May, 2013, by Todd Marshall, President of Marshall Urban Development Company, an Arizona corporation, as Manager of Farmer Arts, LLC, an Arizona limited liability company, on behalf thereof.

Notary Public

My commission expires:

WHEN RECORDED, RETURN TO:

Squire Sanders (US) LLP
1 East Washington, Suite 2700
Phoenix, Arizona 85004
Attention: Jim Gibson, Esq.

SPECIAL WARRANTY DEED

C2007-98

For the consideration of Ten Dollars (\$10.00) and other valuable considerations, The City of Tempe, a municipal corporation (“**Grantor**”), hereby conveys to Farmer Arts, LLC, an Arizona limited liability company (“**Grantee**”), the following real property situated in Maricopa County, Arizona, together with all rights and privileges appurtenant thereto:

Lot 2 of Farmer Arts District -- Parcel 1, according to Book 1070 of Maps, Page 15, records Maricopa County, Arizona (the “**Property**”).

SUBJECT TO current real property taxes and other assessments; patent reservations; and all easements, rights of way, covenants, conditions, restrictions and other matters as may appear of record or which an accurate survey or inspection would reveal.

AND Grantor hereby binds itself and its successors to warrant and defend the title against all of the acts of Grantor and no other, subject to the matters above set forth.

IN WITNESS WHEREOF, Grantor has caused this Special Warranty Deed to be executed on this _____ day of May, 2013.

CITY OF TEMPE,
an Arizona municipal corporation

By: _____
Mark W. Mitchell, Mayor

ATTEST:

Brigitta M. Kuiper, City Clerk

APPROVED AS TO FORM:

Judith R. Baumann
Interim City Attorney

STATE OF ARIZONA)
) ss.
County of Maricopa)

The foregoing instrument was acknowledged before me this ____ day of May, 2013, by Mark W. Mitchell, the Mayor of The City of Tempe, an Arizona municipal corporation, who acknowledged that he signed the foregoing instrument on behalf of the City.

Notary Public

My Commission Expires:



CITY OF TEMPE
REQUEST FOR COUNCIL ACTION

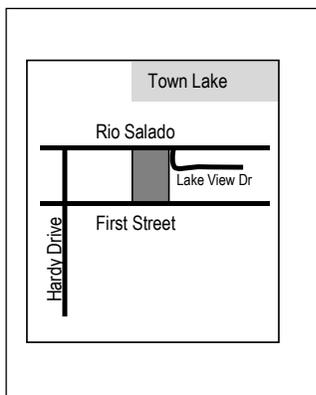
Council Meeting Date: 4/4/2013
Agenda Item: 5E1

ACTION: Adopt a resolution authorizing the mayor to execute a Second Amended and Restated Street and Landscape Easement for the benefit of the ARGO Development covering real property located at 601 West Rio Salado Parkway. (Resolution No. 2013.30)

FISCAL IMPACT: No fiscal impact to City funds.

RECOMMENDATION: Adopt Resolution No. 2013.30.

BACKGROUND INFORMATION: The ARGO Development consists of a 328 unit apartment complex directly south of the Tempe Center for the Arts. The City Council approved plans for the project and granted a street and landscape easement this past summer. The Street and Landscape Easement was recorded in 2012, and provides that the City may terminate the easement if the Development Agreement is terminated. The Development Agreement will expire on July 19, 2013. The Developer has performed its other obligations under the Development Agreement and there is no reason for it to remain active. The parties desire to amend the easement so it is no longer tied to the Development Agreement. The easement is being amended to require that construction begin on or before June 28, 2014 and be completed on or before December 31, 2016 or the City may terminate the easement.



ATTACHMENTS: Resolution, Second Amended and Restated Street and Landscape Easement

STAFF CONTACT: Lisa Collins, Interim Community Development Director (480) 350-8989

Department Director: Lisa Collins, Interim Community Development Director
Legal review by: Cynthia McCoy, Assistant City Attorney
Prepared by: Chris Messer, Principal Planner

RESOLUTION NO. 2013.30

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF TEMPE, ARIZONA, AUTHORIZING THE MAYOR TO EXECUTE A SECOND AMENDED AND RESTATED STREET AND LANDSCAPE EASEMENT WITH OR FOR THE BENEFIT OF EVERGREEN-LAKESIDE & RIO SALADO L.L.C.

A. City and Evergreen-Lakeside & Rio Salado, LLC (“Developer”) are parties to that certain Development and Disposition Agreement dated as of July 6, 2011, and recorded as Instrument No. 20110596717, Official Records of Maricopa County, Arizona (the “Development Agreement”), wherein the City granted the Developer an option to purchase certain real property owned by City (the “Option Property”) and authorized the granting of an easement for certain purposes over additional City-owned property (the “Easement Property”).

B. City and Developer are parties to that certain First Amendment to Development and Disposition Agreement dated June 28, 2012, and recorded as Instrument No. 2012-0631487, Official Records of Maricopa County, Arizona (the "Amended Development Agreement"), wherein the scope of permitted uses within the easement area was expanded.

C. City executed that certain Amended and Restated Street and Landscape Easement dated September 20, 2012, which was recorded as Instrument No. 2012-0949280, Official Records of Maricopa County, Arizona (the "Amended Easement").

D. City and Developer now desire to amend the Amended Easement to provide clarify the circumstances in which the City may terminate the easement.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TEMPE, ARIZONA, as follows:

That the Mayor is authorized to execute the Second Amended and Restated Street and Landscape Easement, and to execute all other documents reasonably required to effectuate the amendment of the easement, or that may be necessary to carry out the provisions of this Resolution.

**PASSED AND ADOPTED BY THE CITY COUNCIL OF THE CITY OF
TEMPE, ARIZONA, this _____ day of _____, 2013.**

Mark W. Mitchell, Mayor

ATTEST:

Brigitta M. Kuiper, City Clerk

APPROVED AS TO FORM:

Judith R. Baumann, Interim City Attorney

When Recorded, Return to:

City of Tempe
31 East Fifth Street
Tempe, Arizona 85281
Attention: City Clerk

SECOND AMENDED AND RESTATED
STREET AND LANDSCAPE EASEMENT

This Second Amended and Restated Street and Landscape Easement amends and restates in its entirety that Amended and Restated Street and Landscape Easement made by the City of Tempe, a municipal corporation (“City”), in favor of Evergreen-Lakeside & Rio Salado, L.L.C., an Arizona limited liability company ("Developer"), and its successors and assigns, which easement was recorded October 19, 2012 at Document Number 20120949289 Official Records of the Maricopa County Recorder (the “Amended and Restated Access Easement”), as follows:

For valuable consideration, City hereby grants to Developer, and its successors and assigns, a non-exclusive easement over, under, and across the following described property (the “Burdened Parcel), situated in the County of Maricopa, State of Arizona, to-wit:

SEE EXHIBIT “A” ATTACHED HERETO AND
BY REFERENCE INCORPORATED HEREIN

Such easement shall be for the benefit of the real property described on Exhibit ”B” attached hereto and by reference incorporated herein (the “Benefited Parcel”), and shall run with the land and shall be binding upon the successors and assigns of all persons and entities owning the Burdened Parcel, and shall benefit the successors and assigns of all persons and entities owning the Benefited Parcel.

Use of the easement shall be limited to the following purposes:

1. Construction, operation and maintenance of a driveway to provide ingress and egress;
2. Construction, installation, operation and maintenance of parking, sidewalks, lighting, public or private utilities installed solely for providing service to the Benefited Parcel, storm water drainage and retention, signs, landscaping and irrigation; and
3. Periodic use by Mobile Merchants to the extent defined in and permitted by that certain Development and Disposition Agreement between City and Developer dated as of July 6, 2011, and recorded as Instrument No. 20110596717, Official Records of Maricopa County, Arizona, as amended by a First Amendment to Development and Disposition

Agreement, dated as of June 28, 2012, and recorded as Instrument No. 2012-0631487, Official Records of Maricopa County, Arizona (the "Development Agreement").

4. Plans for proposed improvements within the Burdened Parcel require the approval and signature of the City Engineer prior to installation, which approval may be obtained as part of the Planned Area Development application to be submitted by Developer with respect to the Project. Any unauthorized improvements constructed on the Burdened Parcel by the Developer shall be removed within 30 days of written notice from the City. If the unauthorized improvements are not removed within the 30-day notice period, the City has the option to remove the unauthorized improvements and bill the associated costs to the Developer. All Mobile Merchants must have a valid Mobile Sale Unit Permit prior to any vending on the Burdened Parcel.

5. If the Developer (a) is in default under the Development Agreement or (b) fails to pull permits for the construction of improvements on the Benefited Parcel on or before June 28, 2014 and thereafter diligently pursue to completion within a reasonable time thereafter (but in no event later than December 31, 2016) construction of the improvements covered by such building permits, then City may terminate this easement by giving written notice of such termination to Developer. Any such termination shall become effective on the 30th day following written notice from City.

6. The improvements to be constructed on the Burdened Parcel shall be maintained by the Developer or as may be determined through a cost sharing agreement reached between the Developer and the owners of the Regatta Pointe Condominium Project. Failure to maintain the improvements to acceptable City standards may result in City action against Developer or the parties to the cost sharing agreement pursuant to the remedies available to the City under applicable City Ordinances and Codes. The remedies may include, but are not limited to notifying the Developer and the parties to the cost sharing agreement in writing of the failure to maintain the improvements to City standards and providing for a 30-day period to attain compliance. In the event the Developer or the parties to the cost sharing agreement are in non-compliance at the end of the 30-day period, the City has the option to correct the non-compliance and bill the associated costs to the Developer or the parties to the cost-sharing agreement.

7. During the effective term of this easement and as a condition precedent to the effectiveness of this easement, the Developer and its successors and assigns, at its own expense shall maintain in full force a policy or policies of comprehensive liability insurance, including property damage, written by one or more responsible insurance companies licensed to do business in Arizona, which shall insure the Developer, the City, including its employees and agents, against liability for injury to persons and property and for the death of any person occurring in, on or about the easement. During construction of the project on the Burdened Parcel and until the final Certificate of Occupancy is issued, the limits of such insurance shall not be less than \$5,000,000 for each occurrence to include property damage, personal injury, bodily injury, products, and completed operations, with a \$5,000,000 general aggregate. After a final Certificate of Occupancy has been issued by the City the limits of

EXHIBIT "A"

An Easement for driveway for access and egress, sidewalk, lighting, public and private utilities, storm water drainage and retention, signage, landscape and irrigation purposes over a portion of the Northeast quarter of Section 16, Township 1 North, Range 4 East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, being more particularly described as follows:

Commencing at a City of Tempe brass cap flush with the pavement marking the center of said Section 16 at the intersection of Hardy Drive and 1st Street from which a City of Tempe aluminum cap marking the East quarter corner of said Section 16 bears North 89 degrees 28 minutes 05 seconds East 2,674.63 feet;

Thence North 89 degrees 28 minutes 05 seconds East 1005.71 feet along the monument line of said Hardy Drive and the South line of the Northeast quarter of said Section 16 to the Southerly extension of the West line of Lot 15, STATE PLAT NO. 9, recorded in Book 23 of Maps, Page 48, records of Maricopa County, Arizona;

Thence North 01 degrees 04 minutes 55 seconds West 443.49 feet along said Southerly extension and the West line of said Lot 15 to the Northwest corner of said Lot 15 and the Point of Beginning;

Thence continuing North 01 degrees 04 minutes 55 seconds West 93.86 feet along Northerly extension of said West line to the Southerly right of way line of Rio Salado Parkway as described in Document No. 89-023644, of Official Records of Maricopa County, Arizona, being the beginning of a non-tangent curve the center of which bears North 03 degrees 26 minutes 01 second East 1974.86 feet;

Thence Easterly along the arc of said curve and said Southerly right of way line through a central angle of 16 degrees 02 minutes 26 seconds and arc length of 552.88 feet to the Northerly extension of the East line of Lot 8E, STATE PLAT NO. 12 AMENDED, recorded in Book 69 of Maps, Page 38, records of Maricopa County, Arizona;

Thence South 01 degree 04 minutes 25 seconds East 92.40 feet along said Northerly extension;

Thence South 80 degrees 14 minutes 05 seconds West 293.02 feet;

Thence North 89 degrees 04 minutes 55 seconds West 260.53 feet to the Point of Beginning;

EXCEPT the following described property:

A Parcel of land lying within Section 16, Township 1 North, Range 4 East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, being more particularly described as follows:

COMMENCING at the East Quarter corner of said Section 16, a Maricopa County Aluminum Cap Flush, from which the center of said Section, a City of Tempe Brass Cap in Handhold, bears South 89 degrees 41 minutes 29 seconds West (basis of bearing), a distance of 2674.58 feet;

THENCE along the East-West Mid-Section Line of said Section, South 89 degrees 41 minutes 29 seconds West, a distance of 1412.00 feet;

THENCE leaving said East-West Mid-Section line, North 00 degrees 18 minutes 31 seconds West, a distance of 436.86 feet, to the Northerly line of State Plat No. 12 Amended, recorded in Book 69, page 38, Maricopa County Records (M.C.R.) and the POINT OF BEGINNING;

THENCE along said Northerly line, North 88 degrees 51 minutes 28 seconds West, a distance of 184.70 feet;

THENCE leaving said Northerly line, North 29 degrees 11 minutes 59 seconds East, a distance of 24.67 feet;

THENCE North 87 degrees 46 minutes 47 seconds East, a distance of 189.50 feet;

THENCE South 60 degrees 48 minutes 01 seconds East, a distance of 46.88 feet, to said Northerly line;

THENCE along said Northerly line, South 80 degrees 27 minutes 49 seconds West, a distance of 58.45 feet to the POINT OF BEGINNING.

EXHIBIT “B”

Lot 1, THE ARGO AT TOWN LAKE, according to the plat of record in the Office of the County Recorder of Maricopa County, Arizona, recorded in Book 1133 of Maps, page 34.



CITY OF TEMPE
REQUEST FOR COUNCIL ACTION

Council Meeting Date: 4/4/2013
Agenda Item: 5E2

ACTION: Adopt a resolution authorizing the Mayor to execute the Intergovernmental Agreement between the City of Tempe and the Town of Guadalupe for the purpose of satisfying a Federal Emergency Management Agency Homeland Security Grant to purchase and distribute dual-band portable radios and accessories. (Resolution No. 2013.31)

FISCAL IMPACT: This intergovernmental Agreement will result in the City receiving \$9,320 reimbursement from the Town of Guadalupe to be returned to the Radio Replacement program CIP (566947).

RECOMMENDATION: Adopt Resolution No. 2013.

BACKGROUND INFORMATION: In 2011, the Tempe Fire Department accepted a FEMA Homeland Security Grant to purchase dual-band (VHF-800MHz) radios and accessories to update, and become aligned with the regional build out of the 800 MHz digital trunked radio system. The Tempe Fire Department authored and submitted the FEMA Homeland Security application as a regional request with Guadalupe Fire Department. This grant request was to purchase VHF-800 MHz dual-band radios and accessories to maintain interoperability with other Valley cities. Further, this was a pass through grant, which the Town of Guadalupe was to reimburse the City of Tempe for VHF-800 MHz radio and accessory purchases.

ATTACHMENTS: Resolution, Intergovernmental Agreement, Contract, Motorola Invoice, Cost Listing, Grant Award Letter

STAFF CONTACT(S): Hans Silberschlag, Assistant Fire Chief, (480) 858-7201

Department Director: Greg Ruiz, Fire Chief
Legal review by: Kara Stanek, Assistant City Attorney
Prepared by: Hans Silberschlag, Assistant Fire Chief

RESOLUTION NO. 2013.31

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF TEMPE, ARIZONA, APPROVING THE INTERGOVERNMENTAL AGREEMENT BETWEEN THE CITY OF TEMPE AND THE TOWN OF GUADALUPE FOR MOTOROLA RADIOS AND AUTHORIZING THE FIRE CHIEF TO ACT AS AGENT OF THE CITY OF TEMPE FOR ALL NEGOTIATIONS AND NECESSARY INSTRUMENTS.

WHEREAS, the City of Tempe (“Tempe”) and the Town of Guadalupe (“Guadalupe”) are neighboring communities participating in the State of Arizona Automatic Aid Agreement; and

WHEREAS, Tempe purchased radio communication equipment using United States Department of Homeland Security (“DHS”) and the Federal Emergency Management Agency’s (“FEMA”) funds under the condition that Tempe would allocate a portion of the equipment purchased to the Guadalupe for their fire department’s use; and

WHEREAS, it is advantageous for Tempe and Guadalupe to update and replace communication equipment to ensure the communicability between the two agencies in the coming years; and

WHEREAS, this is for the benefit of the citizens of Tempe; and

WHEREAS, this is compatible with the laws of the United States of America, Arizona and the City of Tempe.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TEMPE, ARIZONA, HEREBY:

1. Authorizes the Mayor or his designee to execute the Intergovernmental Agreement between Tempe and Guadalupe to convey the radio communication equipment and to execute such other documents and to take such further actions as are necessary to implement its terms and this Resolution.

PASSED AND ADOPTED BY THE CITY COUNCIL OF THE CITY OF
TEMPE, ARIZONA, this ____ day of April, 2013.

Mark W. Mitchell, MAYOR

ATTEST:

Brigitta M. Kuiper, City Clerk

APPROVED AS TO FORM:

Judith Baumann, Interim City Attorney

WHEN RECORDED RETURN TO:

City of Tempe
31 E. Fifth Street
Tempe, AZ 85281
Attn: City Clerk

**INTERGOVERNMENTAL AGREEMENT
BETWEEN
CITY OF TEMPE
AND
TOWN OF GUADALUPE**

This Intergovernmental Agreement (“Agreement”) is made and entered into this _____ day of _____ 2013, (“Effective Date”), by and between the Town of Guadalupe, a township duly organized under the laws of the State of Arizona, and the City of Tempe (“Tempe” or “City of Tempe”), a municipal corporation duly organized and existing under the laws of the State of Arizona. The entities are referred to jointly herein as “Parties” and individually as “Party”. This Agreement constitutes the entire understanding and agreement of the Parties.

RECITALS

A. Arizona Revised Statutes (ARS), § 11-951 through § 11-954, provide that public agencies may enter into intergovernmental agreements for the provisions of services or for joint and cooperative action.

B. Tempe is empowered by Tempe City Charter Section 1.03 to enter into this Agreement and has authorized the undersigned to execute this Agreement on behalf of the City.

C. The program was developed to assist each municipality in providing emergency response within the region, as well as statewide. A goal of this collaboration is to update and replace obsolete communication equipment.

D. The City of Tempe purchased 73 dual band 800 MHz radios from Motorola for use by the Tempe Fire Department as a part of Tempe’s regional radio system maintenance and replacement program pursuant to the Regional Wireless Cooperative (“RWC”) and for distribution to another regional fire department participating in the Assistance to Firefighters Grant Program. Tempe purchased the radios under a larger State of Arizona contract to ensure the best pricing. The Contract for Solicitation # AD050017-A5-6-A10 is attached hereto as *Exhibit A* and outlines all of the equipment purchased by the State including the equipment purchased by Tempe along with the costs associated with the purchase of this equipment.

E. The equipment was purchased with the use of funds secured from the United States Department of Homeland Security (“DHS”) and the Federal Emergency Management Agency’s (“FEMA”) Fiscal Year 2010 Assistance to Firefighters Grant. The grant was awarded with the condition that Tempe would allocate a portion of the equipment purchased to the Town of Guadalupe for their fire department’s use as a part of their effort to update and replace their communication equipment to ensure the communicability between the two agencies in the coming years.

F. The parties desire to enter into this agreement with the understanding that this is the entire agreement and with the understanding that each party will be responsible for the equipment they receive pursuant to this agreement

NOW, THEREFORE, in consideration of the foregoing recitals, which are incorporated herein, and the covenants and promises set forth below, the City of Tempe and the Town of Guadalupe hereby mutually agree as follows:

AGREEMENT

1. **Purpose.** The purpose of this Agreement is to set forth the rights and responsibilities of the parties with respect to the distribution by the City of Tempe, through the Tempe Fire Department, of certain equipment obtained by the City of Tempe pursuant to a sole source contract to Motorola for seventy-three (73) 800 MHz radios model APX 7000XE, including six (6) radios and accessories purchased for the Town of Guadalupe Fire Department.

2. **Equipment.**

2.1. Responsibility for and Use of Equipment. Attached hereto is a list of all the radio equipment and accessories that was purchased by the City of Tempe from Motorola. **Exhibit B.** The equipment listed in **Exhibit C** will be transferred to the care, custody and control of the Fire Department of the Town of Guadalupe for the exclusive use of that Town’s fire department. The City of Tempe maintains no control over said equipment and once the equipment has been transferred to the Town of Guadalupe, any responsibility for said equipment will be solely that of the Town of Guadalupe. The Town of Guadalupe agrees to be responsible for the maintenance and upkeep, which may include responsibility for the costs associated with any repairs or replacement, of the equipment and may deal directly with the manufacturer of said equipment in relation to any repairs, maintenance, replacements, and/or calibrations of said equipment subject to any of the terms set forth herein. The Town of Guadalupe acknowledges and agrees that the City of Tempe will not be responsible for any maintenance or replacement of, repairs to or calibrating any of the equipment nor will the Town of Guadalupe seek reimbursement for any related costs from the City of Tempe notwithstanding any efforts Tempe Fire Department may willingly offer to assist Guadalupe Fire Department

in the maintenance and calibration of the radios in order to ensure consistency and communicability during emergency operations.

The use of the equipment set forth herein shall be in accordance with the terms and conditions set forth in the agreement entered into by the City of Tempe with the Federal Emergency Management Agency, a copy of which is attached hereto as ***Exhibit D***. The Town of Guadalupe agrees to comply with all of the conditions set forth in that agreement.

- 2.2. Equipment Inspection. The Town of Guadalupe agrees to make the equipment set forth herein available for equipment auditing by authorized representatives of the Federal DHS. The parties agree and understand that the City of Tempe will not retake possession of the equipment for any said monitoring and auditing nor will the City of Tempe or any of its employees, agents, departments or any other representative of the City of Tempe be responsible for, or held liable for, conducting any monitoring, auditing or any inspections of any kind of the equipment transferred to the Town of Guadalupe.
- 2.3. Notice to Tempe. The Town of Guadalupe recognizes that the City of Tempe Fire Department is keeping a master list of the equipment distributed solely for tracking purposes. The Town of Guadalupe agrees to notify the City of Tempe Fire Department of any theft, destruction or loss of the equipment set forth herein.
3. **Payment**. There shall be payment for the equipment received by the Town of Guadalupe under the terms of this agreement in the amount of 20% matching funds per the FEMA Grant totaling \$9,320.00. Funds must be paid to City of Tempe within 30 days of receipt of billing. The City of Tempe has been reimbursed for the remainder cost of the equipment by the Assistance to Firefighter's Grant secured from the DHS and additional funding from a Capital Improvement Plan.
4. **Transactional Conflict of Interest**. All parties hereto acknowledge that this Agreement is subject to cancellation by the City of Tempe pursuant to the provisions of Section 38-511, Arizona Revised Statutes.
5. **Indemnification**.
 - 5.1. Indemnification. The Town of Guadalupe shall indemnify, defend, save and hold harmless Tempe, its departments, agencies, boards, commissions, officers, officials, agents, and employees (hereinafter referred to as "Indemnitee") for, from and against any and all claims, actions, liabilities, damages, losses, or expenses (including court costs, attorneys' fees, and costs of claim processing, investigation and litigation) (hereinafter referred to as "Claims") for bodily injury or personal injury (including death), or

loss or damage to tangible or intangible property caused, or alleged to be caused, in whole or in part, by the use of, the equipment transferred hereunder. This would include any claims related to the failure of the equipment to perform properly.

5.2. Severability. This section shall survive termination, cancellation, or revocation whether whole or in part, of this Agreement for a period of one (1) year from the date of such termination, cancellation or revocation unless a timely claim is filed under A.R.S. § 12-821.01, in which case this paragraph shall remain in effect for each claim and/or lawsuit filed thereafter, but in no event shall this paragraph survive more than five (5) years from the date of termination, cancellation or revocation of this Agreement.

6. **Warranties and/or Guarantees.** The parties understand that the City of Tempe has not, will not, and is not required to, perform any independent testing of the equipment provided to the Town of Guadalupe under the terms of this Agreement and the City of Tempe in no way provides any warranties or guarantees as to the equipment provided herein. Any warranties or guarantees that may attach to said equipment are limited to those warranties or guarantees provided by the manufacturer of the equipment and which are set forth in the purchase agreement between the City of Tempe and the manufacturer, which is attached hereto as *Exhibit A*.

7. **Interpretation of Agreement.**

7.1. Entire Agreement. This Agreement constitutes the entire agreement between the parties pertaining to the subject matter contained herein, and all prior or contemporaneous agreements and understandings, oral or written, are hereby superseded and merged herein.

7.2. Amendment. This Agreement shall not be modified, amended, altered, or changed except by written agreement signed by both parties.

7.3. Construction and Interpretation. All provisions of this Agreement shall be construed to be consistent with the intention of the parties as expressed in the recitals contained herein.

7.4. Waiver. No waiver, whether written or tacit, of any remedy or provision of this Agreement shall be deemed to constitute a waiver of any other provision hereof or a permanent waiver of the provision concerned, unless otherwise stated in writing by the party to be bound thereby.

7.5. Relationship of the Parties. Neither party shall be deemed to be an employee or agent of the other party to this Agreement.

7.6. Days. Days shall mean calendar days.

7.7. Severability. In the event that any provisions of this Agreement or the application thereof is declared invalid or void by statute or judicial decision, such action shall have no effect on other provisions and their application which can be given effect without the invalid or void provision or application, and to this extent the provisions of the Agreement are severable. In the event that any provision of this Agreement is declared invalid or void, the parties agree to meet promptly upon request of the other party in an attempt to reach an agreement on a substitute provision.

8. **Authority**. Tempe and Guadalupe each represent, warrant and covenant to the other that they have the right to enter into and make this Agreement

9. **Notices**. Any notice, consent or other communication or modification (“Notice”) required or permitted under this Agreement shall be in writing and shall be given by registered or certified mail or in person to the following individuals. The date of receipt of such notices shall be the date the notice shall be deemed to have been given.

For the Town of Guadalupe: Town of Guadalupe Fire Department
Interim Fire Chief Wayne Clement
8413 S. Avenida Del Yaqui
Guadalupe, Arizona

For the City of Tempe: Tempe City Fire Department

Fire Chief Greg Ruiz
P.O. Box 5002
Tempe, Arizona 85280-5002

IN WITNESS WHEREOF, the parties have executed this Intergovernmental Agreement on the dates indicated below.

TOWN OF GUADALUPE, a
township

CITY OF TEMPE, a
municipal corporation

By: _____

By: _____

Name: _____

Name: _____

Its: _____

Its: _____

Date: _____

Date: _____

APPROVAL OF ATTORNEY

In accordance with the requirements of A.R.S. §11-952(D), the undersigned attorney acknowledges that (i) he has reviewed the above Agreement on behalf of the TOWN OF GUADALUPE and (ii) as to the Town of Guadalupe only, has determined that this Agreement is in proper form and that execution hereof is within the powers and authority granted under the laws of the State of Arizona.

City Attorney

Date

APPROVAL OF CITY ATTORNEY

In accordance with the requirements of A.R.S. §11-952(D), the undersigned attorney acknowledges that (i) he has reviewed the above Agreement on behalf of the CITY OF TEMPE and (ii) as to the City of Tempe only, has determined that this Agreement is in proper form and that execution hereof is within the powers and authority granted under the laws of the State of Arizona.

Interim City Attorney

Date

Contract

Solicitation # AD050017-A5

Document Information

Type:	Supplier	Amendment:	Yes	Amend #:	10
Requisition #:	ADSM-655LA8	Solicitation #:	AD050017-A5	Contract #:	AD050017-A5-6-A10
PO Assigned:	LeAnn Wong/ADSM-5KAM9N	Date Completed:	05/20/2009		
PM Assigned:	James Scarboro/ADSM-5KAM9N	PA Assigned:	James Scarboro/ADSM-5KAM9N		
Supplier Name:	Motorola	Proposal #:	ADSM-68DUXZ		
Gov't Entity:	Arizona State Procurement Office	Type:	Statewide		
Process Status:	Complete	Status:	Complete		
Total/Not to Exceed Cost:	0	External Contract:			

Contract Information

NOTE: As a State Agency, you are only allowed to use contracts that are either Statewide Contracts or contracts that are assigned to your Agency. You are not allowed to use other Agency Contracts.

Start Date:	10/3/08	End Date:	10/2/09
Term:	1 Year(s)	FOB:	As Specified Herein
Payment Terms:	Due Net 30 Days, Also accepting PCards	Delivery:	30A.R.O. Days
Contract Extension Allowed		Max Extension:	3 Year(s)

Amendment Information

Amendment #10:

Promotional document file has been added as "Motorola Radlo Accessory Promotion effective 5_20_2009.doc" to the Attachments section.

All other terms and conditions remain unchanged.

AMENDMENT NO. 9:

This Contract is hereby amended to add promotional pricing discounts as stated in Attachments' file (below) titled, "Q1_2009_Promo_national.ppt" and "Q1 09 Promo(V4).pdf". This promotional pricing expires on March 31, 2009.

All other Terms & Conditions remain in effect.

AMENDMENT NO. 8:

In accordance with this Contract's Terms and Conditions under Amendments, this Contract is hereby amended to ADD the following:

A. Compliance Requirements for A.R.S. § 41-4401, Government Procurement; E-Verify Requirement

1. The contractor warrants compliance with all Federal immigration laws and regulations relating to employees and warrants its compliance with Section A.R.S. § 23-214, Subsection A. (That subsection reads: After December 31, 2007, every employer, after hiring an employee, shall verify the employment eligibility of the employee through the e-verify program.)

2. A breach of a warranty regarding compliance with immigration laws and regulations shall be deemed a material breach of the contract and the contractor may be subject to penalties up to and including termination of the contract.

3. Failure to comply with a State audit process to randomly verify the employment records of contractors and subcontractors shall be deemed a material breach of the contract and the contractor may be subject to penalties up to and including termination of the contract.

4. The State Agency retains the legal right to inspect the papers of any employee who works on the contract to ensure that the contractor or subcontractor is complying with the warranty under paragraph A.1. (above).

B. Administrative Fee

Upon written notice from the Procurement Officer, the Contractor shall begin assessing administrative fees in the amount of one percent (1%) of all sales occurring under the contract, not including taxes, to members of the State Purchasing Cooperative. An updated list of State Purchasing Cooperative members may be found at the following URL:

<http://azdoa.gov/spo/agency-resources/az-purchasing-coop/arizona-purchasing-cooperative>. At its option, the State may expand the applicability of this fee. Contractor shall not assess the administrative fee in the form of a line item in their invoices. Rather, the Contractor shall include the amount of the administrative fee in their unit prices for all products and services available under the contract. All administrative fees shall be remitted to the State Procurement Office, at 100 N. 15th Avenue, Suite 104 Phoenix, AZ 85007, no later than thirty (30) days following the end of the calendar quarter in which the fee was assessed. Calendar quarters shall include the months of January through March, April through June, July through September, and October through December. Contractor's failure to collect or remit administrative fees in a timely manner may result in the State exercising any recourse available under the contract or as provided for by law.

All other terms and conditions set forth in this Contract not amended hereby shall remain unchanged and in full force and effect.

AMENDMENT NO. 7:

This Contract is hereby amended to extend the Contract's duration from October 3, 2008, through October 2, 2009.

All other terms and conditions set forth in this Contract not amended hereby shall remain unchanged and in full force and effect.

AMENDMENT NO. 6:

This Contract is hereby amended to add promotional pricing discounts as stated in Attachments' file (below) titled, "AD050017_A5_6_PROMO_OFFER_110907a.pdf". This promotional pricing expires on November 21, 2007.

All other Terms & Conditions remain in effect.

AMENDMENT NO. 5:

This Contract is hereby amended to extend the contract for one year until 10/02/2008.

All other Terms and Conditions remain in effect.

AMENDMENT NO. 4:

This Contract is hereby amended to add promotional pricing discounts as stated in file titled, "Q2 Promotions 2007_State of AZ Contract". This promotional pricing expires on June 15, 2007.

All other Terms & Conditions remain in effect.

AMENDMENT NO.3:

This Contract is hereby amended to add promotional pricing discounts as stated in file titled, "07Q1 Promotion". This promotion expires on March 15, 2007.

All other Terms & Conditions remain in effect.

AMENDMENT NO. 2:

This Contract is hereby amended to add promotional pricing discounts as stated in attached file, "07Q1 Promotions.ppt". This promotional pricing expires on March 15, 2007.

All other Terms and Conditions remain in effect.

Amendment AD050017-A5-6-A1 is as follows:

Supplemental information added to correct missing award items and for discontinuance of model series. See attached doc titled "supp info for amendment #1"

All other terms and conditions remain the same.

Contract Reassignment

N/A

Contractor Amendment Approval

N/A

Solicitation Information

Title: Two-Way Radios

Type: RFP

Description:

Pursuant to provisions of the Arizona Procurement Code, ARS 41-2501 et seq., the State of Arizona, State Procurement Office intends to establish contract(s) for the materials or services as listed herein. The State and members of its purchasing cooperative have an ongoing requirement for two-way radios and related services. Two-way radio systems available under any resulting contract(s) shall be available to various State agencies and members of the State Purchasing Cooperative in their applicable systems.

Special Instructions

Current Products

All products offered in response to this solicitation shall be in current and ongoing production; shall have been formally announced for general marketing purposes; shall be a model or type currently functioning in a user (paying customer) environment and capable of meeting or exceeding all specifications and requirements set forth in this solicitation.

Definition

'May' denotes the permissive

'Shall' denotes the imperative

'Must' denotes the imperative

Eligible Agencies (Statewide)

Any contract resulting from this solicitation shall be for the use of all State of Arizona departments, agencies, commissions and boards. In addition, eligible universities, political subdivisions and nonprofit educational or public health institutions may participate at their discretion. In order to participate in any resultant contract, a university, political subdivision, or nonprofit educational or public health institution must have entered into a cooperative purchasing agreement with the State Procurement Office as required by Arizona Revised Statutes 41-2632.

Evaluation

In accordance with A.R.S. 41-2534, award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the State based upon the evaluation criteria cited herein.

Offerors shall indicate their acceptance of the State's Uniform and Special Terms and Condition as instructed herein. Offerors taking exceptions to any of the Uniform or Special Terms and Conditions, shall include an explanation for each exception and include any proposed replacement language. In accordance with R2-7-330(B) and the Uniform Instructions, 3.4., proposals including changes to the Uniform or Special Terms and Conditions may be deemed non-responsive, not susceptible for contract award or may cause the proposal to be rejected.

The evaluation factors are listed in their relative order of importance.

1. Conformance to Scope and Specifications
2. Cost
3. Capacity of Offeror

1. Conformity to Scope and Specifications
2. Cost
3. Capacity of Offeror

Individual Line Item Response

The vendor may respond to any of the equipment or service items listed in the solicitation. It is not mandatory to respond to all. The State reserves the right to accept or reject any line item proposed.

Multiple Awards

The equipment best responding to the requirements of the RFP will be identified, and multiple awards made where in the best interests of the State. This will be done in order to provide a broad range of types and quality equipment, with adequate contractor support. Evaluations will generally not include accessory items.

Offshore Performance of Work Prohibited

Due to security and identity protection concerns, all services under this contract shall be performed within the borders of the United States. All storage and processing of information shall be performed within the borders of the United States. This provision applies to work performed by all subcontractors at all tiers.

Price Submission

The price submitted for each line item shall be the price of the base radio. For each line item proposed, additional information shall be provided. The required information is called out in the Attachment entitled 'Additional Pricing Information'.

For all optional accessories, acceptable responses shall be in one of three formats. If they are provided with the radio at no additional cost the 'price' shall be listed as 'Standard'. If the option can be provided at an additional price, the dollar amount shall be indicated. If the specifications do not require the accessory (as in a Basic model), the 'price' shall be listed as N/A. Please refer to the specifications to determine which accessories are desired.

Proposals: SPIRIT Submission Requirement

In accordance with the Uniform Instructions 3.1, Forms: No Facsimile, Telegraphic or Electronic Mail Offers; proposals to this solicitation shall be submitted in an acceptable electronic format, as described herein, using the State's online eProcurement application SPIRIT. Submission of offers by means other than the SPIRIT system will not be accepted. Potential offerors with questions in this regard shall contact the State Procurement Office prior to the solicitations due date and time.

Purpose

Pursuant to provisions of the Arizona Procurement Code, ARS 41-2501 et seq., the State of Arizona, State Procurement Office intends to establish a contract for the materials or services as listed herein.

Questionnaire Section

Offeror(s) should complete the entire questionnaire section of the Request for Proposal. The offerors responses should be in the form of a brief written narrative demonstrating the Offerors ability to satisfy the Scope of Work. The narrative should describe a logical progression of tasks and efforts starting with the initial steps or tasks to be accomplished and continuing until all proposed tasks are fully described. The language of the narrative should be straightforward and limited to facts, solutions to problems, and plans of proposed action. The use of technical language should be minimized and used only to describe a technical process.

Responsibility, Responsiveness and Acceptability

In accordance with A.R.S. 41-2534(G), A.A.C. R2-7-330 and R2-7-354, State shall consider the following in determining offerors' responsibility as well as the responsiveness and acceptability of their proposals. Offerors may not be considered responsible if they have been debarred from the practice of their profession that would otherwise be necessary in the provision of goods and services under any resulting contract. Offerors may not be considered responsible if they have had a contract with the State, within the last three-years, that was terminated for cause, due to breach or similar failure to comply with the terms of any such contract. Offerors may also not be considered responsible if there is factual evidence of their frequent and reoccurring failure to satisfy the terms of their agreements and contractual relationships, both with the State or other government entities. Factual evidence shall consist of any documented vendor performance reports, customer complaints and/or negative references.

Proposals may not be considered responsive and/or acceptable if they do not contain information sufficient to evaluate the proposal in accordance with the factors identified in the solicitation or other necessary proposal components. Necessary components include: an indication of the Offeror's intent to be bound, price proposal, solicitation amendments, bond and reference data as required.

Subcontractors

Supplemental to the Subcontractor provision in the Uniform Instructions, offerors shall include with their list of proposed subcontractors, their contact information, certifications required of them, their Minority and Women Owned Enterprise status (cite any certifications use in determining such status) as well as the subcontractor's proposed responsibilities under the offeror's proposal.

Technical Information to be Furnished with Offer

At the time of submitting bids, each bidder shall submit complete technical information, graphs, photographs, circuit diagrams, instruction manuals and other means to fully describe the equipment being bid. It is the responsibility of each vendor to provide ALL technical data addressing RFP specifications. Failure to do so will indicate vendor non-compliance to the relevant item in the RFP. It is NOT the responsibility of the State to request further technical data from the vendor to verify compliance to the detailed technical specifications. Failure to supply complete technical information SHALL BE sufficient cause for rejection of a proposal. All specifications provided MUST be stated as 'Minimum' specifications, not 'Typical' specifications. If not stated as 'Minimum', specifications provided will be assumed non-compliant.

Contract
Solicitation # AD050017-A5

Special Terms and Conditions

Confidentiality of Records

The contractor shall establish and maintain procedures and controls acceptable to the State for the purpose of assuring that information or data in its possession is not mishandled, misused, released, disclosed, or used in an inappropriate manner by it, its agents, officers, or employees. This includes information contained in its records obtained from the State or others, necessary for contract performance. The contractor shall take all reasonable steps and precautions to safeguard this information and data and shall not divulge the information or data to parties other than those needed for the performance of duties under the contract.

Contract Extension

The contract term is for a two(2) year period subject to additional successive periods of a maximum twelve months per extension with a maximum aggregate including all extensions not to exceed five (5) years

Contract Type (Term)

Fixed price term indefinite quantity.

Delivery (Days)

Delivery shall be made within 90 days of receipt of a contract release order/purchase order.

Eligible Agencies (Statewide)

Contract shall be for the use of the State of Arizona, including all of its departments, agencies, boards and commissions. Also, in accordance with A.R.S. 41-2642, members of the State Purchasing Cooperative, comprised of cities, counties, schools and special districts, universities, nonprofit educational and public health institutions may also purchase from under this Contract at their discretion. State Purchasing Cooperative members can be confirmed at the following URL:

<http://www.azspo.az.gov/ProcurementPartners/index.htm>

Estimated Quantities (Considerable)

The state anticipates considerable activity resulting from contracts that will be awarded as a result of this solicitation; however, no commitment of any kind is made concerning quantities actually acquired and that fact should be taken into consideration by each potential contractor.

Insurance

INDEMNIFICATION:

Contractor agrees to indemnify, defend, save and hold harmless the State of Arizona, any jurisdiction or agency issuing permits for any work included in the project, and their respective directors, officers, officials, agents and employees (hereinafter referred to as 'Indemnitee') from and against any and all claims, actions, liabilities, costs, losses, or expenses, including reasonable attorney's fees, (hereinafter collectively referred to as 'Claims') arising out of actual or alleged bodily injury or personal injury of any person (including death) or loss or damage to tangible or intangible property caused, or alleged to be caused, in whole or in part, by the negligent or willful acts or omissions of Contractor or any of Contractor's directors, officers, agents, employees, volunteers or subcontractors. This indemnity includes any claim or amount arising or recovered under the Workers' Compensation Law or arising out of the failure of Contractor to conform to any federal, state or local law, statute, ordinance, rule, regulation or court decree. It is the specific intention of the parties that the Indemnitee shall, in all instances, except for Claims arising solely from the negligent or willful acts or omissions of the Indemnitee, be indemnified by Contractor from and against any and all Claims. It is agreed that Contractor will be responsible for primary loss investigation, defense and judgment costs where this indemnification is applicable.

This indemnity shall not apply if the contractor or sub-contractor(s) is/are an agency, board, commission or university of the State of Arizona.

INSURANCE REQUIREMENTS:

Vendor shall procure and maintain, until all of their obligations, including any warranty periods under this Contract, are satisfied, insurance against claims for injury to persons or damage to property which may arise from or in connection with the purchase and or use of the commodity.

The insurance requirements herein are minimum requirements for this Contract and in no way limit the indemnity covenants contained in this Contract. The State of Arizona in no way warrants that the minimum limits contained herein are sufficient to protect the Vendor from liabilities that might arise out of the purchase and use of the commodities sold under this Contract by the Vendor, his agents, representatives, employees or subcontractors and Vendor is free to purchase such additional insurance as may be determined necessary.

A. MINIMUM SCOPE AND LIMITS OF INSURANCE: Contractor shall provide coverage at least as broad and with limits of liability not less than those stated below.

1. Commercial General Liability ? Occurrence Form

Policy shall include bodily injury, property damage, personal injury and broad form contractual liability.

? General Aggregate \$2,000,000

? Products ? Completed Operations Aggregate \$1,000,000
? Personal and Advertising Injury \$1,000,000
? Fire Legal Liability \$ 50,000
? Blanket Contractual Liability ? Written and Oral \$1,000,000
? Each Occurrence \$1,000,000

2. Automobile Liability

Bodily Injury and Property Damage for any owned, hired, and/or non-owned vehicles used in the performance of this Contract.

Combined Single Limit (CSL) \$1,000,000

a. The policy shall be endorsed to include the following additional insured language: 'The State of Arizona, its departments, agencies, boards, commissions, universities and its officers, officials, agents, and employees shall be named as additional insureds with respect to liability arising out of the activities performed by or on behalf of the Contractor, involving automobiles owned, leased, hired or borrowed by the Contractor.'

3. Worker's Compensation and Employers' Liability

Workers' Compensation Statutory

Employers' Liability

Each Accident \$ 500,000

Disease ? Each Employee \$ 500,000

Disease ? Policy Limit \$1,000,000

a. Policy shall contain a waiver of subrogation against the State of Arizona, its departments, agencies, boards, commissions, universities and its officers, officials, agents, and employees for losses arising from work performed by or on behalf of the Contractor.

b. This requirement shall not apply to: Separately, EACH contractor or subcontractor exempt under A.R.S. 23-901, and when such contractor or subcontractor executes the appropriate waiver (Sole Proprietor/Independent Contractor) form.

B. ADDITIONAL INSURANCE REQUIREMENTS: The policies are to contain, or be endorsed to contain, the following provisions:

1. The State of Arizona, its departments, agencies, boards, commissions, universities and its officers, officials, agents, and employees wherever additional insured status is required such additional insured shall be covered to the full limits of liability purchased by the Contractor, even if those limits of liability are in excess of those required by this Contract.

2. The Contractor's insurance coverage shall be primary insurance with respect to all other available sources.

3. Coverage provided by the Contractor shall not be limited to the liability assumed under the indemnification provisions of this Contract.

C. NOTICE OF CANCELLATION: Each insurance policy required by the insurance provisions of this Contract shall not be suspended, voided, cancelled, reduced in coverage or in limits except after thirty (30) days prior written notice has been given to the State of Arizona. Such notice shall be sent directly to (State of Arizona Department Representative's Name and Address) and shall be sent by certified mail, return receipt requested.

D. ACCEPTABILITY OF INSURERS: Insurance is to be placed with duly licensed or approved non-admitted insurers in the State of Arizona with an A.M. Best? rating of not less than A- VII. The State of Arizona in no way warrants that the above-required minimum insurer rating is sufficient to protect the Vendor from potential insurer insolvency.

E. VERIFICATION OF COVERAGE: Contractor shall furnish the State of Arizona with certificates of insurance (ACORD form or equivalent approved by the State of Arizona) as required by this Contract. The certificates for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf.

All certificates and endorsements are to be received and approved by the State of Arizona before work commences. Each insurance policy required by this Contract must be in effect at or prior to commencement of work under this Contract and remain in effect for the duration of the project. Failure to maintain the insurance policies as required by this Contract, or to provide evidence of renewal, is a material breach of contract.

All certificates required by this Contract shall be sent directly to (State of Arizona Department Representative's Name and Address). The State of Arizona project/contract number and project description are to be noted on the certificate of insurance. The State of Arizona reserves the right to require complete, certified copies of all insurance policies required by this Contract at any time. DO NOT SEND CERTIFICATES OF INSURANCE TO THE STATE OF ARIZONA'S RISK MANAGEMENT SECTION.

F. APPROVAL: Any modification or variation from the insurance requirements in this Contract must have prior approval from the State of Arizona Department of Administration, Risk Management Section, whose decision shall be final. Such action will not require a formal contract amendment, but may be made by administrative action.

G. EXCEPTIONS: In the event the Contractor or sub-contractor(s) is/are a public entity, then the Insurance Requirements shall not apply. Such public entity shall provide a Certificate of Self-Insurance. If the contractor or sub-contractor(s) is/are a State of Arizona agency, board, commission, or university then none of the above shall apply.

Key Personnel

It is essential that the contractor provide an adequate staff of experienced personnel, capable of and devoted to the successful accomplishment of work to be performed under this contract. The contractor must assign specific individuals to the key positions. Once assigned to work under the contract, key personnel shall not be removed or replaced without the prior written approval of the issuing agency and a copy to the procurement office of record.

Licenses

Contractor shall maintain in current status all Federal, State and Local licenses and permits required for the operation of a business conducted by the contractor.

New Equipment

All equipment, materials, parts and other components incorporated in the work or an item covered by this contract shall be new, of the latest model and of the most suitable grade for the purpose intended. Any and all work under this contract shall be performed in a skilled and workmanlike manner.

New Products

1. The State, at its sole discretion may allow new products announced by manufactures represented on the contract to be incorporated. The request may be submitted at any time during the contract period and shall be supplemented with the following information. If the New Product is a member of a product line already accepted in the contract, it may be sold to all eligible agencies and subdivisions as soon as the contract administrator has indicated in writing that they have received all required documents. Failure to supply any of the following information with the request shall result in the State not considering the request.

1.1. A formal announcement from the manufacturer stating that the product(s) are new and were not available at the time of contract award.

1.2. Documentation from the manufacturer that cites the effected products by item number and description.

1.3. Documentation that provides clear evidence that the new products are those that are within an established contract group. NO OTHER PRODUCTS SHALL BE ALLOWED.

1.4. That states prices at which sales are currently or were last made to a significant number of any category of buyers or buyers constituting the general buying public for the materials or services involved and that will be sold at the existing discount (percents %) form list price as existing products.

2. Approval shall be in the form of a contract amendment and shall become effective on the date specified in the amendment. Upon approval by the State, the contractor shall make available all electronic and hard catalog/price list updates to all eligible agencies at no additional cost to the State.

Offshore Performance of Work Prohibited

Due to security and identity protection concerns, all services under this contract shall be performed within the borders of the United States. All storage and processing of information shall be performed within the borders of the United States. This provision applies to work performed by subcontractors at all tiers.

Ordering Process

1. For the purposes of this contract, contract release order/purchase orders are those that are issued by an eligible agency any of the following forms:

1.1. Hard copy, one time only or blanket (term type) type;

1.2. Electronically transmitted through facsimile equipment;

1.3. Electronically transmitted as an e-mail attachment;

1.4. Electronically transmitted through a contractor's Electronic Data Interchange (EDI) system or secured internet/web portal, i.e. those that provide electronic commerce assistance for the electronic submission of purchase orders, purchase order tracking and reporting.

1.4.1. Such systems shall not allow for purchase orders to be placed for non-contract or excluded items.

1.4.2. Use of such systems shall be at the sole at the sole discretion of the eligible agency and all cost associated with set-up, maintenance and support shall be borne by the contractor.

1.5. Electronically through State's or eligible agencies p-card program.

2. This contract was awarded in accordance with the Arizona Procurement Code and all transactions and procedures required by the code for competitive source selection have been met. A contract release order/purchase order, initiated in accordance with the requirements contained herein, that cites the correct Arizona contract number is the only document required for the agency to order and the contractor to deliver the material and /or service.

3. Any attempt to represent any material and/or service not specifically awarded, as being under contract with the State of Arizona is a violation of the contract and the Arizona Procurement Code. Any such action is subject to the legal and contractual remedies available to the state inclusive of, but not limited to, contract cancellation, suspension and/or debarment of the contractor.
and/or debarment of the contractor.

Price Adjustment

1. The State Procurement Office may review a fully documented request for a price increase only (change in discount) only on the anniversary or renewal date of the contract. The requested increases shall be based upon a cost increase to the contractor that was clearly unpredictable at the time of the offer and is directly correlated the price of the product/service contractually covered.

1.1. The request shall be submitted from 90 to 120 days prior to the anniversary or contract renewal date of the contract and shall be a factor in the extension review process.

1.2. Failure to submit the request within the stated timeframe and/or failure to supply adequate information with the request may result in the state not considering the request.

2. The State, at its sole option shall determine whether the requested price adjustment or an alternate option is in the best interest of the State. Approval shall be in the form of a contract amendment, and shall become effective on the date specified in the amendment. Upon approval by the State, the contractor shall make available all electronic and hard copy catalog/price list updates to all eligible using agencies at no additional cost to the State.

Price Increase

The State Procurement Office may review a fully documented request for a price increase only after the contract has been in effect for two (2) years. The requested increase shall be based upon a cost increase to the contractor that was clearly unpredictable at the time of the offer and is directly correlated to the price of the product concerned. The State Procurement Office shall determine whether the requested price increase or an alternate option, is in the best interest of the state.

Written request by the contractor is required thirty (30) days in advance of any desired price change. Following approval by the State Procurement Office, the request shall provide the following:

1. A formal announcement from the manufacturer that the cost of the contract product has been increased.

2. Documentation, i.e., published cost lists, from the manufacturer showing, to the satisfaction of the state, the actual cost increase.

Price Reductions

Price reductions may be submitted to the state for consideration at any time during the contract period. The contractor shall offer the state a price reduction on the contract product(s) concurrent with a published price reduction made to other customers. The state at its own discretion may accept a price reduction. The contractor shall request, in writing, a price reduction. The contractor shall request, in writing, a price reduction and provide the following:

1. A formal announcement from the manufacturer that the cost of the contract product has been reduced.

2. Documentation, i.e., published cost lists, from the manufacturer showing, to the satisfaction of the state, the actual cost reduction.

3. Documentation showing that the published cost reductions have been offered to other distributors.

Pricing

All prices shall include delivery and first year warranty

Product Discontinuance

1. In the event that a product or groups of products are discontinued by a manufacturer, the State at its sole discretion may allow the contractor to provide substitutes for the discontinued product(s) or allow the deletion of such products from the contract. The request may be submitted at any time during the contract period and shall be supplemented with the following information. Failure to supply any of the following information with the request may result in the state not considering the request.

1.1. A formal announcement from the manufacturer stating that the product(s) have been discontinued.

1.2. Documentation from the manufacturer that cites the effected products by item number and description.

1.3. Documentation from the manufacturer that names the replacement product(s).

1.4. Documentation that provides clear evidence that the replacement product(s) meets or exceeds the specifications of the discontinued product(s) while remaining in the same product group(s) as the discontinued item, and;

1.5. Documentation confirming that the price for the replacement product(s) is the same as or less than the discontinued item.

2. Approval shall be in the form of a contract amendment and shall become effective on the date specified in the amendment. Upon approval by the state, the contractor shall make available all electronic and hard catalog/price list updates to all eligible at no additional cost to the State.

Safety Standards

All items supplied on this contract must comply with the current applicable occupational safety and health standards of the State of Arizona Industrial Commission, The National Electric Code, and The National Fire Protection Association Standards.

Shipping F.O. B. Delivered

Prices shall be F.O.B. destination to the delivery location designated herein. Contractor shall retain title and control of all goods until they are delivered and the contract of coverage has been completed. All risk of transportation and all related charges shall be the responsibility of the contractor. All claims for visible or concealed damage shall be filed by the contractor. The state will notify the contractor promptly of any damaged goods and shall assist the contractor in arranging for inspection.

Social Responsibility of Offeror

Offerors are encouraged to make every effort to utilize subcontractors that are small, women owned and/or minority owned business enterprises. This could include, for example, subcontracts for creative development, media placement or printing services. Offerors who are offering to commit a portion of their work to such subcontractors shall do so by identifying the type of services and work to be performed by completing the solicitation questionnaire section entitled 'Social Responsibility of Offeror.'

Subcontractors

Supplemental to the Subcontractor term in the Uniform Terms and Conditions, Contractor shall not enter into any Subcontract under this Contract, for the provision of supplies or performance of services under this Contract, without the advance written approval of the Procurement Officer. When requesting the Procurement Officer's approval, the Contractor shall list all new subcontractors, their contact information, certifications required of them, their Minority and Women Owned Enterprise status (cite any certifications use in determining such status) as well as the subcontractor's proposed responsibilities under the Contract. With the request, Contractor shall certify that all Subcontracts incorporate by reference the terms and conditions of this Contract.

Taxes

1. Applicable Taxes: The State will pay only the rate and/or amount of taxes identified in the offer and in any resulting contract.

2. Tax Indemnification: Contractor and all subcontractors shall pay all federal, state and local taxes applicable to its operation and any persons employed by the Contractor. Contractor shall, and require all subcontractors to hold the state harmless from any responsibility for taxes, penalties and interest, if applicable, contributions required under federal, and/or state and local laws and regulations and any other costs including transaction privilege taxes, unemployment compensation insurance, Social Security and Worker's Compensation.

3. IRS W9 Form: In order to receive payment under any resulting contract, contractor must have a current I.R.S. W9 Form on file with the State of Arizona, Department of Administration, General Accounting Office.

Term of Contract (Sole Option)

The term of the contract shall commence upon award and shall remain in effect for a period of two (2) years, unless terminated, canceled or extended as otherwise provided herein. The contractor agrees that the State of Arizona shall have the right, at its sole option, to renew the contract for three (3) additional one-year periods. In the event that the state exercises such right, all terms, conditions and provisions of the original contract shall remain the same and apply during the renewal period with the exception of price. The contractor shall agree that price stated in the original contract shall apply unless a percent of increase or decrease is quoted.

Usage Report

The contractor shall furnish the state a usage report delineating the acquisition activity governed by the contract. The format of the report shall be approved by the state and shall disclose the quantity and the dollar value of each contract item by individual purchasing unit.

The usage report shall be due at the end of each three month period of the contract term. The due date of the usage reports shall be as follows:

Quarter Ends: Usage Report Due:

Sept. 30 Oct. 31

Dec. 31 Jan. 31

Mar. 31 Apr. 30
June 30 July 31

Failure to submit a usage report may be considered as a failure to comply with contract requirements.

Warranty (12 Months)

All equipment supplied under this specification shall be fully guaranteed by the contractor for a minimum period of 12 months from the date of acceptance by the state. Any defects of design, workmanship, or materials, that would result in non-compliance with the contract specification, shall be fully corrected by the contractor (including parts and labor) without cost to the state. The written warranty shall be included with the delivered products to the using entity.

Contract
Solicitation # AD050017-A5

Uniform Instructions

1 Definition of Terms

As used in these Instructions, the terms listed below are defined as follows:

1.2 Contract

the combination of the Solicitation, including the Uniform and Special Instructions to Offerors, the Uniform and Special Terms and Conditions, and the Specifications and Statement of Scope of Work; the Offer and any Best and Final Offers, and any Solicitation Amendments or Contract Amendments and any terms applied by law.

1.3 Contract Amendment

a written document signed by the Procurement Officer that is issued for the purpose of making changes in the Contract.

1.4 Contractor

any person who has a Contract with the State

1.5 Days

calendar days unless otherwise specified.

1.6 Exhibit

any item labeled as an Exhibit in the Solicitation or placed in the Exhibits section of the Solicitation

1.7 Offer

bid, proposal or quotation.

1.8 Offeror

a vendor who responds to a Solicitation.

1.9 Procurement Officer

the person, or his or her designee, duly authorized by the State to enter into and administer Contracts and make written determinations with respect to the Contract.

1.10 Solicitation

an Invitation for Bids ('IFB'), a Request for Proposals ('RFP'), or a Request for Quotations ('RFQ').

1.11 Solicitation Amendment

a written document that is signed by the Procurement Officer and issued for the purpose of making changes to the Solicitation.

1.12 Subcontract

means any Contract, express or implied, between the Contractor and another party or between a subcontractor and another party delegating or assigning, in whole or in part, the making or furnishing of any material or any service required for the performance of the Contract.

1.13 State

the State of Arizona and Department or Agency of the State that executes the Contract.

2 Inquiries

Inquiries

2.1 Duty to Examine

It is the responsibility of each Offeror to examine the entire Solicitation, seek clarification in writing (Inquiries), and examine its' Offer for accuracy before submitting the Offer. Lack of care in preparing an Offer shall not be grounds for modifying or withdrawing the Offer after the Offer due date and time, nor shall it give rise to any Contract claim.

2.2 Solicitation Contact Person

Any inquiry related to a Solicitation, including any requests for or inquiries regarding standards referenced in the Solicitation, shall be directed solely to the Solicitation contact person. The Offeror shall not contact or direct inquiries concerning this Solicitation to any other State employee unless the Solicitation specifically identifies a person other than the Solicitation contact person as a contact.

2.3 Submission of Inquiries

The Procurement Officer or the person identified in the Solicitation as the contact for inquiries may except at the Pre-Offer Conference, require that an inquiry be submitted in writing. Any inquiry related to a Solicitation shall refer to the appropriate Solicitation number, page and paragraph. Do not place the Solicitation number on the outside of the envelope containing that inquiry, since it may then be identified as an Offer and not be opened until after the Offer due date and time. The State shall consider the relevancy of the inquiry but is not required to respond in writing.

2.4 Timeliness

Any inquiry or exception to the solicitation shall be submitted as soon as possible and should be submitted at least seven days before the Offer due date and time for review and determination by the State. Failure to do so may result in the inquiry not being considered for a Solicitation Amendment.

2.5 No Right to Rely on Verbal Responses

An offeror shall not rely on verbal responses to inquiries. A verbal reply to an inquiry does not constitute a modification of the

solicitation.

2.6 Solicitation Amendments

The Solicitation shall only be modified by a Solicitation Amendment.

2.7 Pre-Offer Conference

If a pre-Offer conference has been scheduled under this Solicitation, the date, time and location shall appear on the Solicitation cover sheet or elsewhere in the Solicitation. Offerors should raise any questions about the Solicitation or the procurement at that time. An Offeror may not rely on any verbal responses to questions at the conference. Material issues raised at the conference that result in changes to the Solicitation shall be answered solely through a written Solicitation Amendment.

2.8 Persons With Disabilities

Persons with a disability may request a reasonable accommodation, such as a sign language interpreter, by contacting the Solicitation contact person. Requests shall be made as early as possible to allow time to arrange the accommodation.

3 Offer Preparation

Offer Preparation

3.1 Forms: No Facsimile, Telegraphic or Electronic Mail Offers

Telegraphic or Electronic Mail Offers. An Offer shall be submitted either on the forms provided in this Solicitation or their substantial equivalent. Any substitute document for the forms provided in this Solicitation must be legible and contain the same information requested on the forms, unless the solicitation indicates otherwise. A facsimile, telegraphic, mailgram or electronic mail Offer shall be rejected if submitted in response to requests for proposals or invitations for bids, unless the solicitation indicates otherwise.

3.2 Typed or Ink; Corrections

The Offer shall be typed or in ink. Erasures, interlineations or other modifications in the Offer shall be initialed in ink by the person signing the Offer. Modifications shall not be permitted after Offers have been opened except as otherwise provided under applicable law.

3.3 Evidence of Intent to be Bound

The Offer and Acceptance form within the Solicitation shall be submitted with the Offer and shall include a signature (or acknowledgement for electronic submissions, when authorized) by a person authorized to sign the Offer. The signature shall signify the Offeror's intent to be bound by the Offer and the terms of the Solicitation and that the information provided is true, accurate and complete. Failure to submit verifiable evidence of an Intent to be bound, such as an original signature, shall result in rejection of the Offer.

3.4 Exceptions to Terms and Conditions

All exceptions included with the Offer shall be submitted in a clearly identified separate section of the Offer in which the Offeror clearly identifies the specific paragraphs of the Solicitation where the exceptions occur. Any exceptions not included in such a section shall be without force and effect in any resulting Contract unless such exception is specifically accepted by the Procurement Officer in a written statement. The Offeror's preprinted or standard terms will not be considered by the State as a part of any resulting Contract.

i. Invitation for Bids. An Offer that takes exception to a material requirement of any part of the Solicitation, including terms and conditions, shall be rejected. [ALL]

ii. Request for Proposals. All exceptions that are contained in the Offer may negatively affect the State's proposal evaluation based on the evaluation criteria stated in the Solicitation or result in rejection of the Offer. An offer that takes exception to any material requirement of the solicitation may be rejected.

3.5 Subcontracts

Offeror shall clearly list any proposed subcontractors and the subcontractor's proposed responsibilities in the Offer.

3.6 Cost of Offer Preparation

The State will not reimburse any Offeror the cost of responding to a Solicitation.

3.7 Solicitation Amendments

Each Solicitation Amendment shall be signed with an original signature by the person signing the Offer, and shall be submitted no later than the Offer due date and time. Failure to return a signed (or acknowledgment for electronic submission, when authorized) copy of a Solicitation Amendment may result in rejection of the Offer.

3.8 Federal Excise Tax

The State of Arizona is exempt from certain Federal Excise Tax on manufactured goods. Exemption Certificates will be provided by the State.

3.9 Provision of Tax Identification Numbers

Offerors are required to provide their Arizona Transaction Privilege Tax Number and/or Federal Tax Identification number in the space provided on the Offer and Acceptance Form.

3.10 Employee Identification

Offeror agrees to provide an employee identification number or social security number to the State for the purposes of reporting to appropriate taxing authorities, monies paid by the State under this contract. If the federal identifier of the offeror is a social security number, this number is being requested solely for tax reporting purposes and will be shared only with

appropriate state and federal officials. This submission is mandatory under 26 U.S.C. § 6041A.

3.11 Identification of Taxes in Offer

The State of Arizona is subject to all applicable state and local transaction privilege taxes. All applicable taxes shall be identified as a separate item offered in the solicitation when applicable, the tax rate and amount shall be identified on the price sheet. At all times, payment of taxes and the determination of applicable taxes are the sole responsibility of the contractor.

3.12 Disclosure

If the firm, business or person submitting this Offer has been debarred, suspended or otherwise lawfully precluded from participating in any public procurement activity, including being disapproved as a subcontractor with any Federal, state or local government, or if any such preclusion from participation from any public procurement activity is currently pending, the Offeror shall fully explain the circumstances relating to the preclusion or proposed preclusion in the Offer. The Offeror shall include a letter with its Offer setting forth the name and address of the governmental unit, the effective date of this suspension or debarment, the duration of the suspension or debarment, and the relevant circumstances relating to the suspension or debarment. If suspension or debarment is currently pending, a detailed description of all relevant circumstances including the details enumerated above shall be provided.

3.13 Solicitation Order of Precedence

In the event of a conflict in the provisions of this Solicitation, the following shall prevail in the order set forth below:

- 3.13.1 Special Terms and Conditions;
- 3.13.2 Uniform Terms and Conditions;
- 3.13.3 Statement or Scope of Work;
- 3.13.4 Specifications;
- 3.13.5 Attachments;
- 3.13.6 Exhibits;
- 3.13.7 Special Instructions to Offerors;
- 3.13.8 Uniform Instructions to Offerors.
- 3.13.9 Other documents referenced or included in the Solicitation.

3.14 Delivery

Unless stated otherwise in the Solicitation, all prices shall be F.O.B. Destination and shall include all freight, delivery and unloading at the destination(s).

4 Submission of Offer

Submission of Offer

4.1 Sealed Envelope or Package

Except for electronic submissions, when authorized, each Offer shall be submitted to the submittal location identified in this Solicitation. Offers should be submitted in a sealed envelope or container. The envelope or container should be clearly identified with name of the Offeror and Solicitation number. The State may open envelopes or containers to identify contents if the envelope or container is not clearly identified.

4.2 Offer Amendment or Withdrawal

An Offer may not be amended or withdrawn after the Offer due date and time except as otherwise provided under applicable law.

4.3 Public Record

All Offers submitted and opened are public records and must be retained by the State. Offers shall be open to public inspection after Contract award, except for such Offers deemed to be confidential by the State. If an Offeror believes that information in its Offer should remain confidential, it shall indicate as confidential the specific information and submit a statement with its Offer detailing the reasons that the information should not be disclosed. Such reasons shall include the specific harm or prejudice which may arise. The State shall determine whether the identified information is confidential pursuant to the Arizona Procurement Code.

4.4 Non-collusion, Employment, and Services

By signing the Offer and Acceptance Form or other official contract form, the Offeror certifies that:

4.4.1 i. The Offeror did not engage in collusion or other anti-competitive practices in connection with the preparation or submission of its Offer; and

4.4.2 ii. The Offeror does not discriminate against any employee or applicant for employment or person to whom it provides services because of race, color, religion, sex, national origin, or disability, and that it complies with all applicable Federal, state and local laws and executive orders regarding employment.

5 Evaluation

Evaluation

- 1. Conformity to Scope and Specifications
- 2. Cost
- 3. Capacity of Offeror

5.1 Unit Price Prevails

In the case of discrepancy between the unit price or rate and the extension of that unit price or rate, the unit price or rate shall govern.

5.2 Taxes

Arizona transaction privilege and use taxes shall not be considered for evaluation.

5.3 Late Offers

An Offer submitted after the exact Offer due date and time shall be rejected.

5.4 Disqualification

An Offeror (including any of its' principals) who is currently debarred, suspended or otherwise lawfully prohibited from any public procurement activity shall have its offer rejected.

5.5 Offer Acceptance Period

An Offeror submitting an Offer under this Solicitation shall hold its Offer open for the number of days from the Offer due date that is stated in the Solicitation. If the Solicitation does not specifically state a number of days for Offer acceptance, the number of days shall be one hundred-twenty (120). If a Best and Final Offer is requested pursuant to a Request for Proposals, an Offeror shall hold its Offer open for one hundred-twenty (120) days from the Best and Final Offer due date.

5.6 Waiver and Rejection Rights

Notwithstanding any other provision of the Solicitation, the State reserves the right to:

5.6.1 Waive any minor informality;

5.6.2 Reject any and all Offers or portions thereof; or

5.6.3 Cancel the Solicitation.

6 Award

Award

6.1 Number or Types of Awards

The State reserves the right to make multiple awards or to award a Contract by individual line items or alternatives, by group of line items or alternatives, or to make an aggregate award, or regional awards, whichever is most advantageous to the State. If the Procurement Officer determines that an aggregate award to one Offeror is not in the State's best interest, 'all or none' Offers shall be rejected.

6.2 Contract Inception

An Offer does not constitute a Contract nor does it confer any rights on the Offeror to the award of a Contract. A Contract is not created until the Offer is accepted in writing by the Procurement Officer's signature on the Offer and Acceptance Form. A notice of award or of the intent to award shall not constitute acceptance of the Offer.

6.3 Effective Date

The effective date of this Contract shall be the date that the Procurement Officer signs the Offer and Acceptance form or other official contract form, unless another date is specifically stated in the Contract.

7 Protests

A protest shall comply with and be resolved according to Arizona Revised Statutes Title 41, Chapter 23, Article 9 and rules adopted thereunder. Protests shall be in writing and be filed with both the Procurement Officer of the purchasing agency and with the State Procurement Administrator. A protest of a Solicitation shall be received by the Procurement Officer before the Offer due date. A protest of a proposed award or of an award shall be filed within ten (10) days after the protester knows or should have known the basis of the protest. A protest shall include:

7.1 The name, address and telephone number of the protester;

7.2 The signature of the protester or its representative;

7.3 Identification of the purchasing agency and the Solicitation or Contract number;

7.4 A detailed statement of the legal and factual grounds of the protest including copies of relevant documents; and

7.5 The form of relief requested.

8 Comments Welcome

The State Procurement Office periodically reviews the Uniform Instructions to Offerors and welcomes any comments you may have. Please submit your comments to: State Procurement Administrator, State Procurement Office, 100 North 15th Avenue, Suite 104, Phoenix, Arizona, 85007.

Uniform Terms and Conditions

- 1 Definition of Terms**
As used in this Solicitation and any resulting Contract, the terms listed below are defined as follows:
- 1.1 Attachment**
any item the Solicitation requires the Offeror to submit as part of the Offer.
- 1.2 Contract**
the combination of the Solicitation, including the Uniform and Special Instructions to Offerors, the Uniform and Special Terms and Conditions, and the Specifications and Statement or Scope of Work; the Offer and any Best and Final Offers; and any Solicitation Amendments or Contract Amendments.
- 1.3 Contract Amendment**
a written document signed by the Procurement Officer that is issued for the purpose of making changes in the Contract.
- 1.4 Contractor**
any person who has a Contract with the State.
- 1.5 Days**
calendar days unless otherwise specified
- 1.6 Exhibit**
any item labeled as an Exhibit in the Solicitation or placed in the Exhibits section of the Solicitation.
- 1.7 Gratuity**
a payment, loan, subscription, advance, deposit of money, services, or anything of more than nominal value, present or promised, unless consideration of substantially equal or greater value is received.
- 1.8 Materials**
all property, including equipment, supplies, printing, insurance and leases of property but does not include land, a permanent interest in land or real property or leasing space.
- 1.9 Procurement Officer**
the person, or his or her designee, duly authorized by the State to enter into and administer Contracts and make written determinations with respect to the Contract.
- 1.10 Services**
the furnishing of labor, time or effort by a contractor or subcontractor which does not involve the delivery of a specific end product other than required reports and performance, but does not include employment agreements or collective bargaining agreements.
- 1.11 Subcontract**
any Contract, express or implied, between the Contractor and another party or between a subcontractor and another party delegating or assigning, in whole or in part, the making or furnishing of any material or any service required for the performance of the Contract.
- 1.12 State**
the State of Arizona and Department or Agency of the State that executes the Contract.
- 1.13 State Fiscal Year**
the period beginning with July 1 and ending June 30,
- 2 Contract Interpretation**
Contract Interpretation
- 2.1 Arizona Law**
The Arizona law applies to this Contract including, where applicable, the Uniform Commercial Code as adopted by the State of Arizona and the Arizona Procurement Code, Arizona Revised Statutes (A.R.S.) Title 41, Chapter 23, and its implementing rules, Arizona Administrative Code (A.A.C.) Title 2, Chapter 7.
- 2.2 Implied Contract Terms**
Each provision of law and any terms required by law to be in this Contract are a part of this Contract as if fully stated in it.
- 2.3 Contract Order of Precedence**
In the event of a conflict in the provisions of the Contract, as accepted by the State and as they may be amended, the following shall prevail in the order set forth below:
- 2.3.1 Special Terms and Conditions;
 - 2.3.2 Uniform Terms and Conditions;
 - 2.3.3 Statement or Scope of Work;
 - 2.3.4 Specifications;
 - 2.3.5 Attachments;
 - 2.3.6 Exhibits;
 - 2.3.7 Documents referenced or included in the Solicitation.
- 2.4 Relationship of Parties**

The Contractor under this Contract is an independent Contractor. Neither party to this Contract shall be deemed to be the employee or agent of the other party to the Contract.

2.5 Severability

The provisions of this Contract are severable. Any term or condition deemed illegal or invalid shall not affect any other term or condition of the Contract.

2.6 No Parole Evidence

This Contract is intended by the parties as a final and complete expression of their agreement. No course of prior dealings between the parties and no usage of the trade shall supplement or explain any terms used in this document and no other understanding either oral or in writing shall be binding.

2.7 No Waiver

Either party's failure to insist on strict performance of any term or condition of the Contract shall not be deemed a waiver of that term or condition even if the party accepting or acquiescing in the nonconforming performance knows of the nature of the performance and fails to object to it.

3 Contract Administration and Operation

Contract Administration and Operation.

3.1 Records

Under A.R.S. § 35-214 and § 35-215, the Contractor shall retain and shall contractually require each subcontractor to retain all data and other 'records' relating to the acquisition and performance of the Contract for a period of five years after the completion of the Contract. All records shall be subject to inspection and audit by the State at reasonable times. Upon request, the Contractor shall produce a legible copy of any or all such records.

3.2 Non-Discrimination

The Contractor shall comply with State Executive Order No. 99-4 and all other applicable Federal and State laws, rules and regulations, including the Americans with Disabilities Act.

3.3 Audit

Pursuant to ARS § 35-214, at any time during the term of this Contract and five (5) years thereafter, the Contractor's or any subcontractor's books and records shall be subject to audit by the State and, where applicable, the Federal Government, to the extent that the books and records relate to the performance of the Contract or Subcontract.

3.4 Facilities Inspection and Materials Testing

The Contractor agrees to permit access to its facilities, subcontractor facilities and the Contractor's processes or services, at reasonable times for inspection of the facilities or materials covered under this Contract. The State shall also have the right to test, at its own cost, the materials to be supplied under this Contract. Neither inspection of the Contractor's facilities nor materials testing shall constitute final acceptance of the materials or services. If the State determines non-compliance of the materials, the Contractor shall be responsible for the payment of all costs incurred by the State for testing and inspection.

3.5 Notices

Notices to the Contractor required by this Contract shall be made by the State to the person indicated on the Offer and Acceptance form submitted by the Contractor unless otherwise stated in the Contract. Notices to the State required by the Contract shall be made by the Contractor to the Solicitation Contact Person indicated on the Solicitation cover sheet, unless otherwise stated in the Contract. An authorized Procurement Officer and an authorized Contractor representative may change their respective person to whom notice shall be given by written notice to the other and an amendment to the Contract shall not be necessary.

3.6 Advertising, Publishing and Promotion of Contract

The Contractor shall not use, advertise or promote information for commercial benefit concerning this Contract without the prior written approval of the Procurement Officer.

3.7 Property of the State

Any materials, including reports, computer programs and other deliverables, created under this Contract are the sole property of the State. The Contractor is not entitled to a patent or copyright on those materials and may not transfer the patent or copyright to anyone else. The Contractor shall not use or release these materials without the prior written consent of the State.

3.8 Ownership of Intellectual Property

Any and all intellectual property, including but not limited to copyright, invention, trademark, tradename, service mark, and/or trade secrets created or conceived pursuant to or as a result of this contract and any related subcontract ('Intellectual Property'), shall be work made for hire and the State shall be considered the creator of such Intellectual Property. The agency, department, division, board or commission of the State of Arizona requesting the issuance of this contract shall own (for and on behalf of the State) the entire right, title and interest to the Intellectual Property throughout the world. Contractor shall notify the State, within thirty (30) days, of the creation of any intellectual Property by it or its subcontractor(s).

Contractor, on behalf of itself and any subcontractor (s), agrees to execute any and all document(s) necessary to assure ownership of the Intellectual Property vests in the State and shall take no affirmative actions that might have the effect of vesting all or part of the Intellectual Property in any entity other than the State. The Intellectual Property shall not be disclosed by contractor or its subcontractor(s) to any entity not the State without the express written authorization of the agency, department, division, board or commission of the State of Arizona requesting the issuance of this contract.

4 Costs and Payments

Costs and Payments

4.1 Payments

Payments shall comply with the requirements of A.R.S. Titles 35 and 41, Net 30 days. Upon receipt and acceptance of goods or services, the Contractor shall submit a complete and accurate invoice for payment from the State within thirty (30) days.

4.2 Delivery

Unless stated otherwise in the Contract, all prices shall be F.O.B. Destination and shall include all freight delivery and unloading at the destination.

4.3 Applicable Taxes

4.3.1 Payment of Taxes. The Contractor shall be responsible for paying all applicable taxes.

4.3.2 State and Local Transaction Privilege Taxes. The State of Arizona is subject to all applicable state and local transaction privilege taxes. Transaction privilege taxes apply to the sale and are the responsibility of the seller to remit. Failure to collect such taxes from the buyer does not relieve the seller from its obligation to remit taxes.

4.3.3 Tax Indemnification. Contractor and all subcontractors shall pay all Federal, state and local taxes applicable to its operation and any persons employed by the Contractor. Contractor shall, and require all subcontractors to hold the State harmless from any responsibility for taxes, damages and interest, if applicable, contributions required under Federal, and/or state and local laws and regulations and any other costs including transaction privilege taxes, unemployment compensation insurance, Social Security and Worker's Compensation.

4.3.4 IRS W9 Form. In order to receive payment the Contractor shall have a current I.R.S. W9 Form on file with the State of Arizona, unless not required by law.

4.4 Availability of Funds for the Next State Fiscal Year

Funds may not presently be available for performance under this Contract beyond the current state fiscal year. No legal liability on the part of the State for any payment may arise under this Contract beyond the current state fiscal year until funds are made available for performance of this Contract.

4.5 Availability of Funds for the Current State Fiscal Year

Should the State Legislature enter back into session and reduce the appropriations or for any reason and these goods or services are not funded, the State may take any of the following actions:

4.5.1 Accept a decrease in price offered by the contractor;

4.5.2 Cancel the Contract

4.5.3 Cancel the contract and re-solicit the requirements.

5 Contract Changes

Contract Changes

5.1 Amendments

This Contract is issued under the authority of the Procurement Officer who signed this Contract. The Contract may be modified only through a Contract Amendment within the scope of the Contract. Changes to the Contract, including the addition of work or materials, the revision of payment terms, or the substitution of work or materials, directed by a person who is not specifically authorized by the procurement officer in writing or made unilaterally by the Contractor are violations of the Contract and of applicable law. Such changes, including unauthorized written Contract Amendments shall be void and without effect, and the Contractor shall not be entitled to any claim under this Contract based on those changes.

5.2 Subcontracts

The Contractor shall not enter into any Subcontract under this Contract for the performance of this contract without the advance written approval of the Procurement Officer. The Contractor shall clearly list any proposed subcontractors and the subcontractor's proposed responsibilities. The Subcontract shall incorporate by reference the terms and conditions of this Contract.

5.3 Assignment and Delegation

The Contractor shall not assign any right nor delegate any duty under this Contract without the prior written approval of the Procurement Officer. The State shall not unreasonably withhold approval.

6 Risk and Liability

Risk and Liability

6.1 Risk of Loss

The Contractor shall bear all loss of conforming material covered under this Contract until received by authorized personnel at the location designated in the purchase order or Contract. Mere receipt does not constitute final acceptance. The risk of loss for nonconforming materials shall remain with the Contractor regardless of receipt.

6.2 Indemnification

6.2.1 Contractor/Vendor Indemnification (Not Public Agency) The parties to this contract agree that the State of Arizona, its' departments, agencies, boards and commissions shall be indemnified and held harmless by the contractor for the vicarious liability of the State as a result of entering into this contract. However, the parties further agree that the State of Arizona, its' departments, agencies, boards and commissions shall be responsible for its' own negligence. Each party to this contract is responsible for its' own negligence.

6.2.2 Public Agency Language Only Each party (as 'indemnitor') agrees to indemnify, defend, and hold harmless the other party (as 'indemnitee') from and against any and all claims, losses, liability, costs, or expenses (including reasonable

attorney's fees) (hereinafter collectively referred to as 'claims') arising out of bodily injury of any person (including death) or property damage but only to the extent that such claims which result in vicarious/derivative liability to the indemnitee, are caused by the act, omission, negligence, misconduct, or other fault of the indemnitor, its' officers, officials, agents, employees, or volunteers.'

6.3 Indemnification – Patent and Copyright

The Contractor shall indemnify and hold harmless the State against any liability, including costs and expenses, for infringement of any patent, trademark or copyright arising out of Contract performance or use by the State of materials furnished or work performed under this Contract. The State shall reasonably notify the Contractor of any claim for which it may be liable under this paragraph. If the contractor is insured pursuant to A.R.S. § 41-621 and § 35-154, this section shall not apply.

6.4 Force Majeure

6.4.1 Except for payment of sums due, neither party shall be liable to the other nor deemed in default under this Contract if and to the extent that such party's performance of this Contract is prevented by reason of force majeure. The term 'force majeure' means an occurrence that is beyond the control of the party affected and occurs without its fault or negligence. Without limiting the foregoing, force majeure includes acts of God; acts of the public enemy; war; riots; strikes; mobilization; labor disputes; civil disorders; fire; flood; lockouts; injunctions–intervention–acts; or failures or refusals to act by government authority; and other similar occurrences beyond the control of the party declaring force majeure which such party is unable to prevent by exercising reasonable diligence.

6.4.2 Force Majeure shall not include the following occurrences:

6.4.2.1 Late delivery of equipment or materials caused by congestion at a manufacturer's plant or elsewhere, or an oversold condition of the market;

6.4.2.2 Late performance by a subcontractor unless the delay arises out of a force majeure occurrence in accordance with this force majeure term and condition; or

6.4.2.3 Inability of either the Contractor or any subcontractor to acquire or maintain any required insurance, bonds, licenses or permits.

6.4.3 If either party is delayed at any time in the progress of the work by force majeure, the delayed party shall notify the other party in writing of such delay, as soon as is practicable and no later than the following working day, of the commencement thereof and shall specify the causes of such delay in such notice. Such notice shall be delivered or mailed certified–return receipt and shall make a specific reference to this article, thereby invoking its provisions. The delayed party shall cause such delay to cease as soon as practicable and shall notify the other party in writing when it has done so. The time of completion shall be extended by Contract Amendment for a period of time equal to the time that results or effects of such delay prevent the delayed party from performing in accordance with this Contract.

6.4.4 Any delay or failure in performance by either party hereto shall not constitute default hereunder or give rise to any claim for damages or loss of anticipated profits if, and to the extent that such delay or failure is caused by force majeure.

6.5 Third Party Antitrust Violations

The Contractor assigns to the State any claim for overcharges resulting from antitrust violations to the extent that those violations concern materials or services supplied by third parties to the Contractor, toward fulfillment of this Contract.

7 Warranties

Warranties

7.1 Liens

The Contractor warrants that the materials supplied under this Contract are free of liens and shall remain free of liens.

7.2 Quality

Unless otherwise modified elsewhere in these terms and conditions, the Contractor warrants that, for one year after acceptance by the State of the materials, they shall be:

7.2.1 Of a quality to pass without objection in the trade under the Contract description;

7.2.2 Fit for the intended purposes for which the materials are used;

7.2.3 Within the variations permitted by the Contract and are of even kind, quantity, and quality within each unit and among all units;

7.2.4 Adequately contained, packaged and marked as the Contract may require; and

7.2.5 Conform to the written promises or affirmations of fact made by the Contractor.

7.3 Fitness

The Contractor warrants that any material supplied to the State shall fully conform to all requirements of the Contract and all representations of the Contractor, and shall be fit for all purposes and uses required by the Contract.

7.4 Inspection/Testing

The warranties set forth in subparagraphs 7.1 through 7.3 of this paragraph are not affected by inspection or testing of or payment for the materials by the State.

7.5 Year 2000

7.5.1 Notwithstanding any other warranty or disclaimer of warranty in this Contract, the Contractor warrants that all products delivered and all services rendered under this Contract shall comply in all respects to performance and delivery requirements of the specifications and shall not be adversely affected by any date-related data Year 2000 issues. This warranty shall survive the expiration or termination of this Contract. In addition, the defense of force majeure shall not apply to the Contractor's failure to perform specification requirements as a result of any date-related data Year 2000 issues.

7.5.2 Additionally, notwithstanding any other warranty or disclaimer of warranty in this Contract, the Contractor warrants that each hardware, software, and firmware product delivered under this Contract shall be able to accurately process date/time data (including but not limited to calculation, comparing, and sequencing) from, into, and between the twentieth and twenty-first centuries, and the years 1999 and 2000 and leap year calculations, to the extent that other information technology utilized by the State in combination with the information technology being acquired under this Contract properly exchanges date-time data with it. If this Contract requires that the information technology products being acquired perform as a system, or that the information technology products being acquired perform as a system in combination with other State information technology, then this warranty shall apply to the acquired products as a system. The remedies available to the State for breach of this warranty shall include, but shall not be limited to, repair and replacement of the information technology products delivered under this Contract. In addition, the defense of force majeure shall not apply to the failure of the Contractor to perform any specification requirements as a result of any date-related data Year 2000 issues.

7.6 Compliance With Applicable Laws

The materials and services supplied under this Contract shall comply with all applicable Federal, state and local laws, and the Contractor shall maintain all applicable license and permit requirements.

7.7 Survival of Rights and Obligations after Contract Expiration or Termination

7.7.1 Contractor's Representations and Warranties. All representations and warranties made by the Contractor under this Contract shall survive the expiration or termination hereof. In addition, the parties hereto acknowledge that pursuant to A.R.S. § 12-510, except as provided in A.R.S. § 12-529, the State is not subject to or barred by any limitations of actions prescribed in A.R.S., Title 12, Chapter 5.

7.7.2 Purchase Orders. The Contractor shall, in accordance with all terms and conditions of the Contract, fully perform and shall be obligated to comply with all purchase orders received by the Contractor prior to the expiration or termination hereof, unless otherwise directed in writing by the Procurement Officer, including, without limitation, all purchase orders received prior to but not fully performed and satisfied at the expiration or termination of this Contract.

8 State's Contractual Remedies

State's Contractual Remedies

8.1 Right to Assurance

If the State in good faith has reason to believe that the Contractor does not intend to, or is unable to perform or continue performing under this Contract, the Procurement Officer may demand in writing that the Contractor give a written assurance of intent to perform. Failure by the Contractor to provide written assurance within the number of Days specified in the demand may, at the State's option, be the basis for terminating the Contract under the Uniform Terms and Conditions or other rights and remedies available by law or provided by the contract.

8.2 Stop Work Order

8.2.1 The State may, at any time, by written order to the Contractor, require the Contractor to stop all or any part, of the work called for by this Contract for period(s) of days indicated by the State after the order is delivered to the Contractor. The order shall be specifically identified as a stop work order issued under this clause. Upon receipt of the order, the Contractor shall immediately comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage.

8.2.2 If a stop work order issued under this clause is canceled or the period of the order or any extension expires, the Contractor shall resume work. The Procurement Officer shall make an equitable adjustment in the delivery schedule or Contract price, or both, and the Contract shall be amended in writing accordingly.

8.3 Non-exclusive Remedies

The rights and the remedies of the State under this Contract are not exclusive.

8.4 Nonconforming Tender

Materials or services supplied under this Contract shall fully comply with the Contract. The delivery of materials or services or a portion of the materials or services that do not fully comply constitutes a breach of contract. On delivery of nonconforming materials or services, the State may terminate the Contract for default under applicable termination clauses in the Contract, exercise any of its rights and remedies under the Uniform Commercial Code, or pursue any other right or

remedy available to it.

8.5 Right of Offset

The State shall be entitled to offset against any sums due the Contractor, any expenses or costs incurred by the State, or damages assessed by the State concerning the Contractor's non-conforming performance or failure to perform the Contract, including expenses, costs and damages described in the Uniform Terms and Conditions.

9 Contract Termination

Contract Termination

9.1 Cancellation for Conflict of Interest

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

9.2 Gratuities

The State may, by written notice, terminate this Contract, in whole or in part, if the State determines that employment or a Gratuity was offered or made by the Contractor or a representative of the Contractor to any officer or employee of the State for the purpose of influencing the outcome of the procurement or securing the Contract, an amendment to the Contract, or favorable treatment concerning the Contract, including the making of any determination or decision about contract performance. The State, 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 Contractor.

9.3 Suspension or Debarment

The State may, by written notice to the Contractor, immediately terminate this Contract if the State determines that the Contractor has been debarred, suspended or otherwise lawfully prohibited from participating in any public procurement activity, including but not limited to, being disapproved as a subcontractor of any public procurement unit or other governmental body. Submittal of an offer or execution of a contract shall attest that the contractor is not currently suspended or debarred. If the contractor becomes suspended or debarred, the contractor shall immediately notify the State.

9.4 Termination for Convenience

The State reserves the right to terminate the Contract, in whole or in part at any time, when in the best interests of the State without penalty or recourse. Upon receipt of the written notice, the Contractor shall stop all work, as directed in the notice, notify all subcontractors of the effective date of the termination and minimize all further costs to the State. In the event of termination under this paragraph, all documents, data and reports prepared by the Contractor under the Contract shall become the property of and be delivered to the State upon demand. The Contractor shall be entitled to receive just and equitable compensation for work in progress, work completed and materials accepted before the effective date of the termination. The cost principles and procedures provided in A.A.C. R2-7-701 shall apply.

9.5 Termination for Default

9.5.1 In addition to the rights reserved in the contract, the State may terminate the Contract in whole or in part due to the failure of the Contractor to comply with any term or condition of the Contract, to acquire and maintain all required insurance policies, bonds, licenses and permits, or to make satisfactory progress in performing the Contract. The Procurement Officer shall provide written notice of the termination and the reasons for it to the Contractor.

9.5.2 Upon termination under this paragraph, all goods, materials, documents, data and reports prepared by the Contractor under the Contract shall become the property of and be delivered to the State on demand.

9.5.3 The State may, upon termination of this Contract, procure, on terms and in the manner that it deems appropriate, materials or services to replace those under this Contract. The Contractor shall be liable to the State for any excess costs incurred by the State in procuring materials or services in substitution for those due from the Contractor.

9.6 Continuation of Performance Through Termination

The Contractor shall continue to perform, in accordance with the requirements of the Contract, up to the date of termination, as directed in the termination notice.

10 Contract Claims

All contract claims or controversies under this Contract shall be resolved according to A.R.S. Title 41, Chapter 23, Article 9, and rules adopted thereunder.

11 Arbitration

The parties to this Contract agree to resolve all disputes arising out of or relating to this contract through arbitration, after exhausting applicable administrative review, to the extent required by A.R.S. § 12-1518, except as may be required by other applicable statutes (Title 41).

Contract
Solicitation # AD050017-A5

Offer

Tax Information

Arizona Transaction (Sales) Privilege Tax License No. 07041256P
Federal Employer Identification No. XXXXXXXXXX

Location Information

Supplier Number: 6
Company Name: Motorola
Address: 2501 South Price Road, G2150
Chandler, AZ 85248

Signature

Name: Blair Quaggan Date: 2/16/05 21:29:14
Title: Regional Manager, Sales & Marketing
Signature:

Blair Quaggan

Certification

Acceptance

Award Date TBD

Contract
Solicitation # AD050017-A5

Line Items								
LI #	CM Code # CM Code Item #	Commodity Code Description Commodity Code Item Description	Manufacturer	Pricing	Qty	%	Unit Price	Ext Price
1	0725-0074 0725-0074-0010	Two-Way Radio, Portable, Including Vehicle Radio Relay Systems Top-Line, 100W, VHF Mobile Radio; Trunk Mount; Digital Conventional.	Motorola XTL5000 110W, W5, Enh. Audio, Key Mnt.	FP	1		\$3,494.31	\$3,494.31



MOTOROLA

MOTOROLA SOLUTIONS, INC.
1301 E. Algonquin Road
Schaumburg, IL 60196

Visit our website at: www.motorola.com

INVOICE

Page 1 of 1

TOTAL INVOICE AMOUNT:	\$547,649.82
MOTOROLA INVOICE NUMBER:	41164616
INVOICE DATE:	4/3/12
PAYMENT DUE:	5/3/12
CUSTOMER ACCOUNT NUMBER:	1012545127 0001
PURCHASE ORDER DATE:	
YOUR PURCHASE ORDER NUMBER:	231067

BILL TO TEMPE, CITY OF
53 PRIEST DR BLDG G

TEMPE AZ, 85281

For questions concerning this Invoice please contact
Motorola at: 1-800-247-2346

Motorola Federal Tax Id: 36-1115800

Payment Terms: NET 30 DAYS FROM INVOICE
Sales Order Number: 0602042760050

Invoice Detail

Item	MODEL #	QTY	Description	Unit Price	Amount
1		4	H49TGD9PW1 N APX700XE DIGITAL PORTABLE RADIO	\$7,290.00	\$29,160.00
2		69	H49TGD9PW1 N APX700XE DIGITAL PORTABLE RADIO SERIAL # 562CND0374-562CND0442	\$6,190.00	\$427,110.00
3		73	NNTN7624B IMPRES VEHICULAR CHARGER	\$261.13	\$19,062.49
4		8	NNTN7073B IMPRES CG MUD MACKINAW US/NA/CA/LA	\$904.50	\$7,236.00
5		13	PMLN5275B HEAVY DUTY HEADSET PMLN5275B	\$339.50	\$4,413.50
6		60	NNTN8203A IMPRES XE RSM, FM	\$234.50	\$14,070.00
7			TAXES		\$46,597.83
TOTAL					\$547,649.82

THIS INVOICE CREATED AT CUSTOMERS REQUEST
PRIOR TO SHIPMENT OF ALL EQUIPMENT
IF YOU HAVE ANY QUESTIONS REGARDING THIS INVOICE
PLEASE CONTACT PATTY RUDOLPHI (800)247-2346 AT EXT 4364
THANK YOU FOR CHOOSING MOTOROLA SOLUTIONS!

Detach here and return bottom portion with your payment.

INVOICE NUMBER CUSTOMER ACCOUNT NUMBER PAYMENT DUE
41164616 1012545127 5/3/12

Payment Coupon

Invoice Total	Amount Paid
\$547,649.82	

Please put your Invoice Number and your Customer Account Number
on your check for prompt processing.

TEMPE, CITY OF
53 PRIEST DR BLDG G
0
TEMPE AZ, 85281

Send Payment To:



MOTOROLA
MOTOROLA SOLUTIONS, INC.

13108 COLLECTIONS CENTER DRIVE
CHICAGO, IL 60693

Cost Listing

January 22, 2013

Qty	Description	Price	Total
6	H49TGD9PW1 N APX7000 DIGITAL PORTABLE RADIO	6,190.00	\$ 37,140.00
6	NNTN7624B Vehicle Chargers	261.50	1,569.00
6	NNTN82013A Remote Speaker Mic	234.50	1,407.00
		Tax	3,730.79
		Total	43,846.79
80% Grant Reimbursed			35,077.43
20% Non-Reimbursed			<u>\$ 8,769 *</u>

Non Grant Item

Qty	Description	Price	Total
6	Rugged Batteries	84.00	504.00
		Tax	46.87
Total Due to the City of Tempe			<u>\$ 9,320 *</u>

*Rounded to the nearest dollar

Serial Numbers for Motorola Radios to be transferred to Guadalupe FD

GUAD FD	562CND0382
GUAD FD	562CND0383
GUAD FD	562CND0384
GUAD FD	562CND0385
GUAD FD	562CND0386
GUAD FD	562CND0387

U.S. Department of Homeland Security
Washington, D.C. 20472



FEMA

Ms. Deborah Bair
City of Tempe Fire Department
P.O. Box 5002
Tempe, Arizona 85280-5002

Re: Grant No.EMW-2010-FR-00420

Dear Ms. Bair:

On behalf of the Federal Emergency Management Agency (FEMA) and the Department of Homeland Security (DHS), I am pleased to inform you that your grant application submitted under the FY 2010 Assistance to Firefighters Grant has been approved. FEMA's Grant Programs Directorate (GPD), in consultation with the U.S. Fire Administration (USFA), carries out the Federal responsibilities of administering your grant. The approved project costs total to \$462,494.00. The Federal share is 80 percent or \$369,996.00 of the approved amount and your share of the costs is 20 percent or \$92,498.00.

As part of your award package, you will find Grant Agreement Articles. Please make sure you read and understand the Articles as they outline the terms and conditions of your grant award. Maintain a copy of these documents for your official file. **You establish acceptance of the grant and Grant Agreement Articles when you request and receive any of the Federal grant funds awarded to you.** By accepting the grant, you agree not to deviate from the approved scope of work without prior written approval from FEMA.

If your SF 1199A has been reviewed and approved, you will be able to request payments online. Remember, you should request funds when you have an immediate cash need.

If you have any questions or concerns regarding the awards process or how to request your grant funds, please call the helpdesk at 1-866-274-0960.

A handwritten signature in cursive script that reads "Elizabeth M. Harman".

Elizabeth M. Harman
Assistant Administrator
Grant Programs Directorate



FEMA

U.S. Department of Homeland Security
Washington, D.C. 20472

AGREEMENT ARTICLES

ASSISTANCE TO FIREFIGHTERS GRANT PROGRAM - Operations and Safety program

GRANTEE: City of Tempe Fire Department

PROGRAM: Operations and Safety

AGREEMENT NUMBER: EMW-2010-FR-00420

AMENDMENT NUMBER:

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Article I - Project Description

The purpose of the Assistance to Firefighters Program is to protect the health and safety of the public and firefighting personnel against fire and fire-related hazards. After careful consideration, FEMA has determined that the grantee's project submitted as part of the grantee's application, and detailed in the project narrative as well as the request details section of the application - including budget information - is consistent with the program's purpose and worthy of award. Therefore, the grantee shall perform the work described in the approved grant application as itemized in the request details section of the application and further described in the grant application's narrative. These sections of the application are made a part of these grant agreement articles by reference. The grantee may not change or make any material deviations from the approved scope of work outlined in the above referenced sections of the application without prior written approval from FEMA.

Article II - Grantee Concurrence

By requesting and receiving Federal grant funds provided by this grant program, the grantee accepts and agrees to abide by the terms and conditions of the grant as set forth in this document and the documents identified below. By receiving funds under this grant, grantees agree that they will use the funds provided through the Fiscal Year 2010 Assistance to Firefighters Grant Program in accordance with these Articles of Agreement and the program guidelines provided in the Fiscal Year 2010 Assistance to Firefighters Grant program guidance. All documents submitted as part of the application are made a part of this agreement by reference.

Article III - Period of Performance

The period of performance shall be from **10-APR-11 to 09-APR-12**.

Article IV - Amount Awarded

The amount of the award is detailed on the Obligating Document for the Award attached to these articles. Following are the budgeted estimates for each object class of this grant (including Federal share plus grantee match):

Personnel	\$0.00
Fringe Benefits	\$0.00
Travel	\$0.00
Equipment	\$462,494.00
Supplies	\$0.00
Contractual	\$0.00
Construction	\$0.00
Other	\$0.00
Indirect Charges	\$0.00
Total	\$462,494.00

NEGOTIATION COMMENTS IF APPLICABLE (max 4000 characters)

The Program Office has made the following reductions to your grant:
 The approved cost of portable radios is 73 @ \$5,000, not 73 @ \$6740.
 The approved quantity of Vehicular Chargers are 73 @ \$312, not 25 @ \$312
 The approved quantity for Universal Carry Holders is 73 @ \$23, not 25 @ \$23.
 The approved quantity for Impress Remote Speaker Mics is 76 @ \$86, not 25 @ \$86.
 The shipping @ 5.0% is \$20,232
 The sales tax @ \$ 9.3% is 37,630
 Therefore, they have recommended the award at this level:
 Total Budget \$462,494
 Federal Share \$369,996
 Applicant Share \$92,498

Article V - Financial Guidelines

The grantee and any subgrantee shall comply with the most recent version of the Administrative Requirements, Cost Principles, and Audit Requirements. A non-exclusive list of regulations commonly applicable to FEMA grants are listed below:

A. Administrative Requirements

1. 44 CFR Part 13, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments
2. 2 CFR Part 215, Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Nonprofit Organizations (OMB Circular A-110)

B. Cost Principles

1. 2 CFR Part 225, Cost Principles for State, Local, and Indian Tribal Governments (OMB Circular A-87)
2. 2 CFR Part 220, Cost Principles for Educational Institutions (OMB Circular A-21)
3. 2 CFR Part 230, Cost Principles for Nonprofit Organizations (OMB Circular A-122)
4. Federal Acquisition Regulations (FAR), Part 31.2 Contract Cost Principles and Procedures, Contracts with Commercial Organizations

C. Audit Requirements

1. OMB Circular A-133, Audits of States, Local Governments, and Nonprofit Organizations

Article VI - Prohibition on Using Federal Funds

Recipient understands and agrees that it cannot use any federal funds, either directly or indirectly, in support of the enactment, repeal, modification or adoption of any law, regulation or policy, at any level of government, without the express prior written approval of FEMA.

Article VII - GPD Allocations

The recipient agrees that all allocations and use of funds under this grant will be in accordance with the FY 2010 Assistance to Firefighters Grant Program guidance and application kit.

Article VIII - Financial Reporting

Recipients of any AFG grants will be required to submit a semi-annual Federal Financial Report (FFR) via the automated system on the Standard Form 425. The FFR is intended to provide Federal agencies and grant recipients with a standard format and consistent reporting requirements throughout the government. The FFR, to be submitted using the online e-grant system, will be due semi-annually based on the calendar year beginning with the period after the award is made. Grant recipients will be required to submit a FFR throughout the entire period of performance of the grant.

The reporting periods for the FFR are January 1 through June 30 (Report due by July 31), and July 1 through December 31 (Report due by January 30).

At the end of the grant's period of performance, all grantees are required to produce a final report on how the grant funding was used and the benefits realized from the award. Grantees must submit a final financial report and a final performance report within 90 days after the end of the period of performance.

Article IX - FEMA Officials

Program Officer: Catherine Patterson is the Program Officer for the Assistance to Firefighters Grant Program. The Program Officer is responsible for the technical monitoring of the stages of work and technical performance of the activities described in the approved grant application.

Grants Assistance Officer: Natalie Romanoff is the Assistance Officer for this grant program. The Assistance Officer is the Federal official responsible for negotiating, administering, and executing all grant business matters.

Grants Management Division POC: The Grants Management Specialist shall be contacted to address all financial and administrative grant business matters for this award. If you have any questions regarding your grant please call ASK-GMD at 866-927-5646 to be directed to a specialist.

FEDERAL EMERGENCY MANAGEMENT AGENCY OBLIGATING DOCUMENT FOR AWARD/AMENDMENT						
1a. AGREEMENT NO: EMW-2010-FR-00420	2. AMENDMENT NO: 0	3. RECIPIENT NO: 86-6000262	4. TYPE OF ACTION AWARD	5. CONTROL NO: W494324N		
6. RECIPIENT NAME AND ADDRESS City of Tempe Fire Department 1400 E. Apache Blvd Tempe Arizona, 85281-5921		7. ISSUING OFFICE AND ADDRESS Grant Programs Directorate 500 C Street, S.W. Washington DC, 20528-7000 POC: Natalie Romanoff		8. PAYMENT OFFICE AND ADDRESS FEMA, Financial Services Branch 500 C Street, S.W., Room 723 Washington DC, 20472		
9. NAME OF RECIPIENT PROJECT OFFICER Deborah Bair		PHONE NO: 4808587220	10. NAME OF PROJECT COORDINATOR Catherine Patterson		PHONE NO: 1-866-274-0960	
11. EFFECTIVE DATE OF THIS ACTION 10-APR-11		12. METHOD OF PAYMENT SF-270	13. ASSISTANCE ARRANGEMENT Cost Sharing		14. PERFORMANCE PERIOD: From:10-APR-11 To:09-APR-12 Budget Period From:29-OCT-10 To:30-SEP-11	
15. DESCRIPTION OF ACTION a. (Indicate funding data for awards or financial changes)						
PROGRAM NAME/ ACRONYM	CFDA NO.	ACCOUNTING DATA (ACCS CODE) XXXX-XXX-XXXXXX-XXXXX-XXXX-XXXX-X	PRIOR TOTAL AWARD	AMOUNT AWARDED THIS ACTION + OR (-)	CURRENT TOTAL AWARD	CUMMULATIVE NON FEDERAL COMMITMENT
AFG	97.044	2011-MO-3120GF-25000000-4101-D	\$0.00	\$369,996.00	\$369,996.00	\$92,498.00
TOTALS			\$0.00	\$369,996.00	\$369,996.00	\$92,498.00
b. To describe changes other than funding data or financial changes, attach schedule and check here: N/A						
16a. FOR NON-DISASTER PROGRAMS, RECIPIENT IS REQUIRED TO SIGN AND RETURN THREE (3) COPIES OF THIS DOCUMENT TO FEMA (See Block 7 for address) Assistance to Firefighters Grant recipients are not required to sign and return copies of this document. However, recipients should print and keep a copy of this document for their records.						
16b. FOR DISASTER PROGRAMS, RECIPIENT IS NOT REQUIRED TO SIGN This assistance is subject to terms and conditions attached to this award notice or by incorporated reference in program legislation cited above.						
17. RECIPIENT SIGNATORY OFFICIAL (Name and Title) N/A					DATE N/A	
18. FEMA SIGNATORY OFFICIAL (Name and Title) Natalie Romanoff					DATE 01-APR-11	

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CITY OF TEMPE
REQUEST FOR COUNCIL ACTION

Council Meeting Date: 4/4/2013
Agenda Item: 5E3

ACTION: Adopt a resolution authorizing the Mayor to sign an intergovernmental agreement with the Regional Public Transportation Authority for dial-a-ride and related mobility services. (Resolution No. 2013.32)

FISCAL IMPACT: Net cost to Tempe is estimated to be \$295,210. Gross cost of Tempe's dial-a-ride and mobility programs is \$1,111,418. Funding sources include: Regional Proposition 400 funding (\$689,000 - 62%), federal grants (\$38,000 - 3%), fare revenue (\$89,000 - 8%), and Tempe local funds (\$295,000 - 27%). Funding for Tempe's local share is provided by the Transit fund in operating budget cost center 3914.

RECOMMENDATION: Approve Resolution No. 2013.32.

BACKGROUND INFORMATION: The five year intergovernmental agreement (FY 2013 – FY 2017) includes three distinct transportation programs along with a separate funding element, which will provide transportation choices to Tempe's seniors and residents with disabilities:

1. Dial-a-Ride Services (Local Contribution is \$241,988) – This service provides Tempe residents with city-wide and regional dial-a-ride services for Americans with Disabilities (ADA) certified users, non-ADA certified persons with disabilities and senior citizens. Fiscal year 2011-12 ridership was 29,592, at a cost of \$47.92 per trip. Tempe's estimated gross cost for dial-a-ride service in fiscal year 2012-13 is \$1,007,834, which is 37% lower than fiscal year 2011-12. This agreement reduces operating costs due to a recent competitive procurement for service, which established a brokerage type of service that capitalizes on use of existing regional resources and equipment across multiple sectors (i.e. private, public, non-profit). Under the new arrangement, the average cost per trip for the first six months of fiscal year 2012-2013 is \$25.88. Offsetting revenue includes: Proposition 400 funding for ADA eligible trips (\$676,904), fare revenue (\$76,742), and Tempe local funds (\$241,988).
2. Alternative Transportation Services (Local Contribution is \$53,222) – This Valley Metro program provides taxi coupons for seniors and persons with disabilities in the east valley. This agreement increases Tempe's annual local contribution to \$53,222 and is combined with \$38,062 from the Federal Transit Administration's New Freedom Grant Program and \$12,300 in passenger revenue. Participation by Tempe's residents continues to increase with 6,100 trips provided during fiscal year 2011-12 (a 32% increase over prior year) at a cost of \$16.59 per trip. The program offers Tempe seniors and persons with disabilities a convenient and cost-effective alternative to dial-a-ride.
3. Platinum Pass Program – The new ADA Platinum Pass program allows free use of fixed route bus and light rail for ADA certified Tempe residents. Participation in the ADA Platinum Pass Program reduces ADA operational costs by encouraging ADA certified passengers to use bus and rail service in-lieu of ADA dial-a-ride services. The total expense of \$12,200 is funded by Proposition 400 revenue.
4. Proposition 400 ADA Funding – This agreement stipulates that up to \$858,858 of regional Proposition 400 funding is allocated to Tempe for ADA eligible trips taken during fiscal year 2012-13. It is estimated that only \$676,904 will be needed based on anticipated demand.

ATTACHMENTS: Resolution and intergovernmental agreement.

STAFF CONTACT: Greg Jordan, Deputy Public Works Director, (480) 858-2094

Department Director: Don Bessler, Public Works Director
Legal review by: Teresa Voss, Assistant City Attorney
Prepared by: Mike Nevarez, Transit Operations Coordinator

RESOLUTION NO. 2013.32

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF TEMPE, ARIZONA TO AUTHORIZE THE MAYOR TO SIGN AN INTERGOVERNMENTAL AGREEMENT WITH THE REGIONAL PUBLIC TRANSPORTATION AUTHORITY FOR DIAL-A-RIDE AND MOBILITY SERVICES.

WHEREAS, the Regional Public Transportation Authority (RPTA) is authorized to contract for the provision of public transportation services pursuant to A.R.S. §§ 48-5122 and 48-5123; and

WHEREAS, the City of Tempe (Tempe) is authorized to contract for the provision of public transportation services pursuant to City of Tempe Code; and

WHEREAS, Tempe and the RPTA together with other Maricopa County cities desire to provide a regional public transportation system; and

WHEREAS, Tempe has been authorized by its City Council and RPTA has been authorized by its Board of Directors to enter into this Agreement; and

WHEREAS, the RPTA has established a regional dial-a-ride system within Maricopa County; and

WHEREAS, Tempe, a public agency, and the RPTA, a public agency, have authority in accordance with A.R.S. § 11-952 to enter into intergovernmental agreements.

NOW, THEREFORE, BE IT RESOLVED BY THE TEMPE CITY COUNCIL OF TEMPE OF TEMPE, ARIZONA, that:

The Mayor is authorized to sign an Intergovernmental Agreement between Tempe and RPTA for the purchase of dial-a-ride and mobility services.

PASSED AND ADOPTED BY TEMPE COUNCIL OF THE CITY OF TEMPE, ARIZONA, this ____ day of _____, 2013.

Mark W. Mitchell, Mayor

ATTEST:

Brigitta M. Kuiper, City Clerk

APPROVED AS TO FORM:

Judith R. Bauman, Interim City Attorney

**EAST VALLEY DIAL-A-RIDE (EVDAR)
INTERGOVERNMENTAL AGREEMENT**

CONTRACT # 169 32-2013

BETWEEN: THE City of Tempe, a municipal corporation (hereinafter referred to as the "CITY")

AND: THE REGIONAL PUBLIC TRANSPORTATION AUTHORITY (of Maricopa County), a public agency established pursuant to A.R.S. Section 48-5101, et seq., (hereinafter referred to as the "RPTA").

WHEREAS: The RPTA is authorized to contract for the provision of public transportation services pursuant to A.R.S. Sections 48-5122 and 48-5123; and

WHEREAS: The CITY is authorized to contract for the provision of public transportation services pursuant to the City of Tempe Code; and

WHEREAS: The CITY and the RPTA together with other Maricopa County cities desire to provide a regional public transportation system; and

WHEREAS: CITY has been authorized by its City Council and RPTA has been authorized by its Board of Directors to enter into this Agreement; and

WHEREAS: The RPTA has established a network of regional public transportation services within Maricopa County; and

WHEREAS: The CITY, a public agency, and the RPTA, a public agency, have authority in accordance with A.R.S. Section 11-952 to enter into intergovernmental agreements;

NOW, THEREFORE IT IS AGREED by and between the parties, as follows:

DEFINITIONS

Valley Metro Mobility Services: RPTA has defined the suite of services which include ADA Certification eligibility (Platinum Pass and Reduced Fare Programs), East Valley Dial-a-Ride (Chandler, Gilbert, Mesa, Scottsdale, Tempe), NW Valley Dial-a-Ride (currently provides trips in the Sun City, El Mirage, Youngtown, portions of Peoria and unincorporated Maricopa County), and RideChoice (includes Coupons for Cabs, Mileage Reimbursement and Vouchers) and Customer Service.

Broker: The prime contractor hired by RPTA to receive and schedule all trip requests, provide transportation services, and schedule and oversee trips subcontracted to other transportation providers.

Ride Choice Program: This program includes Coupons for Cabs, Vouchers and Mileage Reimbursement for seniors and individuals with disabilities. Coupons for Cabs provide up to \$100 of coupons to customers for \$25.00 with the difference being subsidized by the City of Tempe. Vouchers are provided to individuals for dialysis, chemotherapy or radiation treatments. The City of Tempe pays 100% of the cost for these trips. The City of Mesa is the only city participating in Mileage Reimbursement providing eligible participants the opportunity to have neighbors and friends transport them to medical appointments, shopping, etc. and reimbursing for up to 300 miles per month.

Dial-a-Ride Services: As described in Schedule A means a system operated for the purpose of transporting designated passengers, within designated time periods, to destinations within and between each of the Cities and Towns, and to designated transfer points for travel outside of the East Valley Dial a Ride service area.

Service Specifications: detailed description of the Dial-a-Ride Services covered by this Agreement is found in Schedule A, and includes:

- a description of the service area;
- days and hours of operation;
- transfer points within the system and with other services;
- disabled passenger eligibility criteria;
- fare structure and fare zones within the service area;
- contract administration;
- complaint procedures;

Platinum Pass Program: The Platinum Pass Program provides trips to customers that are ADA certified through the “in person” assessment to travel on bus and rail services at no cost to the customer. The cities subsidize the trip at 100% and is designed to encourage ADA certified individuals to use bus and rail services for trips where they can versus DAR) trips. This program provides cost avoidance for both the participating city and the customer.

SECTION 1: SERVICE AREA AND TRANSIT SERVICES

- 1.1 The boundaries of the Dial-A-Ride Service Areas are shown in Schedule B. This service area may be changed with prior written consent of the RPTA and the CITY. The transit services specified in Schedule A shall be operated during the term of this Agreement.

SECTION 2: TERM AND RENEWAL

- 2.1 The term of this Agreement shall be from July 1, 2012 to June 30, 2013 with four (4) additional one-year optional periods. Upon termination of this Agreement, any and all property used in connection with this Agreement shall be returned to the party holding title thereto.

- 2.2 This Agreement or any portion thereof may be canceled in any fiscal year, effective at the end of such fiscal year, if, for any reason, the CITY Council fails to appropriate funds for Dial-a-Ride Services. If CITY fails to appropriate funds, CITY shall notify the other cities that are participating in the same type of service provision through RPTA (“Other Cities”) and RPTA in writing of such failure to appropriate funding prior to June 15 of the subject fiscal year.
- 2.3 If the parties are not able to agree upon renewal terms for the existing Agreement prior to the expiration of the term of the existing Agreement, the CITY shall make the payments required to be paid under this Agreement monthly during or before July 1 for the new fiscal year and thereafter for a one hundred eighty (180) day period unless the parties agree upon renewal terms prior to the expiration of such one hundred eighty (180) day period. For example, if there is a disagreement with the proposed rate for the new fiscal year, or if the renewal Agreement is not signed, for any reason, the CITY shall make payments at the old rate (the previous year’s rate) until such time that renewal Agreement can be fully approved and executed.

SECTION 3: RPTA RESPONSIBILITY

- 3.1 With respect to East Valley Dial a Ride (“Dial-a-Ride”), the RPTA, in consultation with and with the approval of the CITY, shall:
- a. Negotiate and coordinate the implementation of operating agreements;
 - b. Provide directly or through contractors (collectively, “Contractors”), Dial-a-Ride Services as provided in this Agreement.
 - c. Provide marketing and merchandising of services;
 - d. Draft and secure approval for annual operating budgets;
 - e. Plan for, prepare changes, and amend service specifications as contained in Schedule A;
 - f. Bill the CITY on a monthly basis for actual service (revenue miles) provided to Tempe residents or non-residents traveling in Tempe.
 - g. Subject to Schedule A, and with Tempe concurrence, determine, set, and amend as necessary the fare structure for services provided by the RPTA or under contract;
 - h. Convene a Paratransit Steering Committee, consisting of representatives from CITY, the other participating Towns or Cities as identified in Schedule C, and the RPTA to coordinate and monitor service and to resolve service and contractual performance issues;
 - i. Provide professional staff as necessary to plan for, develop, contract for, monitor, and adjust service.
 - j. Credit CITY pursuant to Schedule D, up to the pre-determined amount of Americans Disabilities Act (ADA), Public Transportation Funds (PTF) for the transport of ADA certified riders.
 - k. Provide complaint resolution process
 - l. The RPTA will draw down ADA PTF on behalf of the City as approved by the RPTA Board of Directors.

- 3.2 At the end of each quarter, RPTA will conduct a financial reconciliation of all costs of service (including any administrative fees) for informational purposes only, and at fiscal year-end a final reconciliation shall be performed. If it is found that CITY has paid more than its share of the costs of service, RPTA shall credit such overpayment to CITY on its next invoice. Conversely, if CITY has under paid its share of the costs of services, RPTA shall bill the underpayment to CITY. CITY shall pay all invoices submitted by RPTA to CITY within 30 days.
- 3.3 The RPTA may conduct service and financial audits, as required, of the Dial-A-Ride Services.
- 3.4 The RPTA shall provide performance data reports on a monthly basis. The data will be posted on the Valley Metro website http://www.valleymetro.org/valley_metro/east_valley_partners and/or sent directly to the CITY and shall include the following at a minimum. RPTA shall ensure the confidentiality of all data and any personal information posted on the above website.

The RPTA shall collect the following performance statistics for the CITY:

- ADA Ridership
- Non-ADA Ridership
- Boardings by CITY and Other Cities;
- Wheelchair Boardings by CITY and Other Cities; *
- Vehicle Revenue Miles by CITY and Other Cities;
- Vehicle Revenue Hours by CITY and Other Cities;
- Operating Days by CITY;
- Average number of passengers by revenue mile of service;
- Percent On-time Performance;
- Service Interruptions;
- Vehicle Breakdowns;
- Wheelchair lift/ramp Breakdowns;
- Accidents;
- Vehicle Accidents;
- Passenger Accidents;
- Passenger Security Incidents;
- Crimes reported; and
- Vehicles Operated per day.
- All other performance indicators stipulated in contracts for service

- 3.5 RPTA shall administer the ADA Platinum Pass (Schedule F) and Valley Metro Ride Choice (Schedule E) programs on behalf of CITY. CITY's ADA-PTF account shall be debited for all Platinum Pass uses by residents of CITY on an annual basis up to the monthly capped amount of the individual reduced fare Platinum Pass and/or express fare Platinum Pass when applicable. The RPTA shall provide on a monthly basis information on the number of Tempe residents certified ADA eligible and receiving Platinum Passes. RPTA shall provide reports within 15 calendar days from the receipt of detailed billing report from the City of Phoenix on usage and costs incurred by the Platinum Pass Program.

RPTA shall administer the Ride Choice Program, and provide CITY monthly operating reports which include year to date expense, revenue, number of Tempe participant's enrolled monthly, cumulative enrollment, active participants and other relevant program data.

- 3.6 By February 21st of each year, the RPTA shall provide the CITY with a detailed written budget estimate for the provision of Valley Metro Mobility Services, including the expected sources and amounts of funding, for the next fiscal year. If the CITY approves the budget estimate, RPTA shall prepare a summary of the budget estimate in the format attached hereto as Schedules C, D, E and F and such summary shall be attached to this Agreement and become applicable for the next fiscal year.

SECTION 4: CITY RESPONSIBILITIES

- 4.1 With respect to Dial-a-Ride Services, CITY shall:
 - a. If CITY desires services in addition to the Dial-a-Ride Services described in Schedule A, CITY shall provide funding adequate to finance such services over and above funding provided by the RPTA and CITY pursuant to Schedule C; In addition to funding necessary to pay for actual service or costs, reimburse the RPTA within 30 days for its costs monthly to, monitor and generally administer the service in CITY, not to exceed a total annual administrative fee as shown in Schedule C;
 - b. Provide for local complaint resolution with citizens of the CITY;
 - c. Participate in the screening and selection of Contractors;
 - d. Become members of and participate in all meetings, deliberations, and decisions of the Paratransit Steering Committee.
- 4.2 The CITY shall pay the RPTA monthly in accordance with Schedules C and E. In the event that there is a disagreement with the new proposed rate, the City is responsible for making payment at the old rate (the previous year's rate) until such time that the disagreement can be resolved.
- 4.3 By March 1 of each year, CITY shall notify the RPTA in writing of its intention to seek an appropriation of local funds (and the amount) for the provision of Dial a Ride Services as described in this Agreement.
- 4.4 CITY does hereby agree to participate in the Valley Metro ADA Platinum Pass Program specified in Schedule F. The ADA Platinum Pass program allows free use of fixed route bus and light rail by ADA certified CITY residents. The City will be responsible for the cost of reduced fare on local service and full express fare on express service. Participation in the ADA Platinum Pass Program is voluntary by CITY and may be cancelled by CITY by providing a ninety (90) calendar day written notice to RPTA.

SECTION 5: GENERAL PROVISIONS

5.1 Records

The Federal Transit Administration (FTA), the Comptroller General of the United States, or any designee, and the CITY shall have access to all books, documents, papers and records which are pertinent to this Agreement for the purpose of making audit, examination, excerpts and transcriptions. All required records shall be maintained for a minimum of five (5) years after all pending matters are closed.

5.2 Covenant Against Contingent Fees

All parties warrant that no person has been employed or retained to solicit or secure this Agreement upon an agreement or understanding for a commission, percentage, brokerage or contingent fee; and that no member of Congress, City Council, the RPTA Board or any employee of the respective Cities or RPTA, has any interest, financially or otherwise, in this Agreement.

5.3 Alteration in Character of Work

Minor alterations in the character of the service to be provided hereunder shall be authorized in writing by RPTA and acknowledged by CITY by letter. Mutually agreed-upon costs associated with minor changes will be reflected in the year end reconciliation of final costs pursuant to Section 3.2 of this Agreement. Whenever an alteration in the character of such service results in a substantial change in the nature of services, thereby materially increasing the maximum costs of the Valley Metro Mobility Services as defined in the RPTA/Contractors agreement, a Contract Change Order or an Amendment to this Agreement shall be executed by CITY and the RPTA subject to City Council approval. Any amendment alteration, or other change to this Agreement must occur in a writing specifically referring to this paragraph.

5.4 Termination

In addition to the termination rights in Section 2.2, the CITY and RPTA hereby agree to full performance of the covenants and obligations contained herein, except that each reserves the right, at its option and sole discretion, to terminate or abandon the service provided for in this Agreement, or abandon any portion thereof. Such termination of this Agreement may be at any time and for any reason, with or without cause, upon providing ninety (90) days' prior written notice. Such termination shall be effected by delivery of a Notice of Termination specifying the date upon which such termination becomes effective. Upon termination, RPTA shall calculate actual expenses incurred up to and including the date of termination and (if termination was at the election of CITY) any penalties to which CITY and RPTA have previously agreed and costs (including, but not limited to the total of all costs described in the preceding sentence shall hereinafter be referred to as "termination cost". If CITY has paid RPTA sums in excess of the "termination costs," RPTA shall refund the excess; if CITY has paid RPTA an amount less than the "termination costs," then CITY shall pay to RPTA an amount equal to the difference between the "termination costs" and the amount paid. Final payment shall be made within thirty (30) calendar days after the termination of service.

5.5 Additional Work

Additional work, when authorized by executed Contract Change Order or Amendment to this Agreement and approved by RPTA and the CITY, shall be compensated for by a fee, mutually agreed upon by RPTA and CITY and stated as part of the Contract Change Order or Amendment to this Agreement.

5.6 Successors and Assigns

This Agreement shall not be assignable, except at the written consent of RPTA and CITY hereto; and it shall extend to and be binding upon the heirs, executors, administrators, successors and assigns of the parties hereto.

5.7 Labor Protective Provisions

To the extent of its Responsibilities set forth in section (4) of this Agreement, CITY shall fully cooperate with RPTA in meeting the legal requirements of the labor protective provisions of 49 U.S.C. 5333(b) [formerly Section 13(c) of the Federal Transit Act of 1964, as amended (49 U.S.C. 1609)] and the Labor Agreements and side letters currently in force and certified by the United States Department of Labor.

5.8 Title VI Assurances

The parties hereby agree that as a condition of this Agreement, they will comply with Title VI of the Civil Rights Act of 1964, and all requirements imposed by or pursuant to Title 49, Code of Federal Regulations, Department of Transportation, to the end that no person in the United States shall, on the grounds of race, color sex or national origin be subjected to discrimination under any program or activity that receives federal assistance from the Department of Transportation, including the Federal Transit Administration.

5.9 Civil Rights

The parties agree that as a condition of this Agreement they will each comply with all applicable civil rights laws and regulations, in accordance with applicable Federal directives, except to the extent that the Federal government determines otherwise in writing. These include, but are not limited to, those civil rights laws and regulations set forth on Exhibit A, as such civil rights laws and regulations may be amended from time to time.

SECTION 6: INDEMNIFICATION

Each party (as "Indemnitor") agrees to indemnify, defend, and hold harmless the other party (as "Indemnitee") from and against any and all claims, losses, liability, costs, or expenses (including reasonable attorney's fees) (hereinafter collectively referred to as "Claims") arising out of bodily injury of any person (including death) or property damage, but only to the extent that such Claims which result in vicarious/derivative liability to the Indemnitee are caused by the act, omission, negligence, misconduct, or other fault of the Indemnitor, its officers, officials, agents, or employees.

SECTION 7: CAPITAL/EXPENDITURES; BUDGET

Capital expenditures for equipment, vehicles, facilities or otherwise shall be limited to the approved budget, appended to this Agreement as Schedule C.

SECTION 8: AMENDMENT

Subject to approval of the respective governing bodies for each party to this Agreement, this Agreement may be amended in whole or in part by agreement in writing of RPTA and CITY hereto including, without limitation, the substitution of a revised Schedule C.

SECTION 9: RELATIONSHIP OF PARTIES

Nothing in this Agreement creates any partnership, joint venture, representative or agency relationship between the parties. Each party shall be solely and entirely responsible for its acts or the acts of its agents and employees during the performance of this Agreement.

SECTION 10: INTEGRATION

This Agreement represents the entire agreement of the parties with respect to the subject matter hereof, and all agreements entered into prior hereto with respect to the subject matter hereof are revoked and superseded by this Agreement, and no representations, warranties, inducements or oral agreements have been made by any of the parties except as expressly set forth herein, or in other contemporaneous written agreements. This Agreement may not be changed, modified or rescinded except in writing, signed by all parties hereto, and any attempt at oral modification of this Agreement shall be void and of no effect.

SECTION 11: ATTORNEYS' FEES

In the event suit is brought or an attorney is retained by any party to this Agreement to enforce the terms of this Agreement or to collect any moneys due hereunder, or to collect money damages for breach hereof, the prevailing party shall be entitled to recover, in addition to any other remedy, reimbursement for reasonable attorneys' fees, court costs, costs of investigation and other related expenses incurred in connection therewith.

SECTION 12: SEVERABILITY

If any provision of this Agreement is declared void or unenforceable, such provision shall be deemed severed from this Agreement, which shall otherwise remain in full force and effect.

SECTION 13: WAIVER

Failure of any party to exercise any right or option arising out of a breach of this Agreement shall not be deemed a waiver of any right or option with respect to any subsequent or different breach, or the continuance of any existing breach.

SECTION 14: COUNTERPARTS

This Agreement may be executed in any number of counterparts, all such counterparts shall be deemed to constitute one and the same instrument, and each of said counterparts shall be deemed an original hereof.

SECTION 15: CAPTIONS

Captions and section heading used herein are for convenience only and are not a part of this Agreement and shall not be deemed to limit or alter any provisions hereof and shall not be deemed relevant in construing this Agreement.

SECTION 16: CANCELLATION

This Agreement is subject to cancellation pursuant to A.R.S. Section 38-511.

SECTION 17: SCHEDULES AND EXHIBITS

All schedules and exhibits referred to in this Agreement and attached to this Agreement are expressly incorporated herein by this reference.

SECTION 18: NOTICES

Any notice, consent or other communication ("Notice") required or permitted under this Contract or any Notice to Proceed issued hereunder shall be in writing and either delivered in person, sent by facsimile transmission, deposited in the United States mail, postage prepaid, registered or certified mail, return receipt requested, or deposited with any commercial air courier or express service addressed as follows:

If to RPTA:

Regional Public Transportation Authority
101 N. 1st Ave., Suite 1100
Phoenix, Arizona 85003
(Attention: Stephen R. Banta, Chief Executive Officer)

If to CITY:

CITY of Tempe
Transportation
200 E. 5th Street
Tempe, Arizona 85281
(Attention: Greg Jordan, Deputy Public Works Director)

A Notice shall be deemed received at the time it is personally served, on the day it is sent by facsimile transmission, on the second day after its deposit with any commercial air courier or express service or, if mailed, ten (10) days after the Notice is deposited in the United States mail as above provided. Any time period stated in a Notice shall be computed from the time the Notice is deemed received. Either party may change its mailing address or the person to receive Notice by notifying the other party as provided in this paragraph.

Notices sent by facsimile transmission shall also be sent by regular mail to the recipient at the above address. This requirement for duplicate notice is not intended to change the effective date of the Notice sent by facsimile transmission.

SECTION 19: COMPLIANCE WITH THE E-VERIFY PROGRAM

19.1 Warrant of Compliance - Under the provisions of A.R.S. §41-4401, both parties warrant to the other that each party will comply with all Federal Immigration laws and regulations that relate to their employees and that each now complies with the E-Verify Program under A.R.S. §23-214(A).

19.2 Breach of Warranty - A breach of this warranty will be considered a material breach of this Agreement and may subject the breaching party to penalties up to and including termination of this Agreement.

19.3 Right to Inspect - Both parties retain the legal right to inspect the papers of any employee who works on this Contract or subcontract to ensure compliance with the warranty given above.

19.4 Random Verification - Either party may conduct a random verification of the employment records of the other to ensure compliance with this warranty.

19.5 Federal Employment Verification Provisions – No Material Breach. A party will not be considered in material breach of this Agreement if it establishes that it has complied with the employment verification provisions prescribed by 8 USCA §1324(a) and (b) of the Federal Immigration and Nationality Act and the E-Verify requirements prescribed by A.R.S. §23-214(A).

19.6 Inclusion of Article in Other Contracts - The provisions of this Article must be included in any contract either party enters into with any and all of its contractors or subcontractors who provide services under this Agreement.

SECTION 20: LEGAL COMPLIANCE AND PROHIBITION

To the extent applicable, RPTA and CITY each warrant compliance with any and all applicable governmental restrictions, regulations and rules of duly constituted authorities having jurisdiction over transit services provided via this Agreement, and all applicable employment laws, rules and regulations, including to the extent applicable, the Fair Labor Standards Act, the Walsh-Healey Act, Arizona Executive Order No. 99-4, and the Arizona Fair and Legal Employment Act, along with all laws, rules and regulations attendant thereto. Parties acknowledge that a breach of this warranty is a material breach of this Agreement and parties are subject to penalties for violation(s) of this provision, including termination of this Agreement. CITY and RPTA each retain the right to inspect the documents of any and all contractors, subcontractors and sub-subcontractors performing work and/or services relating to this Agreement to ensure compliance with this warranty. Any and all costs associated with inspections are the sole responsibility

of the party subject to inspection. RPTA and CITY each hereby agree to indemnify, defend and hold each other harmless for, from and against all losses and liabilities arising from any and all violations thereof. Pursuant to A.R.S. §§ 35-391.06 and 35-393.06, each Party certifies that it does not have a scrutinized business operation, as defined in A.R.S. §§ 35-391 and 35-393, in either Sudan or Iran.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the _____ day
of _____, 2013.

By: _____
Mark W. Mitchell
Mayor

By: _____
Stephen R. Banta
Chief Executive Officer

By: _____
Brigitta M. Kuiper
Tempe City Clerk

By: _____
John McCormack
Chief Financial Officer

INTERGOVERNMENTAL AGREEMENT DETERMINATION

In accordance with the requirements of A.R.S. Section 11-952(D), each of the undersigned attorneys acknowledge that: (1) they have reviewed the above Agreement on behalf of their respective clients; and, (2) as to their respective clients only, each attorney has determined that this Agreement is in proper form and is within the powers and authority granted under the laws of the State of Arizona.

Judith R. Baumann
Interim City Attorney

Attorney for RPTA

SCHEDULE A

EAST VALLEY DIAL-A-RIDE SERVICE DESCRIPTION

The goal of East Valley Dial-a-Ride (EVDAR) Project is to enhance the mobility of senior citizens and persons with disabilities living in the cities of Chandler, Mesa, Tempe, Scottsdale, the Town of Gilbert and neighboring communities. The project provides a joint Dial-a-Ride program in Chandler, Mesa, Gilbert, Tempe and Scottsdale that will coordinate with the existing service in Phoenix.

The program is designed to meet the performance criteria established by the Federal Transit Administration (FTA) Section 504 Program and the Americans with Disabilities Act (ADA) of 1990. The following is a description of the service:

1. Type of Service:

A reservation based paratransit transportation service with a 45-minute on time window for Non-ADA service at least 95 percent of the time and with a 30 minute on time window for ADA service at least 95 percent of the time. The EVDAR service is provided by a broker that performs 50% of the trips while the remaining 50% are sub-contracted to at least 3 other transportation companies and at least one non-profit. The broker has a fleet of taxi cabs, sedans and other accessible vehicles; the sub-contractors also have cabs, sedans, medical transport and accessible vehicles. The combined fleet is sized to meet all demands of the EVDAR.

2. Eligibility Criteria/Certification:

This service is available for use by persons with disabilities and those that are ADA certified and reside in the City and by persons aged 65 and older. Only those with valid ADA certification or ADA visitors will be eligible to book an ADA trip.

3. Restrictions/Priorities:

Priority will be given to all ADA trips and there will be no restrictions or priorities based on trip purpose for any ADA trips.

4. Fares:

ADA fares shall comply with the adopted RPTA Board Policy and are a flat rate and apply throughout the services area.

Non-ADA fares are based on a zone fare system agreed to by the member agencies of the EVDAR. The first zone will be one dollar (\$1); each additional zone will be 50 cents beginning July 1, 2012. Notwithstanding any provisions of this Agreement, Fares may be amended at any time upon the approval of the RPTA Board of Directors. The map attached in Schedule B outlines the zones in each city and town. Passengers not a resident of the participating cities trip miles will be charged based upon revenue miles traveled within each city or town's jurisdiction.

5. Days and Hours:

Service hours every day for ADA and Non-ADA service will be from 4:00 a.m. to 1:00 a.m. in Chandler, Gilbert, Mesa, Scottsdale and Tempe. Days and hours of operation may be amended at any time upon mutual agreement among parties to this Agreement.

6. Service area:

The EVDAR Service Area is more fully described in Schedule B. Each community's Service Area may be amended at any time upon agreement among the parties to this Agreement.

7. Transfers:

Transfers to or from the Phoenix dial-a-ride services will be arranged by the originating dial-a-ride and in a way that ensures that the receiving dial-a-ride is open and that the passenger does not wait more than 30 minutes for the transfer vehicle.

8. Complaints:

There is a central (RPTA-based) complaint system and process referred to as the Customer Assistance System (CAS). The broker and sub-contractors, monitored by Valley Metro, will have all complaints entered into CAS. The broker and sub-contractors will respond to the complaints and document resolution in CAS. One of the measures that the broker will receive incentives on is the number of valid complaints per 1,000 trips.

9. Payment to Provider:

The operator will be paid on a monthly fixed fee, cost per revenue mile and a surcharge for every wheelchair boarding of City Residents. All fares will be kept by the operator but remain the property of RPTA and serve to offset expenses.

10. Contract Administration:

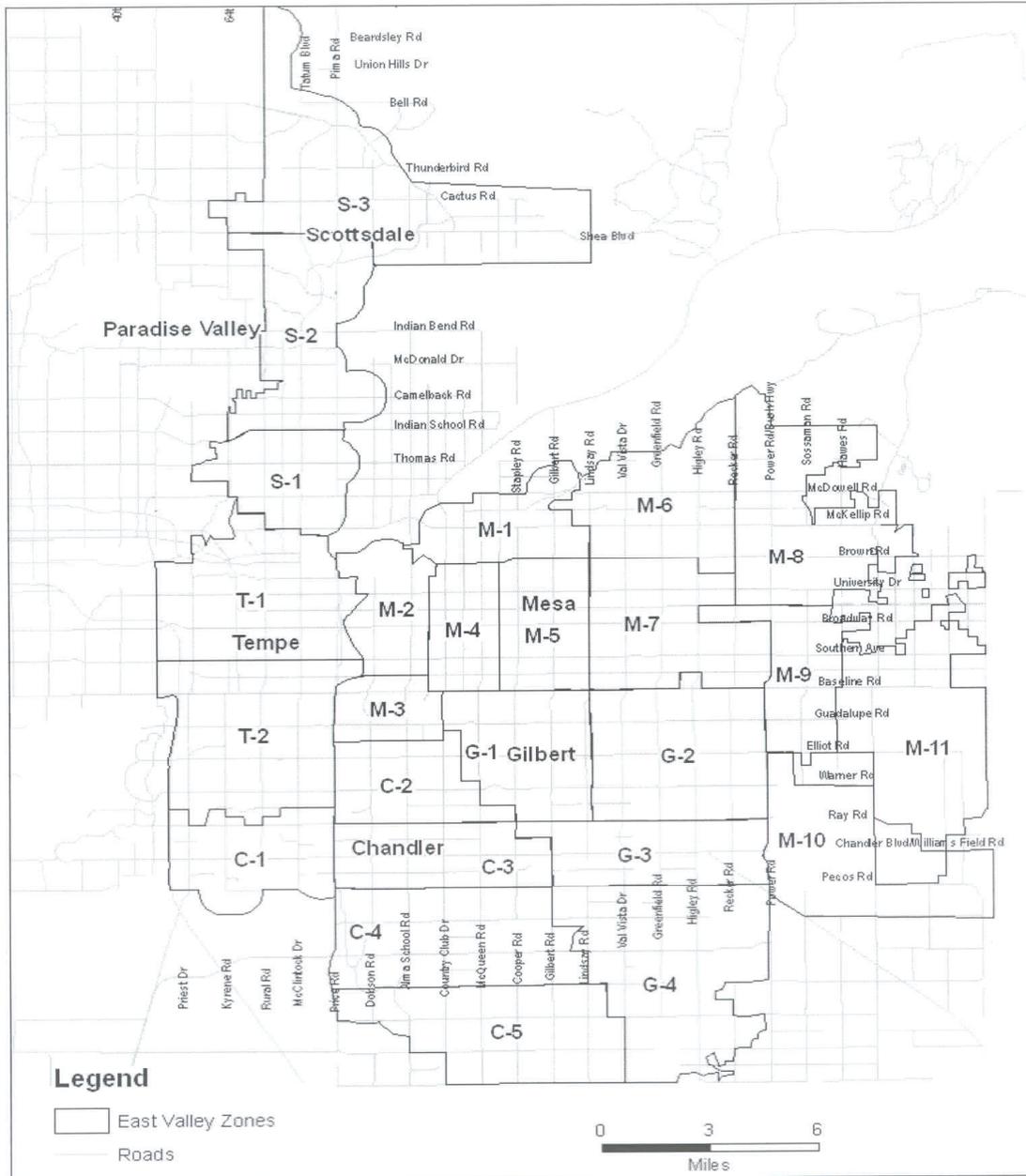
RPTA shall serve as Contract Administrator. RPTA Shall:

- Provide monthly reports to funding agencies (cities/town)
- Process, review, validate, and pay contractor invoices
- Process customer complaints
- Assume compliance of the contract and that its operation adheres to state, local, and federal laws.
- Provide contract oversight to ensure contractor performance and take corrective action as necessary.
- Administer federal, regional, and local project funds
- Produce and distribute program marketing materials.

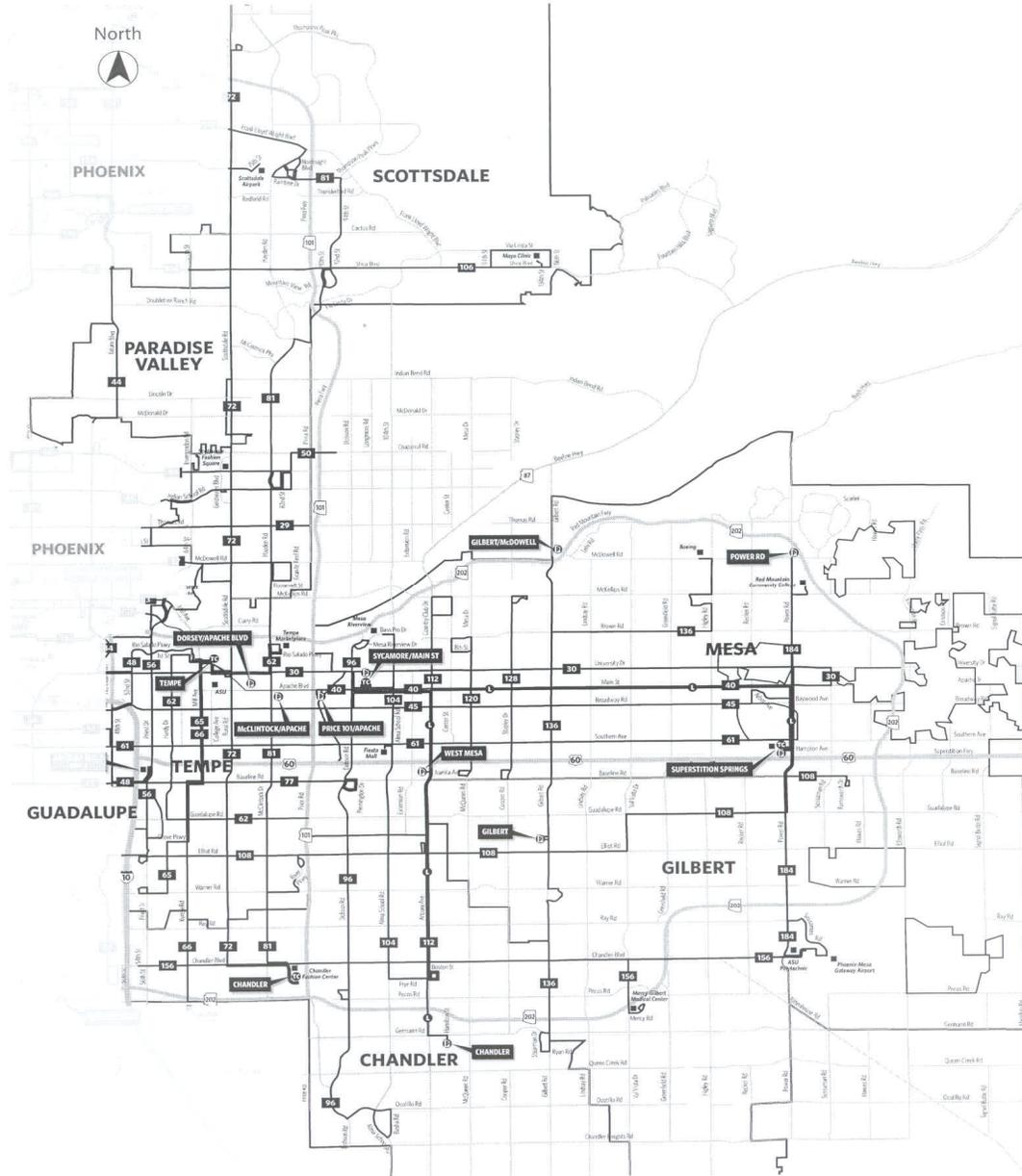
SCHEDULE B

MAPS OF SERVICE AREAS

East Valley Zones by City



SCHEDULE B Cont.



SCHEDULE C

FINANCIAL INFORMATION

I. Sources of Project Operating Budget:

FY 2012-2013

For the period of time July 1, 2012 through June 30, 2013, the City of Tempe will pay RPTA an estimated amount of \$241,988.00 for provision of East Valley Dial-a-Ride Services. Payments will be made monthly based on total actual vehicle revenue miles traveled by Tempe residents or non-residents traveling in Tempe, less fare revenue. The cost per revenue mile charged to the City of Tempe and other costs are established by the contract between the RPTA and the Broker. Monthly payments shall become due within thirty (30) calendar days after the receipt of an invoice from RPTA.

Expenses for Dial-a-Ride Services under this Agreement are allocated to jurisdictions that are part of the EVDAR System (Member Jurisdictions) based upon the number of vehicle revenue miles (VRM) projected to be provided to the Member Jurisdiction's residents. VRM shall be based on total trip miles by resident. If a passenger is a non-resident of the Member Jurisdictions, the expense for that passenger's transportation (within the EVDAR system) shall be allocated to the jurisdiction based on the (VRM) travelled in each Member Jurisdiction; and the non-resident passenger will be transported to the closest transfer location the City of Phoenix when leaving the EVDAR Service Area.

NOTE: In the new brokerage model, vehicle revenue miles will be the shortest travel distance between the origin and destination as determined by the demand response software. There is no deadhead.

SCHEDULE C Cont.

**East Valley DIAL-A-RIDE
Cost Projections
FY 2012/13**

	Total	Chandler	Percent	Gilbert	Percent	Mesa	Percent	Scottsdale	Percent	Tempe	Percent
Passenger Trips	221,659	35,406	16.0%	26,322	11.9%	86,256	38.9%	39,653	17.9%	34,021	15.3%
Revenue Miles	1,773,269	283,251	16.0%	210,576	11.9%	690,049	38.9%	317,226	17.9%	272,168	15.3%
Wheelchair Trips	33,249	2,634	7.9%	1,981	6.0%	21,888	65.8%	3,005	9.0%	3,741	11.3%
Gross Contractor Cost	\$ 6,135,492	\$ 980,045	16.0%	\$ 728,590	11.9%	\$ 2,387,562	38.9%	\$ 1,097,600	17.9%	\$ 941,698	15.3%
Other Indirect Expenses	\$ 123,190	\$ 19,678	16.0%	\$ 14,629	11.9%	\$ 47,938	38.9%	\$ 22,038	17.9%	\$ 18,908	15.3%
Salaries, Fringes & Overhead	\$ 307,705	\$ 49,151	16.0%	\$ 36,540	11.9%	\$ 119,740	38.9%	\$ 55,046	17.9%	\$ 47,228	15.3%
Gross EVDAR Svc Ops	\$ 6,566,387	\$1,048,874		\$ 779,759		\$ 2,555,240		\$ 1,174,684		\$ 1,007,834	
Less Fares	\$ (500,000)	\$ (79,867)	16.0%	\$ (59,375)	11.9%	\$ (194,570)	38.9%	\$ (89,447)	17.9%	\$ (76,742)	15.3%
Less: ADA Platinum Program	\$ (104,100)	\$ -		\$ (13,500)		\$ (78,400)		\$ -		\$ (12,200)	
Less: Remaining ADA Funds	\$ (4,976,150)	\$ (773,267)	79.8%	\$ (713,180)	99.0%	\$ (2,005,382)	98.8%	\$ (807,417)	74.4%	\$ (676,904)	72.7%
Net EVDAR Svc Ops	\$ 986,137	\$ 195,739		\$ -		\$ 276,889		\$ 277,821		\$ 241,988	

SCHEDULE D

PUBLIC TRANSPORTATION FUNDS (PTF) AVAILABILITY

For the period July 1, 2012 to June 30, 2013 the maximum amount of Americans Disabilities Act (ADA) and Public Transportation Funds (PTF) available for the City of Tempe is \$858,858.00. The PTF will pay actual costs for ADA trips and other requests for Paratransit service made by ADA certified Riders up to the maximum amount. The attached Operating Budget lists the estimated amount of PTF ADA funds for City based on the previous year's history. A final reconciliation at fiscal year-end will be performed and adjustments, if necessary, will be made using actual ADA eligible costs.

Total reimbursements to the City will not exceed the net amount that factors in estimated and actual costs associated with operating RPTA's In-Person Eligibility Determination Facility and ADA Certification office.

Any remaining PTF ADA funds not used up to the maximum reimbursements may be requested by CITY for other ADA certified rider eligible expenses, and certified by the CITY's chief financial officer or designee. RPTA will reimburse CITY within thirty (30) business days based upon availability of funds. CITY may request that reimbursements be made electronically. Wire transfers must be pre arranged through the RPTA Finance Department

Maximum amount:

City of Tempe	\$858,858.00
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SCHEDULE E

RIDE CHOICE PROGRAM

The City of Tempe agrees to participate and financially support the Alternative Transportation Services program for Fiscal year 2012–13. The City of Tempe shall fund this project in the amount of **\$53,222.00** for the period July 1, 2012–through June 30, 2013. The City of Tempe will pay for this project in twelve (12) monthly installments of **\$4,435.16**. Payment of invoices shall become due within thirty (30) calendar days after the receipt of an invoice from RPTA.

City of Tempe	
RideChoice Program	
Fiscal Year 2013	
Expenditures:	
Payments to Taxi Cab Companies	\$46,904
Mileage Reimbursement Program	N/A
Dialysis Voucher Program	\$31,000
Contractor Administrative Cost	\$15,480
Program Cost	\$93,384
Administrative Support and Printing	\$10,200
Total Expenditures	\$103,584
Sources:	
New Freedom Grants	\$38,062
Coupon Revenue	12,300
City Contributions	\$53,222
Total Funding	\$103,584

SCHEDULE F

VALLEY METRO ADA PLATINUM PASS PROGRAM

ADA certified passengers in participating cities may apply for a Platinum Pass that will allow them to ride fixed route service at no cost to them. It is estimated that CITY's ADA PTF annual allocation for the ADA Platinum Pass Program shall incur a cost of **\$12,200.00**, in FY 2012-13. In all cases CITY shall be responsible for the actual costs incurred by RPTA for administering this program including actual transportation costs by its residents. In the event that CITY does not use its estimated funding provided through the RPTA Board approved ADA allocation, RPTA may direct such remaining funding to other ADA programs approved by RPTA, including but not limited to, funding of dial-a-ride and other alternative transportation programs for ADA certified users within CITY.

EXHIBIT A

a. Nondiscrimination in Federal Public Transportation Programs. The Recipient agrees to comply, and assures the compliance of each subrecipient, lessee, third party contractor, or other participant at any tier of the Project, with the provisions of 49 U.S.C. § 5332, which prohibit discrimination on the basis of race, color, creed, national origin, sex, or age, and prohibits discrimination in employment or business opportunity.

b. Nondiscrimination – Title VI of the Civil Rights Act. The Recipient agrees to comply, and assures the compliance of each subrecipient, lessee, third party contractor, or other participant at any tier of the Project, with all provisions prohibiting discrimination on the basis of race, color, or national origin of Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000d *et seq.*, and with U.S. DOT regulations, “Nondiscrimination in Federally-Assisted Programs of the Department of Transportation – Effectuation of Title VI of the Civil Rights Act,” 49 C.F.R. Part 21. Except to the extent FTA determines otherwise in writing, the Recipient agrees to follow all applicable provisions of the most recent edition of FTA Circular 4702.1A, “Title VI and Title VI-Dependent Guidelines for Federal Transit Administration Recipients,” and any other applicable Federal directives that may be issued.

c. Equal Employment Opportunity. The Recipient agrees to comply, and assures the compliance of each subrecipient, lessee, third party contractor, or other participant at any tier of the Project, with all equal employment opportunity (EEO) provisions of 49 U.S.C. § 5332, with Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and implementing Federal regulations and any later amendments thereto. Except to the extent FTA determines otherwise in writing, the Recipient also agrees to follow all applicable Federal EEO directives that may be issued. Accordingly:

(1) General. The Recipient agrees that it will not discriminate against any employee or applicant for employment because of race, color, creed, sex, disability, age, or national origin. The Recipient agrees to take affirmative action to ensure that applicants are employed and that employees are treated during employment without regard to their race, color, religion, sex, disability, age, or national origin. Such action shall include, but not be limited to, employment, upgrading, demotions or transfers, recruitment or recruitment advertising, layoffs or terminations; rates of pay or other forms of compensation; and selection for training, including apprenticeship.

(2) Equal Employment Opportunity Requirements for Construction Activities. For activities determined by the U.S. Department of Labor (U.S. DOL) to qualify as “construction,” the Recipient agrees to comply and assures the compliance of each subrecipient, lessee, third party contractor, or other participant, at any tier of the Project, with all requirements of U.S. DOL regulations, “Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor,” 41 C.F.R. Parts 60 *et seq.*; with implementing Executive Order No. 11246, “Equal Employment Opportunity,” as amended by Executive Order No. 11375, “Amending Executive Order No. 11246 Relating to Equal Employment Opportunity,” 42 U.S.C. § 2000e note, and with other applicable EEO laws and regulations, and also agrees to

follow applicable Federal directives, except as the Federal Government determines otherwise in writing.

d. Disadvantaged Business Enterprise. To the extent authorized by Federal law, the Recipient agrees to facilitate participation by Disadvantaged Business Enterprises (DBEs) in the Project and assures that each subrecipient, lessee, third party contractor, or other participant at any tier of the Project will facilitate participation by DBEs in the Project to the extent applicable as follows:

(1) The Recipient agrees and assures that it shall comply with section 1101(b) of SAFETEA-LU, 23 U.S.C. § 101 note, and U.S. DOT regulations, "Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs," 49 C.F.R. Part 26.

(2) The Recipient agrees and assures that it shall not discriminate on the basis of race, color, sex, or national origin in the award and performance of any subagreement, lease, third party contract, or other arrangement supported with Federal assistance derived from U.S. DOT in the administration of its DBE program and shall comply with the requirements of 49 C.F.R. Part 26. The Recipient agrees to take all necessary and reasonable steps as set forth in 49 C.F.R. Part 26 to ensure nondiscrimination in the award and administration of all subagreements, leases, third party contracts, and other arrangements supported with Federal assistance derived from U.S. DOT. As required by 49 C.F.R. Part 26, the Recipient's DBE program approved by U.S. DOT, if any, is incorporated by reference and made part of the Grant Agreement or Cooperative Agreement for the Project. The Recipient agrees that it has a legal obligation to implement its approved DBE program, and that its failure to carry out that DBE program shall be treated as a violation of the Grant Agreement or Cooperative Agreement for the Project and this Master Agreement. Upon notification by U.S. DOT to the Recipient of the Recipient's failure to implement its approved DBE program, U.S. DOT may impose the sanctions as set forth in 49 C.F.R. Part 26 and may, in appropriate cases, refer the matter to the appropriate Federal authorities for enforcement under 18 U.S.C. § 1001, or the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801 *et seq.*, or both.

e. Nondiscrimination on the Basis of Sex. The Recipient agrees to comply with all applicable requirements of Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. §§ 1681 *et seq.*, and with implementing U.S. DOT regulations, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 49 C.F.R. Part 25, that prohibit discrimination on the basis of sex.

f. Nondiscrimination on the Basis of Age. The Recipient agrees to comply with all applicable requirements of:

(1) The Age Discrimination Act of 1975, as amended, 42 U.S.C. §§ 6101 *et seq.*, and with implementing U.S. Health and Human Services regulations, "Nondiscrimination on the Basis of Age in Programs or Activities Receiving Federal Financial Assistance," 45 C.F.R. Part 90, which prohibit discrimination against individuals on the basis of age in the administration of programs or activities receiving Federal financial assistance.

(2) The Age Discrimination in Employment Act (ADEA) 29 U.S.C. §§ 621 through 634 and with implementing U.S. Equal Employment Opportunity Commission (U.S. EEOC) regulations, “Age Discrimination in Employment Act,” 29 C.F.R. Part 1625, which prohibits discrimination against individuals on the basis of age.

g. Access for Individuals with Disabilities. The Recipient agrees to comply with 49 U.S.C. § 5301(d), which states the Federal policy that elderly individuals and individuals with disabilities have the same right as other individuals to use public transportation services and facilities, and that special efforts shall be made in planning and designing those services and facilities to implement transportation accessibility rights for elderly individuals and individuals with disabilities. The Recipient also agrees to comply with all applicable provisions of section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, which prohibits discrimination on the basis of disability in the administration of programs or activities receiving Federal financial assistance; with the Americans with Disabilities Act of 1990 (ADA), as amended, 42 U.S.C. §§ 12101 *et seq.*, which requires that accessible facilities and services be made available to individuals with disabilities; with the Architectural Barriers Act of 1968, as amended, 42 U.S.C. §§ 4151 *et seq.*, which requires that buildings and public accommodations be accessible to individuals with disabilities; and with other laws and amendments thereto pertaining to access for individuals with disabilities that may be applicable. In addition, the Recipient agrees to comply with applicable implementing Federal regulations, and any later amendments thereto, and agrees to follow applicable Federal implementing directives, except to the extent FTA approves otherwise in writing. Among those regulations and directives are:

(1) U.S. DOT regulations, “Transportation Services for Individuals with Disabilities (ADA),” 49 C.F.R. Part 37;

(2) U.S. DOT regulations, “Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance,” 49 C.F.R. Part 27;

(3) Joint U.S. Architectural and Transportation Barriers Compliance Board (U.S. ATBCB)/U.S. DOT regulations, “Americans With Disabilities (ADA) Accessibility Specifications for Transportation Vehicles,” 36 C.F.R. Part 1192 and 49 C.F.R. Part 38;

(4) U.S. DOJ regulations, “Nondiscrimination on the Basis of Disability in State and Local Government Services,” 28 C.F.R. Part 35;

(5) U.S. DOJ regulations, “Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities,” 28 C.F.R. Part 36;

(6) U.S. General Services Administration (U.S. GSA) regulations, “Accommodations for the Physically Handicapped,” 41 C.F.R. Subpart 101-19;

(7) U.S. EEOC, “Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act,” 29 C.F.R. Part 1630;

8) U.S. Federal Communications Commission regulations, “Telecommunications Relay Services and Related Customer Premises Equipment for the Hearing and Speech Disabled,” 47 C.F.R. Part 64, Subpart F;

9) U.S. ATBCB regulations, “Electronic and Information Technology Accessibility Standards,” 36 C.F.R. Part 1194;

10) FTA regulations, “Transportation for Elderly and Handicapped Persons,” 49 C.F.R. Part 609; and

11) Federal civil rights and nondiscrimination directives implementing the foregoing Federal laws and regulations, except to the extent the Federal Government determines otherwise in writing.

h. Drug or Alcohol Abuse-Confidentiality and Other Civil Rights Protections. To the extent applicable, the Recipient agrees to comply with the confidentiality and civil rights protections of the Drug Abuse Office and Treatment Act of 1972, as amended, 21 U.S.C. §§ 1101 *et seq.*, the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970, as amended, 42 U.S.C. §§ 4541 *et seq.*, and the Public Health Service Act of 1912, as amended, 42 U.S.C. §§ 290dd through 290dd-2, and any amendments thereto.

i. Access to Services for Persons with Limited English Proficiency. The Recipient agrees to facilitate compliance with the policies of Executive Order No. 13166, “Improving Access to Services for Persons with Limited English Proficiency,” 42 U.S.C. § 2000d-1 note, and follow applicable provisions of U.S. DOT Notice, “DOT Policy Guidance Concerning Recipients’ Responsibilities to Limited English Proficiency (LEP) Persons,” 70 *Fed. Reg.* 74087, December 14, 2005, except to the extent that FTA determines otherwise in writing.

j. Environmental Justice. The Recipient agrees to facilitate compliance with the policies of Executive Order No. 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,” 42 U.S.C. § 4321 note, except to the extent that the Federal Government determines otherwise in writing.

k. Other Nondiscrimination Laws. The Recipient agrees to comply with applicable provisions of other Federal laws and regulations, and follow applicable Federal directives prohibiting discrimination, except to the extent the Federal Government determines otherwise in writing.