

**WIRED TELECOMMUNICATIONS LICENSE AND  
RIGHT-OF-WAY USE AGREEMENT  
BETWEEN THE CITY OF TEMPE AND  
MCLEODUSA TELECOMMUNICATIONS SERVICES, LLC,  
dba PAETEC COMMUNICATIONS, LLC**

Contract No. C2016-

This Wired Telecommunications License (“License”) and Right-of-Way Use Agreement (“Agreement”) is entered into this \_\_\_\_ day of June, 2016, by and between the City of Tempe, an Arizona municipal corporation (“City”) and McLeodUSA Telecommunications Services, LLC, dba Paetec Communications LLC (“PAETEC”), a Delaware limited liability company that is a subsidiary of Windstream, 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, McLeodUSA Telecommunications Services, LLC is authorized to provide resold inter/intraLATA telecommunications services pursuant to ACC Decision 61001 issued July 16, 1998 and resold and facilities based local exchange and exchange access telecommunications services pursuant to Decision No. 62627 issued June 9, 2000 and

WHEREAS, Paetec Communications Inc. is authorized to provide interLATA/intraLATA resold telecommunications services, except local exchange, pursuant to Decision No. 62458, issued April 14, 2000; and

WHEREAS, Windstream Communications Inc. is authorized to provide resold interexchange services pursuant to Decision No. 68965 issued September 21, 2006; and

WHEREAS, Windstream Communications Inc. became a Delaware LLC on April 8, 2015 and is now known as Paetec Communications LLC; and

WHEREAS, PAETEC (through its predecessor in interest, McLeodUSA Telecommunications Services, Inc.) has previously received permission from the City to place its Facilities in the right-of-way pursuant to the following agreements: i) C2000-308 dated December 14, 2000; ii) C2006-64 dated March 2, 2006; and iii) C2011-79 dated June 16, 2011; and

WHEREAS, PAETEC 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, PAETEC has applied to City for permission to continue using the right-of-way to maintain its empty Conduit(s) and existing Fiber Optic Networks; and

WHEREAS, PAETEC 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, PAETEC agrees to provide and maintain accurate maps showing the location of all Facilities owned or used by PAETEC 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, PAETEC 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, PAETEC 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 PAETEC, and the covenants and agreements contained herein to be kept and performed by PAETEC, and for other good and valuable consideration, the City hereby grants to PAETEC 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 protects 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 Paetec or its Contractor(s) 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, 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 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 McLeodUSA Telecommunications Services, LLC dba PAETEC Business Services.

***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 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 PAETEC permission to use the designated portions of the right-of-way (“ROW”) subject to and conditioned upon PAETEC’s full, timely, complete and faithful performance of all obligations to be performed or required hereunder by PAETEC, and PAETEC hereby accepts the terms and conditions of this License and Agreement.

2.2 PAETEC'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. PAETEC 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 its current route map submitted to the City and as may be expanded or extended under Section 12. The permitted uses are limited to the following:

- 2.2.1.1.1 Constructing, maintaining, repairing and operating the Facilities as described in this Agreement.
- 2.2.1.1.2 To the extent that any Fiber Optic Networks within the route within the City carry intrastate and/or interstate Calls as referenced by A.R.S. §§ 9-582 and 9-583, the City hereby grants PAETEC 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 Fiber Optic Network routes identified in the map(s) submitted to the City.
- 2.2.1.1.3 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 PAETEC 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. PAETEC may not allow third parties to use the Facilities for any use that PAETEC 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 PAETEC 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 PAETEC 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 PAETEC 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 PAETEC 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 PAETEC to install or construct any Facilities not expressly provided for in this Agreement.

2.5 To the extent that PAETEC uses the City's ROW to provide services other than intrastate 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 PAETEC 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 PAETEC to comply with any law or regulation of the FCC or the ACC to engage in the business activities anticipated by this Agreement, PAETEC 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 PAETEC 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 PAETEC 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 PAETEC, including any fee or leasehold interest, easement, or any franchise rights.

3.3 Any right or privilege claimed pursuant to this Agreement by PAETEC 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 PAETEC 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 PAETEC, by virtue of PAETEC'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 PAETEC, at no expense to the City, to remove, relocate or abandon in place PAETEC's Facilities in order to accommodate the activities of the City. The City shall not be liable for lost revenues sustained by PAETEC, 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 PAETEC may enter into contracts with unrelated third parties ("Users") in the ordinary course of PAETEC'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 PAETEC.

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

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

5.1 PAETEC uses its Fiber Optic Network to provide local voice calls and internet services.

5.2 Total linear feet for PAETEC's current route for its Conduit Systems and Fiber Optic Networks in the City is 123,604.8 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, PAETEC 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 PAETEC and any of its Contractors, who will be considered PAETEC's agents and for whom PAETEC will be responsible. PAETEC will ensure that PAETEC and its agents comply with Public ROW use requirements as follows:

6.1 Registration. PAETEC agrees to register with the City by completing an application or renewal application form, paying the applicable application fee and submitting the required map(s).

6.2 Notice of Changes. PAETEC 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 PAETEC'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 PAETEC begins marketing the service.

6.3 PAETEC 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 PAETEC'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.

6.5 PAETEC 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 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 PAETEC has applied for and received approval for permits from the City Engineer. PAETEC 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 PAETEC's Facilities subject to this License and Agreement. Additionally, PAETEC 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 PAETEC'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 PAETEC 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. PAETEC and/or its Contractor(s) shall abide by all stipulations of all licenses and permits issued. If PAETEC 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, PAETEC 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. PAETEC 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 PAETEC, safety and other considerations in accordance with the City's Code, applicable ROW construction regulations and other applicable law. PAETEC 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. PAETEC 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 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 Manual.

7.6 If PAETEC 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 Standard 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 PAETEC and the City. If portions of this project will take place on the major arterial streets in City, PAETEC 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 or other authorized uses over, under or through said streets and public ways. PAETEC 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, PAETEC shall immediately discontinue using the equipment, methodology or technology that causes the interference until PAETEC 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. PAETEC shall be responsible to ensure compliance with this Agreement by all persons using the ROW through or under PAETEC or this Agreement.

7.10 Co-location. PAETEC's installation of the Facilities shall be reasonably coordinated with other utilities and City to accommodate opportunities for common installation along with PAETEC'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 PAETEC 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, PAETEC 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 PAETEC for the Conduit System 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, PAETEC 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 PAETEC 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, PAETEC shall notify all adjacent or affected residents or business 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, PAETEC 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, PAETEC shall promptly furnish to City documentation of such permission from such other affected property owner.

7.14 Whenever PAETEC 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. PAETEC shall upon the completion of the opening or alteration, restore the property, improvements or landscaping disturbed by PAETEC 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, PAETEC 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 PAETEC shall have the full responsibility and liability for traffic control for this project. PAETEC 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. PAETEC 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. PAETEC shall pay any and all applicable barricade fees.

7.15.5 In the event PAETEC 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 repaired by the City will be billed to PAETEC at 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. PAETEC 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. PAETEC and PAETEC'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. PAETEC's failure to thoroughly familiarize itself with the aforementioned safety provisions shall not relieve PAETEC from compliance with these provisions.

7.18 Blue Stake. PAETEC 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 PAETEC'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**

PAETEC'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. PAETEC 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. PAETEC 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. PAETEC 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, PAETEC 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 PAETEC, its Contractor(s) or anyone using the ROW under this Agreement.
  5. PAETEC and/or its Contractor(s) shall immediately notify City of any Toxic Substance at any time discovered or existing upon the ROW. PAETEC is not responsible for Toxic Substances that may exist at the ROW if PAETEC'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. PAETEC understands the hazards presented to persons, property and the environment by dealing with Toxic Substances. PAETEC 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 PAETEC and/or by its Contractor(s) of this Agreement pertaining to Toxic Substances, PAETEC shall give City notice reporting such violation.

## **SECTION 9. On-Call Assistance**

PAETEC shall be available to staff employees of any City department having jurisdiction over PAETEC'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 1-800-332-2385 or 1-575-263-3899 (George Lugo) regarding such problems or complaints, and may use that number in order to reach PAETEC at any time for any emergency matter. PAETEC shall use reasonable efforts to respond to any issues within the time frames specified in its service level agreements. PAETEC 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 PAETEC 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, PAETEC 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. PAETEC will also provide surface-location marking of any of PAETEC'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, PAETEC shall pay the actual, reasonable costs the City incurs to update the City's electronic mapping format due to the location or relocation of PAETEC's Facilities.

10.3 In the event PAETEC fails to supply records in the City specified format and there is a cost to the City in converting PAETEC-provided files, PAETEC 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 PAETEC 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. PAETEC 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, PAETEC 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, PAETEC 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 PAETEC 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 PAETEC is required to make repairs that are of an emergency nature or in connection with an unscheduled disruption of the Facilities. PAETEC will maintain any annual permits required by the City for such maintenance and emergency repairs. PAETEC 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 PAETEC'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 PAETEC 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 PAETEC'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, PAETEC, 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 PAETEC does not repair the damage or disturbance as just described, then City shall have the option, upon ten (10) days prior written notice to PAETEC, to perform or cause to be performed such reasonable and necessary work on behalf of PAETEC and to charge PAETEC 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 PAETEC, such reasonable and necessary work on behalf of PAETEC 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

PAETEC of the repairs as soon as practicable after the work has begun. PAETEC 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 and/or relocation and/or removal costs from PAETEC 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 PAETEC as required by Section 13.3 below.

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

13.4 For any pavement cuts by PAETEC, PAETEC 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. PAETEC 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, relocate, remove, tear out, dig-up or otherwise damage and/or destroy Facilities of PAETEC without any prior notice to PAETEC, 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 PAETEC, 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 PAETEC 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 PAETEC of any actions taken. PAETEC 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 PAETEC'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 PAETEC 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 PAETEC 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 agent, contractors or employees in reasonably responding to such public emergency. When practical and if possible, City will consult with PAETEC 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 PAETEC for the construction activities to expand and extend PAETEC's Facilities and Service Area 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.

16.2 PAETEC 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 PAETEC.

## **SECTION 17. Legal Workers**

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

17.1 PAETEC warrants to City that PAETEC 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 PAETEC 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 PAETEC or any Contractor who works pursuant to this Agreement to ensure that they or the Contractor is complying with the warrant given above.

17.4 City may conduct random verification of PAETEC's and its Contractor's employment records to ensure compliance with the warranty given above.

17.5 PAETEC 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 PAETEC and the execution of it by the Tempe City Council.

18.2 PAETEC shall acknowledge that as a condition of acceptance of this Agreement, PAETEC was required to be represented throughout the negotiations of the Agreement by its own attorneys and PAETEC had the opportunity to consult with its own attorneys about its rights and obligations regarding the Agreement. PAETEC 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, PAETEC 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 PAETEC'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 (5<sup>th</sup>) 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 PAETEC 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, PAETEC shall apply to the City for a new License and Agreement in accordance with the then existing federal, state, and local laws.

20.2 PAETEC 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. PAETEC 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 PAETEC under this Agreement. PAETEC acknowledges the right of the City to adopt and implement such lawful code amendments and/or fee schedules.

20.4 If PAETEC's Facilities remain in the ROW, and PAETEC 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 60 days beyond the expiration of the term, and no permits will be issued to PAETEC by the City until a new License has been approved by the City Council.

20.5 Failure by PAETEC 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 PAETEC and the liquidated damages amount set forth in Section 33 shall apply. If, however, PAETEC 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 PAETEC 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 PAETEC for use of the public ROW.

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

21.2.1 Application Fee – PAETEC 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 PAETEC 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, PAETEC will owe transaction privilege tax on any qualifying services under Tempe City Code Sec. 16-470.

21.2.2.1 PAETEC asserts that under A.R.S. § 9-582, 100% of its route is currently exempt from the fee under Section 21.2.4 below.

21.2.2.2 Should the percentage and/or nature of PAETEC's use change so that either a linear foot fee under Section 21.2.3 or Section 21.7 or a use fee under Section 21.2.3 is applicable, PAETEC agrees to pay such fees, subject to any right of offset under Section 21.2.4.2 and Section 22. Any such fees shall be calculated from the effective date of this Agreement and any retroactive amounts from the date of the change in circumstances that cause the fee to be due the City shall be payable within 30 days of written notification by the City to PAETEC of what amount is due.

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 PAETEC'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 Eleven (\$ 2.11) per linear foot, which shall be adjusted annually as provided in Section 21.2.3.1.

21.2.3.1 Commencing on the anniversary date of this Agreement in 2016 and continuing through the fifth year of the term, the linear foot fee shall be escalated annually each July 1 based on the United States Department of Labor, Bureau of Labor Statistics, Consumer Price Index-All Urban Consumers, West Region for All Items (CPI). If there is no increase in the CPI, the fee shall remain what it was for the prior year.

21.2.4 Compensation for Use of ROW – In the event that PAETEC provides any services that are in addition to intrastate services identified in its CC&N(s) or occupies or uses the ROW for a use other than one that conforms to the definition of Telecommunication Services as defined in this Agreement and A.R.S. § 9-581, PAETEC agrees to pay fair and reasonable compensation for use of the ROW as authorized by law. Upon each anniversary of this Agreement, the compensation will be adjusted by the CPI as provided by Section 21.2.3.1 above, and payment made as required by Section 21.3. PAETEC's current use of the ROW does not require a fee under Section 21.2.4 and PAETEC has no empty conduit currently occupying the ROW.

21.3 Should the percentage and/or nature of PAETEC's use change so that either a linear foot fee under Section 21.2.3 or Section 21.7 or a use fee under Section 21.2.4 is applicable, PAETEC agrees to pay such fees, subject to any right of offset under Section 22. Any such fees shall be calculated from the effective date of this Agreement and any retroactive amounts from the date of

the change in circumstances that cause the fees to be due the City shall be payable within 30 days of written notification by the City to PAETEC of what amount is due.

21.4 For any annual payment(s) owed, PAETEC 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.

21.5 Permit Fees – PAETEC 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 PAETEC, the needs of PAETEC’s work requires after hours or nighttime work outside of normal business hours, PAETEC shall reimburse the City according to the Section 29-19 fee schedule in place.

21.6 Damage Fees – PAETEC shall pay any reasonable costs associated with any damage caused to the ROW or public property Tempe City Code Section 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), if such installation subjects PAETEC to an annual fee pursuant to Section 21.2.3 or Section 21.2.4 above (if applicable), PAETEC 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, PAETEC 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 PAETEC shall be refunded to PAETEC by City.

21.8 Any checks should reference the contract number and be sent to:

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

21.9 PAETEC agrees that if it fails to pay any amounts owed to the City by the time prescribed for payment, PAETEC 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 PAETEC, 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**

PAETEC 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 PAETEC pursuant to Section 21. PAETEC consents to the disclosure of any and all information reported on PAETEC'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, PAETEC shall cause to be filed and maintain until either completion of the construction or termination of this Agreement as determined by PAETEC, 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 PAETEC 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 PAETEC, 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 PAETEC 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 PAETEC 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, PAETEC 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 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 PAETEC 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 PAETEC 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 PAETEC 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 PAETEC.

25.2 Within twenty (20) days after notice to PAETEC that any amount has been withdrawn by City from the security fund account or letter of credit, PAETEC 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 PAETEC 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 PAETEC 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 PAETEC of the amounts and date thereof.

25.4 Any funds that City erroneously or wrongfully withdraws shall be returned to PAETEC, 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 Insurance Required. PAETEC 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 PAETEC, insurance against claims for i) bodily injury, sickness or disease, or death of any person other than PAETEC's employees; ii) damages insured by usual personal and advertising injury liability coverage; iii) damages because of injury to or destruction of tangible property, including loss of use resulting from; iv) products/completed operations; and v) damages involving contractual liability insurance applicable to PAETEC's indemnity obligations under this Agreement. Such insurance shall cover claims as may be occasioned by the operations, act, omission or negligence of PAETEC or its officers, agents, representatives, employees or Contractors during all times that this License and Agreement is in effect. Insurance limits are inclusive of umbrella coverage. PAETEC shall maintain limits no less than those stated herein for each type of insurance.

26.2 General Requirements. PAETEC'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 be duly licensed or otherwise approved by the State of Arizona, Department of Insurance and with forms satisfactory to the City.

26.2.1 Coverage Term. 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 Additional Insured. 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 PAETEC 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 PAETEC. 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 PAETEC'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 PAETEC 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 PAETEC 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 PAETEC shall provide at least thirty (30) days advance written notice to City of any required. Coverage that is reduced, cancelled or non-renewed and not replaced.

26.2.6 PAETEC shall include all Contractors as additional insureds under its policies or shall furnish separate certificates and endorsements for each Contractor. All coverages for Contractors shall be subject to all the requirements stated herein for PAETEC.

26.2.7 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, PAETEC shall furnish to City Certificates of Insurance issued by PAETEC'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 A 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 PAETEC, 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. 6<sup>th</sup> St., 2<sup>nd</sup> Floor  
Tempe, AZ 85281

with copy to:  
City of Tempe  
Attn: City Engineer  
31 E. 5<sup>th</sup> 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 PAETEC of any deficiencies in such policies and endorsements, and such receipt shall not relieve PAETEC from, or be deemed a waiver of City's right to insist on, strict fulfillment of PAETEC's obligations under this Agreement.

26.4 Required Coverage.

26.4.1 Such insurance shall protect PAETEC from claims set forth below that may arise out of or result from the operations of PAETEC under this Agreement and for which PAETEC may be legally liable, whether such operations be by PAETEC 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 and CG 20 37 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 PAETEC'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 PAETEC'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 for each occurrence, with a \$ 10,000,000 general aggregate limit. The policy shall be primary and include coverage for bodily injury, property damage, personal injury, products, completed operations, and blanket contractual coverage, including but not limited to the liability assumed under the indemnification provisions of this Agreement which coverage shall be at least as broad as the Insurance Services Office, Inc. policy form CG 20 10 and CG 20 37 or equivalent thereof, including but not limited to severability of interests and waiver of subrogation clauses. PAETEC shall also obtain Endorsement CG 20 10.

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

PAETEC shall maintain Worker's Compensation insurance to cover obligations imposed by federal and state statutes having jurisdiction over PAETEC'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, PAETEC will require the Contractor to provide Worker's Compensation and Employer's Liability to at least the same extent as required of PAETEC.

26.7. Automobile Liability.

If PAETEC owns and/or operates vehicles in Arizona, PAETEC 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 PAETEC's work. Any combination between automobile liability and excess liability alone amounting to a minimum of \$5,000,000 per occurrence in coverage will be acceptable. 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 PAETEC acknowledges that it has liability for any and all of its Facilities installed in the public ROW and 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 or its agents. To the fullest extent permitted by law, PAETEC, 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 PAETEC, its employees, agents, or any tier of Contractors or any other person for whose acts, errors, mistakes, or omissions PAETEC may be legally liable and from any Claims or amounts arising or recovered under workers compensation laws or any other law, bylaw, or ordinance, order or decree related to any failure on the part of PAETEC, its agent, employees or representatives to fulfill PAETEC'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 indemnification 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 PAETEC 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 PAETEC 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 PAETEC, who shall immediately defend the litigation. If the City tenders the defense to PAETEC, PAETEC shall

have the right to retain counsel of its own choice, to settle all or any part of the litigation on terms acceptable to PAETEC (and, where such terms directly obligate or affect City, acceptable to City). PAETEC 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 PAETEC 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, Contractors, 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 PAETEC 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 PAETEC 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 PAETEC, even if part or all of this License is declared null and void in a legal or administrative proceeding. It is the intent of PAETEC 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 PAETEC and the City and their respective successors and assigns, if any. Any failure by PAETEC 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 Licensor's executing this Agreement, PAETEC specifically agrees that to the extent any provision of this paragraph is not fully enforceable against PAETEC 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 PAETEC or to its affiliates or customers for any interference with or disruption in the operations of PAETEC's Fiber Optic Networks or the provision of services, or for any damages arising out of or materially related to PAETEC'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 PAETEC 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 PAETEC 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 PAETEC.

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 PAETEC, either by act of PAETEC 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, PAETEC 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 PAETEC 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 PAETEC’s rights to use the ROW (collectively “Liens”).
4. PAETEC's insolvency.
5. The occurrence of any of the foregoing with respect to any assignee or other successor to PAETEC.

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 PAETEC's assets) to be signed by Assignee, Assignor and the City. Prior to any assignment or transfer, PAETEC 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 PAETEC.

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 PAETEC, 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 PAETEC could not have exercised; and

29.6.3 PAETEC and the proposed transferee shall submit to City a description of the nature of the transfer.

29.6.4 PAETEC may execute a pledge or, hypothecation or mortgage or similar instrument transferring conditional ownership of all or part of PAETEC's assets to a lender or creditor in the ordinary course of business provided that PAETEC has secured approval from the Arizona Corporation Commission, if required. In the event a lender assumes control of the assets and operation of PAETEC through a default of PAETEC in loan obligations, the Lender may assume the rights and obligations of PAETEC. 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 PAETEC to any company which is owned or controlled or under common control and with the same direct parent as PAETEC, 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 PAETEC 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 PAETEC, known and unknown, for all purposes, and agrees that the transfer shall not permit it to take any position or exercise any right which PAETEC could not have exercised; and
3. The transfer will not substantially diminish the financial resources available to PAETEC.

29.6.5.1 However, prior to completing the transfer described above, PAETEC 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 PAETEC 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. PAETEC 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, PAETEC's construction of improvements, PAETEC's negligence, PAETEC's failure to comply with the provisions of this Agreement (including any absence or inadequacy of insurance required to be carried by PAETEC), or otherwise as a result of the existence of this Agreement.

### **SECTION 31. PAETEC's Records**

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

1. The status of the construction, repair, location or relocation of PAETEC'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 PAETEC's rights or obligations under this License and/or Agreement.

31.2 If necessary for the City to determine PAETEC'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, PAETEC 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 PAETEC's offices in Maricopa County, Arizona. PAETEC 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 PAETEC 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 PAETEC determines that in order to respond to City's request for documentation, it must reasonably provide Proprietary Information, PAETEC 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 PAETEC 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 PAETEC of such request and allow PAETEC 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, PAETEC 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, PAETEC shall provide to City copies of any communications and reports submitted by PAETEC 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 PAETEC 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 PAETEC's obligation to pay liquidated damages does not in any way detract from PAETEC's indemnity and insurance obligations under this Agreement, which shall apply according to their terms in addition to PAETEC's obligation to pay liquidated damages.

33.2 PAETEC 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 PAETEC'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 PAETEC 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 PAETEC may be liable for liquidated damages, the City Engineer shall issue to PAETEC 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. PAETEC 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:

33.4.2.1 PAETEC 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 PAETEC 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 PAETEC 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, PAETEC will be given the opportunity to be heard and present evidence. If the result of the hearing is that PAETEC 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 PAETEC 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 PAETEC 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 and fails to correct the same after notice and opportunity to cure.

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

34.1.3 PAETEC ceases doing business in the CITY.

34.1.4 PAETEC 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 PAETEC 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 PAETEC as a going concern, or if there is any similar action that affects PAETEC's capability to perform its obligations under this License and/or Agreement.

34.1.6 PAETEC 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 PAETEC'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 PAETEC 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 PAETEC of the defect in performance and give PAETEC 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 PAETEC has already had notice and opportunity to cure.

34.4 The City Manager has the authority to terminate, subject to PAETEC'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 PAETEC.

34.6 Termination by Mutual Agreement. This License and/or Agreement may be terminated prior to its date of expiration by PAETEC by providing the City with ninety (90) days written notice and only upon making arrangements satisfactory with the City Engineer to remove all PAETEC's Facilities from public property and the ROW, unless the City Engineer agrees in writing to allow PAETEC to abandon part or all of its Facilities in place. If the City Engineer agrees to allow PAETEC 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 PAETEC 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, PAETEC 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 PAETEC ceases to provide services or abandons use of any of its Facilities, upon cancellation or termination of the Agreement, PAETEC 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 PAETEC, 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, PAETEC 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. PAETEC 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 PAETEC 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 PAETEC to remove Facilities that the PAETEC 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 PAETEC 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 PAETEC or a representative of PAETEC 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 PAETEC.

### **SECTION 38. Condemnation**

The following shall govern any condemnation of any part of or interest in the area used and/or occupied by PAETEC 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. PAETEC acknowledges that City and others from time to time may sue the power to condemn the area used by PAETEC 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 PAETEC. City does not warrant that it will not condemn the area(s) used and/or occupied by PAETEC 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 PAETEC 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 PAETEC.

## **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. 5<sup>th</sup> St.  
Tempe, AZ 85281  
Phone: (480) 350-8200

#### With copies to:

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

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

### **PAETEC:**

McLeodUSA Telecommunications Services, LLC d/b/a Paetec Communications, LLC  
11101 Anderson Drive  
Little Rock, AR 72212  
[Corp.franchise.agreements@windstream.com](mailto:Corp.franchise.agreements@windstream.com)  
(501) 748-5234  
(330) 486-6238 (fax)

#### With copies to:

Windstream Communications  
4001 Rodney Parham Road  
Little Rock, AR 72212  
Attn: Legal Department

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 PAETEC 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 PAETEC ACKNOWLEDGES AND AGREES THAT CITY DOES NOT WARRANT THE CONDITION OR SAFETY OF ITS ROW OR THE PREMISES SURROUNDING THE SAME, AND PAETEC 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. Other Governmental Agreements**

If PAETEC enters into any license or agreement for use of public ROW or public property with another municipality or governmental entity (excluding any government run utility) in Arizona that grants to the other municipality or governmental entity rights or financial benefits, including additional compensation for use of the ROW beyond the applicable transaction privilege tax and what is provided by this Agreement, the City shall have the right to agree to and amend this Agreement to reflect the same or substantially similar terms of such other agreement.

#### **SECTION 44. Non-Waiver**

PAETEC 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 45. 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 46. 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 PAETEC, 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 PAETEC and is beyond its reasonable control.

**SECTION 47. 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 48. 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 49. Survival of Liability**

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

This Agreement executed this \_\_\_\_ day of June, 2016.

City of Tempe,  
an Arizona municipal corporation

McLeodUSA Telecommunications Services,  
LLC d/b/a Paetec Communications, LLC  
a Delaware limited liability company

\_\_\_\_\_  
Mark W. Mitchell, Mayor

By: \_\_\_\_\_  
Title: \_\_\_\_\_

Attest:

Attest:

\_\_\_\_\_  
Brigitta M. Kuiper, City Clerk

\_\_\_\_\_  
Title: \_\_\_\_\_

APPROVED AS TO FORM:

\_\_\_\_\_  
Judith R. Baumann, City Attorney

**Exhibit A – Insurance Certificate**

**Exhibit B – Letter of Credit form**