

**WIRED TELECOMMUNICATIONS LICENSE AND
RIGHT-OF-WAY USE AGREEMENT
BETWEEN THE CITY OF TEMPE
AND LEVEL 3 COMMUNICATIONS, LLC**

Contract No. C2016-

This Wired Telecommunications License ("License") and Right-of-Way Use Agreement ("Agreement") is effective as of this ____ day of December, 2016, by and between the City of Tempe, an Arizona municipal corporation ("City") and Level 3 Communications, LLC ("Level 3"), a Delaware limited liability 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, Level 3 has obtained from the Arizona Corporation Commission a certificate of convenience and necessity by Decision No. 61737 dated June 4, 1999 (the "CC&N"); and

WHEREAS, Level 3 has previously received permission from the City to place Facilities in the right-of-way pursuant to License Nos. C2000-95, C2006-158 and C2011-136; and

WHEREAS, Level 3 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, Level 3 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, Level 3 seeks an agreement to occupy the right-of-way with empty conduits and use the right-of-way for non-telecommunication services; and

WHEREAS, Level 3 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, Level 3 agrees to provide and maintain accurate maps showing the location of all Facilities owned or used by Level 3 on public within City, and to comply with reasonable mapping requirements as City may establish from time to time; and

WHEREAS, Level 3 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, Level 3 has agreed to comply with public property use requirements that City has established and may reasonably establish from time to time in accordance with State and Federal laws,

NOW THEREFORE, for and in consideration of the foregoing, the amounts hereinafter to be paid by Level 3, and the covenants and agreements contained herein to be kept and performed by Level 3, and for other good and valuable consideration, the City hereby grants to Level 3 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 Level 3 Contractors 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, 47 U.S.C. § 573 and implementing regulations (47 CFR § 76.1500), providing service within the City;
- (c) Any other system providing Multichannel Video Programming Services within the City, where the service is transmitted in whole or in part via wires or lines that are in or cross any ROW within the City. The preceding sentence shall apply whether the provider owns, leases or otherwise obtains the right to use the wires or lines, including wires or lines of a telecommunications provider used pursuant to tariff or otherwise for that purpose;
- (d) Any other system providing Multichannel Video Programming Services within the City where a license or similar permission or approval from the City is required under applicable law,

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

Parties shall collectively mean the City of Tempe and Level 3 Communications, LLC.

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

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

Public Emergency means any condition which, in the opinion of City officials, poses an immediate threat to the lives or property of the citizens of Tempe or others caused by any natural or man-made disaster, including but not limited to, storms, floods, fire, accidents, explosions, major water main breaks, hazardous material spills, etc.

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

Public Service Corporation means a corporation engaged in furnishing gas, oil, or electricity for light, fuel, or power; or in furnishing water for irrigation, fire protection, or other public purposes; or in furnishing, for profit, hot or cold air or steam for heating or cooling purposes; or engaged in collecting, transporting, treating, purifying and disposing of sewage through a system, for profit; or in transmitting messages or furnishing public telegraph or telephone service, and all corporations other than municipal, operating as common carriers. However, a message transmitting company is only a public service corporation if it is a common carrier.

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

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

Telecommunications means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received. **However, the term does not include commercial mobile radio services, pay phone services, interstate services, cable services, information services, or the 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 Level 3 permission to use the designated portions of the right-of-way ("ROW") subject to and conditioned upon Level 3's full, timely, complete and faithful performance of all obligations to be performed or required hereunder by Level 3, and Level 3 hereby accepts the terms and conditions of this License and Agreement.

2.2 Level 3'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. Level 3 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 where it has permission to be. The permitted uses are limited to the following:

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

2.2.1.2 To the extent that any Fiber Optic Networks within the 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 Level 3 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 submitted to the City as part of Level 3's application and to future expansions or extensions that are done by Level 3 in accordance with Section 12.

2.2.1.3 Such additional related uses for which City may give consent from time to time. Such additional uses may only be conducted following City's giving to Level 3 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. Level 3 may not allow third parties to use the Facilities for any use that Level 3 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 Level 3 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 or video services system license or franchise. This License does not allow a Multichannel Video System and/or the providing of Multichannel Video Programming Services and the Parties agree that a separate agreement would be needed in order to have such a system or to provide such services.

2.4 The authority to install and construct any Conduit System and/or Fiber Optic Networks on City property granted herein authorizes Level 3 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 Level 3 to install or construct any Facilities not expressly provided for in this Agreement.

2.5 To the extent that Level 3 occupies the ROW with solely empty conduit and/or leased dark fiber and/or uses the City's ROW to provide services other than the telecommunication services as defined by A.R.S. § 9-581, such use and/or occupation of the ROW is subject to the terms and conditions of this Agreement and any applicable fees, permits and laws.

2.6 Level 3 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 Level 3 to comply with any law or regulation of the FCC or the ACC to engage in the business activities anticipated by this Agreement, Level 3 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 Level 3 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, including the City-owned Conduit System that was received from Level 3 pursuant to C2000-95 as shown on Exhibit A (the confidential map showing the location of the running line where the City's conduit has been tagged as required by C2006-158 and C2011-136). Level 3 is not obligated under this Agreement to provide the City with any additional Conduit beyond that which the City has already received. Any and all rights to occupy the ROW granted to Level 3 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 Level 3, including any fee or leasehold interest, easement, or any franchise rights.

3.3 Any right or privilege claimed pursuant to this Agreement by Level 3 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 Level 3 by its execution of this Agreement agrees to be bound thereby and to comply with any lawful action or lawful requirements of the City in its exercise of such rights or power, heretofore or hereinafter enacted or established. Neither the granting of any Agreement nor any provision hereof shall constitute a waiver or bar to the exercise of any lawful governmental right or power of City.

3.5 Nothing in this Agreement shall be construed to prevent the City from abandoning, altering, improving, repairing, or maintaining its Facilities and/or the ROW, and for that purpose to require Level 3, at no expense to the City, to remove, relocate or abandon in place Level 3's Facilities in order to accommodate the reasonable activities of the City. The City shall not be liable for lost revenues sustained by Level 3, 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 and do not result due to the City's gross negligence or willful misconduct.

SECTION 4. Notice of Other Users

4.1 Level 3 may enter into contracts with unrelated third parties ("Users") in the ordinary course of Level 3's business for use of the Conduit Systems and/or Fiber Optic Networks within the portions of the ROW subject to this Agreement. Such contracts ("User Contracts") shall be subject to all requirements and provisions of this Agreement and the following:

- 4.1.1 No person shall transmit voice, video or data over the Fiber Optic Networks or otherwise use the Conduit System(s) except under a User Contract with Level 3.
- 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 Level 3 shall cause to comply with this Agreement all persons using the ROW through or under Level 3 or this Agreement. Level 3 is responsible for any violations of this Agreement by persons using the ROW through or under Level 3 or this Agreement.

4.3 Should Level 3 lease Dark Fiber or Conduit to a User within the ROW, Level 3 shall inform the City within forty-five (45) business days of the location and length of the Dark Fiber or Conduit route that is being leased through an indefeasible right of use agreement or similar contractual arrangement. A pro-rated ROW use fee will be calculated from the installation date to the anniversary date of the Agreement and such amount will be added on to the annual fee that will be due on the anniversary date of the Agreement. This additional footage will be added to any current leased Dark Fiber or Conduit footage and used in the calculation of the total annual fee owed on the anniversary date of this Agreement. Identification of the Dark Fiber leasee will be kept confidential to the extent allowed by law. If there is a public records request for such information, City will contact Level 3 to allow it an opportunity to seek judicial relief to prevent the disclosure of the leasee's identity.

SECTION 5. Description of the Services and Routes

5.1 Level 3 uses its Fiber Optic Network to provide data and Internet services, voice services, point to point broadband, and video transmissions that are not considered Multichannel Video Programming Services, video services provided by an Open Video System, or cable services or video services as defined by Chapter 10 of the Tempe City Code.

5.2 Level 3's CC&N only authorizes it to provide resold and facilities-based local exchange, exchange access and interexchange telecommunications services in Arizona.

5.3 As of the date of this Agreement the total linear footage for the Level 3's Routes within the City ROW is 182,247.

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, Level 3 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 Level 3 and any of its Contractors, who will be considered Level 3's agents and for whom Level 3 will be responsible. Level 3 will ensure that Level 3 and its agents comply with Public ROW use requirements as follows:

6.1 Registration. Level 3 agrees to register with the City by completing an application or renewal application form and the paying the applicable application fee.

6.2 Notice of Changes. Level 3 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 Level 3's name or address must be filed at least ten (10) 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.

6.3 Level 3 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 Level 3's use of the public ROW and easements under the control of the City shall be according to plans approved by the City Engineer, provided that such approval shall not be unreasonably withheld or delayed.

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

6.6 Level 3 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 Level 3 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 Level 3 has applied for and received approval for permits from the City Engineer. Level 3 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 Level 3's Facilities subject to this License and Agreement. Additionally, Level 3 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 Level 3'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 Level 3 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. Level 3 and/or its Contractor(s) shall abide by all stipulations of all licenses and permits issued. If Level 3 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, Level 3 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. Level 3 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 Level 3, safety and other considerations in accordance with the City's Code, applicable ROW construction regulations and other applicable law. Level 3 and/or its Contractor(s) agree to comply with the terms of any City-issued licenses and permits.

7.5 Any new Conduit or other Facilities placed in the ROW will be constructed using industry standard horizontal directional drilling and trenching construction methods. Other material placed in the ground may include concrete manholes, generally 4x4x4, pull boxes/handholes (#7s and #9s) and HDPE couplings and elbows, fiber optic cable, splice cases, tracer wire, grounding material, mule tape, jet string and conduit plugs.

Level 3 and/or its Contractor(s) will install any new Conduit and access points (manholes/pull boxes) using industry standard practices and in full compliance with Uniform Standard Specifications and Details for Public Works Construction sponsored and distributed by the Maricopa Association of Governments as amended (hereinafter referred to as "MAG"), the City's supplements to MAG, and the City of Tempe Utility Permit and Construction Manual.

7.6 If Level 3 desires to change the components of any of the Fiber Optic Network and such would require Level 3 to obtain a permit, written approval of such change must be obtained from a representative of the City Engineer.

7.7 The City shall have the right to inspect all construction or installation work performed subject to the provisions of this License and to make such tests as it shall find necessary to meet City standards as set forth in the City of Tempe Utility Permit and Construction Manual and the MAG Uniform Standard Specifications and Details for Public Works Construction and the City of City 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 as agreed upon by Level 3 and the City. If portions of this project will take place on the major arterial streets in City, Level 3 and City will work to minimize the inconvenience to the citizens of City and others who use those major arterial streets impacted by the project by developing segments of the project to be completed in sequence.

7.9 Any Conduit systems and/or Fiber Optic Network(s) to be constructed, installed, operated and maintained under this Agreement shall be located or relocated so as to interfere as little as possible with traffic, existing utilities or other authorized uses over, under or through said streets and public ways. Level 3 shall not install, operate, or allow the use of equipment, methodology or technology that may or would unreasonably 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 unreasonable interference should occur, Level 3 shall immediately discontinue using the equipment, methodology or technology that causes the interference until Level 3 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. Level 3 shall be responsible to ensure compliance with this Agreement by all persons using the ROW through or under Level 3 or this Agreement.

7.10 Co-location. Level 3's installation of the Facilities shall be reasonably coordinated with other utilities and City to accommodate opportunities for common installation along with Level 3'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 Level 3 to incur any 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, Level 3 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 Level 3 for the Conduit System to be placed by horizontal directional drilling under

such streets when feasible and reasonable, bore profiles based on vacuum pothole information shall be part of the engineered plans submitted to the City. Arterial streets shall not be bored unless approved by the City Engineer. In the event that a street opening in new pavement or resurfaced pavement cannot be avoided, Level 3 agrees to pay a reasonable surcharge fee to cover damages and early deterioration will be assessed for cutting new or resurfaced pavements less than seven years old.

7.12 Level 3 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, Level 3 shall provide written notice to the businesses and/or residences adjacent to the work being done.

7.13.1 If an emergency requires activity without such written notice, Level 3 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, Level 3 shall promptly furnish to City documentation of such permission from such other affected property owner.

7.14 Whenever Level 3 or its Contractors shall cause any opening or alteration to be made for any purpose in any public streets, or public places, the opening or alteration shall be completed and restored with due diligence within seven (7) business days or such time as allowed by the City Engineer. Level 3 shall upon the completion of the opening or alteration, restore the property, improvements or landscaping disturbed by Level 3 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, Level 3 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 Level 3 shall have the full responsibility and liability for traffic control for work performed by Level 3 or their Contractors. Level 3 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. Level 3 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. Level 3 shall pay any and all applicable barricade fees.

7.15.5 City will make no payment for traffic control. The cost for any fees shall be Level 3's responsibility.

7.15.6 In the event Level 3 or its Contractor(s) damages any traffic signal equipment, traffic signal conduit, loop detectors and/or circuits, it shall have them repaired immediately at its expense by an electrical Contractor that has had traffic signal experience which is pre-approved by the City. Any damage caused by Level 3 or its Contractor(s) or subcontractors that is repaired by the City will be billed to Level 3 at two times the cost.

7.15.7 Level 3 shall notify all adjacent or affected residents or businesses at least forty-eight (48) hours in advance of any street, alley, sidewalk, and driveway closures and make suitable arrangements to have all vehicles moved to a satisfactory location outside the closed area.

7.15.8 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.

7.15.9 Speed limits shall be strictly enforced.

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

7.16 Clean Up. Level 3 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. Level 3 and Level 3'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. Level 3's failure to thoroughly familiarize itself with the aforementioned safety provisions shall not relieve Level 3 from compliance with these provisions.

7.18 Blue Stake. Level 3 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 Level 3'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

Level 3'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. Level 3 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. Level 3 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. Level 3 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, Level 3 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 directly caused by Level 3, its Contractor(s) or anyone using the ROW under this Agreement.
5. Level 3 and/or its Contractor(s) shall immediately notify City of any Toxic Substance at any time discovered or existing upon the ROW. Level 3 is not responsible for Toxic Substances that may exist at the ROW if Level 3'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. Level 3 understands the hazards presented to persons, property and the environment by dealing with Toxic Substances. Level 3 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 Level 3 and/or by its Contractor(s) of this Agreement pertaining to Toxic Substances, Level 3 shall give City notice reporting such violation.

SECTION 9. On-Call Assistance

Level 3 shall be available to staff employees of any City department having jurisdiction over Level 3's activities twenty-four (24) hours a day, seven (7) days a week, regarding problems or complaints resulting from the installation, operation, maintenance, or removal of its Network. City may contact by telephone the network operations center operator at the following phone number 1-877-853-8353 regarding such problems or complaints, and may use that number in order to reach Level 3 at any time for any emergency matter. Level 3 shall use reasonable efforts to respond to any issues within the time frames specified in its service level agreements. Level 3 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 Level 3 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 on an annual basis or upon reasonable request by the City. Level 3 shall create and maintain maps of any of its Conduit System and/or Fiber Optic Network routes, new 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. Level 3 will also provide surface-location marking of any of Level 3's Facilities that are located underground within any public ROW within ten (10) business days of installation. The information provided by Level 3 under this section will be accurate to the best of Level 3's knowledge. Level 3 shall make every reasonable effort to provide accurate and useful information, and the City acknowledges that the information will be provided on an "as-is" and "as-available" basis. Level 3 shall be permitted to remove any information from the drawings provided hereunder that is not required for the City's purposes or is otherwise confidential to Level 3.

10.2 If complete updates are not provided in a compatible format, Level 3 shall pay the actual, reasonable costs the City incurs to update the City's electronic mapping format due to the location or relocation of Level 3's Facilities.

10.3 In the event Level 3 fails to supply records in the City specified format and there is a cost to the City in converting Level 3-provided files, Level 3 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.

10.4 The files and drawings provided by Level 3 to the City shall be considered confidential and subject to the restrictions in Section 31 below and disclosed as a public record only to the extent required by A.R.S. § 39-126.01.

SECTION 11. Relocation

11.1 Level 3 shall relocate at no expense to the City any Facilities or other encroachment installed or maintained in, on or under any public place or ROW, as may be necessary to facilitate any public purpose any City project whenever directed to do so by City. However, to the extent that the City receives funds from any third parties or government entities for a project that requires the relocation of Facilities owned, operated and/or maintained by the Level 3, the City shall allocate such funds to the relocation of Level 3's Facilities. If more than one licensee is required to relocate for the same project, and is eligible for reimbursement, any such funds shall be distributed on a pro rata basis based on the total relocation costs of each of the licensees eligible for such reimbursement. Level 3 shall not hold the City liable for failure to request or file a claim for any funds for the relocation of the Level 3's Facilities. Such relocations shall be accomplished in accordance with the directions from City and shall be pursuant to the same terms and conditions as the initial installation allowed pursuant to this Agreement and any applicable issued permits. Level 3 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, Level 3 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, Level 3 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. City agrees to cooperate with Level 3 to identify alternate locations where available within the ROW.

11.2 Level 3 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 Level 3 is required to make repairs that are of an emergency nature or in connection with an unscheduled disruption of the Facilities. Level 3 will maintain any annual permits required by the City for such maintenance and emergency repairs. Level 3 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.

11.4 Except as otherwise provided herein, City shall not, without the prior written approval of Level 3, intentionally alter, remove, relocate or otherwise interfere with any portion of Level 3's Facilities. Any written approval required shall be promptly reviewed and processed by Level 3 and shall not be unreasonably withheld.

SECTION 12. Expansion or Extension of the Current Use Area

12.1 Any further expansion and/or extension of Level 3's Fiber Optic Network and or empty Conduit placement outside the current route(s) shall require written approval from the City Engineer, who may, refer the matter to the City Council for approval, provided that such consent, by either the City Engineer, or the City Council, shall not be unreasonably withheld or delayed.

12.2 Level 3 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 Level 3'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, Level 3, 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 Level 3 does not repair the damage or disturbance as just described, then City shall have the option, upon ten (10) days prior written notice to Level 3, to perform or cause to be performed such reasonable and necessary work on behalf of Level 3 and to charge Level 3 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 Level 3, such reasonable and necessary work on behalf of Level 3 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 Level 3 of the repairs as soon as practicable after the work has begun. Level 3 agrees that any severed City-owned Conduit and/or fiber must be completely repaired or replaced to the nearest splice point. If the City needs to perform any part of the necessary repairs, relocation and/or removal work, it shall be entitled to seek payment for such repairs, relocation and/or removal costs from Level 3 and may draw upon a bond and/or letter of credit or security fund required by this Agreement in full or partial satisfaction of such costs, if payment is not made by Level 3 as required by Section 13.3 below.

13.3 Upon the receipt of a demand for payment by City, Level 3 shall, within thirty (30) days, reimburse City for any undisputed costs.

13.4 For any pavement cuts by Level 3, Level 3 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. Level 3 agrees to pay within thirty (30) days from the date of issuance of an invoice from City. Failure to do so shall entitle City to draw upon the letter of credit or security fund and/or performance bond.

SECTION 14. Public Emergency Disruption by City.

City shall have the right, because of a Public Emergency, to sever, disrupt, remove, tear out, dig-up or otherwise damage and/or destroy Facilities of Level 3 without any prior notice to Level 3, if the action is deemed necessary by either the City Manager, Fire Chief, Police Chief, City Engineer, or Public Works Director or designee. In such event, neither the City nor any agent, Contractor or employee of City shall be liable to Level 3, its Contractors or its customers or their parties for any harm so caused to them or the Facilities, unless such damages are caused by City's gross negligence or willful misconduct. When practical and if possible, City will consult with Level 3 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 Level 3 of any actions taken. Level 3 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 Level 3'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 Level 3 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 Level 3 or its Contractors or its customers or other third parties for any harm so caused to them by the reasonable actions of the City or its agents, Contractors or employees in responding to such public emergency, unless such damages are caused by City's gross negligence or willful misconduct. When practical and if possible, City will consult with Level 3 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 and/or subcontractors identified and used by Level 3 for the construction activities to expand and extend Level 3's Facilities and Service Area will need to be approved by the City Engineer or designee prior to issuance of each construction permit, such approval shall not be unreasonably withheld, delayed, conditioned or denied. Any Contractors performing construction work within the ROW or

public easements shall comply with licensing requirements of the Arizona General Contractors.

16.2 Level 3 represents and warrants all independent Contractors maintain coverages the same as all the requirements stated herein for Level 3.

SECTION 17. Legal Workers

If, and to the extent A.R.S. § 41-4401 is applicable to this Agreement, Level 3 shall comply with laws regarding workers as follows:

17.1 Level 3 warrants to City that Level 3 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 Level 3 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 Level 3 Contractor who works pursuant to this Agreement to ensure that they are complying with the warrant given above.

17.4 Level 3 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 Level 3 and the execution of it by the Tempe City Council.

18.2 Level 3 shall acknowledge that as a condition of acceptance of this Agreement, Level 3 was required to be represented throughout the negotiations of the Agreement by its own attorneys and Level 3 had the opportunity to consult with its own attorneys about its rights and obligations regarding the Agreement. Level 3 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, Level 3 acknowledges and accepts the right and authority of City to execute this Agreement and to enforce the terms herein.

SECTION 19. Term of Agreement

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

SECTION 20. Modification, Renewal, Extension

20.1 At the end of the original Term, this License and Agreement shall be renewed for an additional five (5) years ("Extension Term"), if Level 3 has complied with the License and Agreement's terms and conditions. Such Extension Term would expire at 11:59

p.m. on the fifth anniversary of the beginning date of the Extension Term (same day and month as the original Term's anniversary date), unless either party provides written notice of non-extension to the other party at least ninety (90) days prior to the expiration of the Extension Term.

20.2 Level 3 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. Level 3 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 Level 3 under this Agreement. Level 3 acknowledges the right of the City to adopt and implement such lawful code amendments and/or fee schedules.

20.4 If Level 3's Facilities remain in the ROW, and Level 3 continues to use such Facilities beyond the expiration of the license term and pay the annual fees, 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 Level 3 by the City until a new License has been approved by the City Council.

20.5 Failure by Level 3 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 Level 3 and the liquidated damages amount set forth in Section 33 shall apply. If, however, Level 3 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 Level 3 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 Level 3 for use of the public ROW.

21.2 Level 3 shall be solely responsible for payments to City as follows:

21.2.1 Application Fee – Level 3 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 - Level 3 will owe transaction privilege tax on any qualifying services under Tempe City Code Sec. 16-470.

21.2.3 ROW Usage Fee for Provision of Interstate Telecommunication Services – A Fiber Optic Network in the ROW that carries interstate traffic between and among Level 3's interstate points of presence exclusive of the Fiber Optic

Network used by the local network and the portion of the interstate network that carries intrastate calls is subject to an annual fee based on the number of linear feet of trench in the ROW. The annual fee is Two Dollars and Fifteen Cents (\$2.15) 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.

21.2.3.2 Level 3 warrants and represents that there is no longer any linear feet of its routes that provide solely interstate telecommunication services in which no Tempe customers are served (long haul routes with out-of-state customers not subject to City transaction privilege tax for telecommunication services.) If and when there are portions of Level 3's routes that provide interstate telecommunication services in which no Tempe customers are served, Level 3 will immediately notify the City of the location and footage of such route(s) and pay a pro-rated linear foot fee that is due for the length of such route(s). At the next anniversary date of the Agreement, the yearly fee for such additional footage will be added to the current annual fee.

21.2.3.3 Upon each anniversary of this Agreement, any fee owed will be adjusted as provided by Section 21.2.3.1 above, and payment made by as required by Section 21.3.

21.2.4 Compensation for Use of ROW – Level 3 agrees to pay an annual fee for the portion of the ROW used by Level 3 for Dark Fiber or Conduit sales/leasing, empty conduit occupation of the ROW, and any other uses other than those conforming to the definition of Telecommunication Services as defined in A.R.S. § 9-581. Such compensation for use of the ROW is \$1,345.90 based on 626 feet of ROW (street crossings) used for Dark Fiber leasing. For any additional dark fiber leasing, unless a different calculation for fair and reasonable compensation is agreed to by the City, the fee will be calculated at the same linear foot rate as in Section 21.2.3 above. Upon each anniversary of this Agreement, any monetary fee will be adjusted as provided by Section 21.2.3.1 above, and payment made by as required by Section 21.3. Currently Level 3 warrants and represents that it does not lease Conduit within the ROW. Should Level 3 lease any of its Conduits to a third-party, Level 3 shall immediately notify the City of the location and footage of such leased Conduit route(s) and pay a pro-rated linear foot fee that is due for the length of such route(s), unless a different calculation for fair and reasonable compensation is agreed to by the City.

21.2.5 Level 3 Network. Level 3 and the City acknowledge and agree that the network installed by Level 3 (including its affiliates) provides both interstate and intrastate telecommunications services and there are not separate networks within the Level 3 Fiber Optic Network within the City's ROW.

21.3 For any annual payment(s) owed, Level 3 shall make such payment(s) to the City within thirty (30) business days of the effective date of this Agreement and by the anniversary of such effective date thereof for the duration of the term.

21.4 Arrearage – As of the date of this Agreement, the City agrees that Level 3 has paid all amounts due and no further amounts are owed.

21.5 Permit Fees – Level 3 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 Level 3, the needs of Level 3's work requires after hours or nighttime work outside of normal business hours, Level 3 shall reimburse the City according to the Section 29-19 fee schedule in place.

21.6 Damage Fees – Level 3 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 Level 3 to an annual fee pursuant to Section 21.2.3 or Section 21.2.4 above (if applicable), Level 3 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 installation and the next following anniversary date of this Agreement and the denominator of which is twelve (12).

21.7.1 In the event, Level 3 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 Level 3 shall be applied as a credit toward any annual fee or refunded to Level 3 by City.

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

City of Tempe
Attn: City Engineer
31 E. 5th St., Garden Level
Tempe, AZ 85281

21.9 Level 3 agrees that if it fails to pay any amounts owed to the City by the time prescribed for payment, Level 3 shall pay interest on the amounts owed, at the rate of one percent (1%) per month. If the dispute is later resolved in favor of the City, Level 3 will owe the interest on the amount determined to be owed.

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

This agreement does not currently provide for any future in kind payments by Level 3, 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

Level 3 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 Level 3 pursuant to Section 21. Level 3 consents to the disclosure of any and all information reported on Level 3'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, Level 3 shall cause to be filed and maintain until either completion of the construction or termination of this Agreement as determined by Level 3, a faithful performance bond in favor of City in the sum of One Hundred Thousand Dollars (\$100,000.00) or the amount of the construction costs (whichever is greater) to guarantee that Level 3 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 Level 3, 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 Level 3 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 Level 3 has completed the above construction and wants the bond released, the City will need to inspect and approve the construction prior to such release. However, a performance bond will be required for each subsequent or additional construction project and/or work on public property.

SECTION 25. Security Fund

25.1 Upon application for continued use of the ROW, but no later than five (5) business days before this Agreement is submitted to the City Council for approval, Level 3 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 Level 3 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 Level 3 of any fees, claims, liens and taxes due the City which arise by reason of the construction, operation or maintenance of the Facilities. Upon material default that remains uncured (after written notice) for greater than thirty (30) days the 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 Level 3 on demand. No withdrawals shall be made from the security fund account without the prior written approval of the City Manager and sixty (60) days prior written notice of intent to withdraw to Level 3.

25.2 Within twenty (20) days after notice to Level 3 that any amount has been withdrawn by City from the security fund account or letter of credit, Level 3 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 \$ 50,000.00.

25.3 If Level 3 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 Level 3 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 Level 3 of the amounts and date thereof.

25.4 Any funds that City erroneously or wrongfully withdraws shall be returned to Level 3, with interest of 1.0% per month, within thirty (30) business days of such a determination.

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

SECTION 26. Insurance

26.1 Minimum Limits of Insurance. Level 3 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 Level 3, general public liability insurance against claims for bodily injury, death or property damage, products/completed operations and personal and advertising injury, which insurance shall cover claims as may be occasioned by the operations, act, omission or negligence of Level 3 or its officers, agents, representatives, employees or servants during all times that this License and Agreement is in effect. Insurance limits are inclusive of umbrella coverage. Level 3 shall maintain limits no less than those stated herein for each type of insurance.

26.2 General Requirements. Level 3's insurance of the types and amounts required in this section shall be from companies possessing a current A.M. Best, Inc. rating of A-VII, or better and legally authorized to do business in the State of Arizona.

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

26.2.2 The insurance coverage, except workers' compensation and professional liability, required by this Agreement, shall name City, its agents, representatives,

directors, officials, and employees, as additional insureds, and shall specify that insurance afforded Level 3 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 Level 3. 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 Level 3'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 Level 3 who shall be solely responsible for the deductible and/or self-insured retention. The amounts of any self-insured retentions shall be noted on the Certificate of Insurance. Self-insured retentions of up to \$1,000,000 (One Million Dollars) shall be accepted.

26.2.5 All policies shall contain an endorsement providing that the coverage afforded under such policies shall not be reduced, canceled or allowed to expire until at least thirty (30) days prior written notice has been given to City ten (10) days prior written notice for non-payment of premiums.

26.2.6 Level 3 shall be responsible for ensuring that the City is notified within the above noted time period of the occurrence of any reduction in the insurance coverage amounts, cancellation or expiration of any of the policies as required by this License and Agreement.

26.2.7 Level 3 shall include all Contractors as additional insureds under its policies or shall furnish separate certificates and endorsements for each subcontractor. All coverages for Contractors shall be subject to all the requirements stated herein for Level 3.

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

26.3. Proof of Insurance-Certificates of Insurance.

26.3.1. Prior to or upon execution of this Agreement, Level 3 shall furnish to City Certificates of Insurance issued by Level 3's agent or broker, as evidence that policies providing the required coverages, conditions and limits required by this Agreement are in full force and effect and obtain from the City's Risk Management Division approval of such Certificates. Such certificate(s) shall include the endorsement listing the City as an Additional Insured pursuant to Section 26.2.2 and shall be attached as Exhibit C to this Agreement.

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

26.3.3. All Certificates of Insurance shall identify the required policies in effect on behalf of Level 3, their policy period(s), and limits of liability. Coverage shown on the Certificate of Insurance must coincide with the requirements in the text of the Agreement documents. Information required to be on the Certificate of Insurance may be typed on the reverse of the Certificate and countersigned by an authorized representative of the insurance carrier or agent. Copies of the initial Certificate of Insurance and any and all subsequent renewals that are required under this Agreement shall be sent to:

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

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

26.3.4. City reserves the right to request, 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 Level 3 of any deficiencies in such policies and endorsements, and such receipt shall not relieve Level 3 from, or be deemed a waiver of City's right to insist on, strict fulfillment of Level 3's obligations under this Agreement.

26.4 Required Coverage.

26.4.1 Such insurance shall protect Level 3 from claims set forth below that may arise out of or result from the operations of Level 3 under this Agreement and for which Level 3 may be legally liable, whether such operations be by Level 3 or by a consultant or Contractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts Level 3 may be legally liable. Coverage under the policy will be at least as broad as Insurance Services Office, Inc., policy form CG 00 01 10 01 and CG 20 37 07 04 or equivalent thereof, including but not limited to severability of interest and waiver of subrogation clauses.

26.4.2 Claims for damages because of bodily injury, sickness or disease, or death of any person other than the Level 3's employees;

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

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

26.4.5 Claims involving contractual liability insurance applicable to Level 3's obligations under the Indemnification Agreement.

26.5 Commercial General Liability - Minimum Coverage Limits.

The Commercial General Liability insurance required herein shall be written for not less than \$5,000,000 limits of liability. Any combination between general liability and excess general liability alone amounting to a minimum of \$5,000,000 per occurrence and an aggregate of \$10,000,000 in coverage will be acceptable. The Commercial General Liability additional insured endorsement shall be as broad as the Insurance Services, Inc.'s (ISO) Additional Insured, Form B, CG 20 10 10 01 and CG 20 37 07 04, and shall include coverage for Level 3's completed operations and products.

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

Level 3 shall maintain Worker's Compensation insurance to cover obligations imposed by federal and state statutes having jurisdiction over Level 3'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, Level 3 will require the Contractor to provide Worker's Compensation and Employer's Liability to at least the same extent as required of Level 3.

26.7. Automobile Liability.

If Level 3 owns and/or operates vehicles in Arizona, Level 3 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 Level 3's work. Coverage shall be at least as broad as coverage Symbol 1, "any auto", (Insurance Service Office, Inc. Policy Form CA 0001 0306, or any replacements thereof). Such insurance shall include coverage for pollution for upset/overturn/collision of the automobile(s) and loading and offloading hazards if hazardous substances, materials or wastes are to be transported and a MCS 90 endorsement shall be included with coverage limits of \$5 million per accident for bodily injury and property damage. For automobile liability insurance, contractors may require limits usual and customary for the operations but no less than \$1 million.

SECTION 27. Indemnity.

27.1 Level 3 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. To the fullest extent permitted by law, Level 3, 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 Level 3, its employees, agents, or any tier of Contractors or any other person for whose acts, errors, mistakes, or omissions Level 3 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 Level 3, its agent, employees or representatives to fulfill Level 3'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 In the event that any notice of claim is served or litigation is commenced, City shall tender the defense of the litigation to Level 3, who shall immediately defend the litigation. Level 3 shall have the right to retain counsel of its own choice, to settle all or any part of the litigation on terms acceptable to Level 3 (and, where such terms directly obligate or affect City, acceptable to City). Level 3 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 Level 3 or its insurance carrier.

27.2.1 The parties shall promptly notify each other in writing of any claims, demands, or lawsuits which may involve the City and provide copies of all relevant accident reports, incident reports, statements or other documents relevant to or which may lead to relevant materials or information, in the possession of the other party, its employees, agents, subcontractors, and/or others, promptly upon request.

27.2.2 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.

27.3 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 Level 3 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 Level 3 then commence an action against City for damages related to that portion judicially determined to be City's fault.

27.4 The provisions of Section 27 shall be and remain a binding right and obligation of the City and Level 3. It is the intent of Level 3 and the City upon the effective date of this Agreement, that this Section serves as any such declaration and shall be a binding obligation of and inure to the benefit of Level 3 and the City and their respective successors and assigns, if any. Any failure by Level 3 to indemnify the City as required under this Section 27 shall be considered a material breach of this License and Agreement. Notwithstanding anything to the contrary herein, Level 3 shall not be obligated to indemnify the City on any provision of this Agreement that is later determined to be invalid.

27.5 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.

27.6 As a condition to Licensor's executing this Agreement, Level 3 specifically agrees that to the extent any provision of this paragraph is not fully enforceable against Level 3 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

The City and its officers, agents, elected or appointed officials, employees, departments, boards and commissions, shall not be liable to Level 3 or to its affiliates or customers for any interference with or disruption in the operations of Level 3's Fiber Optic Networks or the provision of services, or for any damages arising out of or materially related to Level 3'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.

SECTION 29. Transferability of License and Agreement

29.1 This License is personal to Level 3.

29.2 Notwithstanding the foregoing, Level 3 may transfer or assign this Agreement to any affiliate entity under common corporate control, or to the surviving entity in the event of a merger or acquisition of Level 3 without City's prior consent. Level 3 shall however give notice to the City of any such transfer or assignment.

29.3 Any transfer or assignment for reasons other than provided for in Section 29.2 above shall require the City's prior consent, which shall not be unreasonably withheld, conditioned, or delayed provided that Level 3 agrees that it will provide reasonable documentation about the proposed transfer or assignment.

29.4 In making a determination as to whether to approve a transfer or assignment, the city may consider the following:

- a. the same information required on an original application for the License
- b. whether Level 3 is in compliance with its License and Tempe City Code and if not, the proposed transferee's commitment to cure such noncompliance
- c. whether the proposed transfer or assignment would result in an evasion of other applicable provisions of law or impair lawful contracts
- d. the effect of the transfer or assignment on the City's interests

29.5 No application for a transfer of a license shall be granted unless the proposed transferee or assignee agrees in writing that it will abide by and accept all terms of the License and the Tempe City Code and that it will assume all obligations, liabilities, and responsibility for all acts and omissions, known and unknown, of Level 3 under Chapter 31A of the Tempe City Code and this License for all purposes, including renewal.

29.6 Approval of the City of a transfer or assignment of this License does not constitute a waiver or release of any of the rights of the City, whether arising before or after the date of the transfer or assignment.

29.7 Transfer Remedies. When consent is required, 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 Level 3 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. Level 3 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, Level 3's construction of improvements, Level 3's negligence, Level 3's failure to comply with the provisions of this Agreement (including any absence or inadequacy of insurance required to be carried by Level 3), or otherwise as a result of the existence of this Agreement.

SECTION 31. Level 3's Records

31.1 Recordkeeping. During the entire term of this License and Agreement, Level 3 shall keep records and provide information to City regarding the following:

1. The status of the construction, repair, location or relocation of Level 3'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 Level 3's rights or obligations under this License and/or Agreement.

Level 3 shall make available to City the requested reports or records in the formats in which they are customarily prepared by Level 3. Level 3 reserves the right to object to any request made under this Section 31 as unnecessary, unreasonable or inappropriate under the circumstances and to seek appropriate confidentiality protections for any information to be produced to City.

31.2 If necessary for the City to determine Level 3's compliance with the terms of this License and Agreement or other applicable law, Level shall provide relevant documentation as requested by the City and respond to questions in a format and time period to be decided by the parties based on the nature of the request. Such records shall be available to City at Level 3's offices in Maricopa County, Arizona or delivered electronically as may be appropriate. Level 3 shall also require its employees, agents, and accountants to give their 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 Level 3 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 Level 3 determines that in order to respond to City's request for documentation, it must reasonably provide Proprietary Information, Level 3 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 Level 3 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 Level 3 of such request and allow Level 3 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, Level 3 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, Level 3 shall provide to City copies of any communications and reports submitted by Level 3 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 Level 3 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.

32.3 Neither party will be liable under this Agreement for lost revenues or indirect, special, incidental, consequential, exemplary, or punitive damages, even if the party knew or should have known that such damages were possible and even if direct damages do not satisfy a remedy. This limitation will not apply to any breach of obligations related to confidentiality.

SECTION 33. Liquidated Damages for Violations

33.1 Level 3's obligation to pay liquidated damages does not in any way detract from Level 3's indemnity and insurance obligations under this Agreement, which shall apply according to their terms in addition to Level 3's obligation to pay liquidated damages.

33.2 Level 3 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 Level 3's books and records available as required by this Agreement and such failure continues for fifteen (15) business days after receipt of notice of failure to provide from the City - \$ 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 material instance of any action or non-action by Level 3 contrary to the terms of this Agreement that is not cured after thirty (30) days' notice - \$ 500.00 per day.

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

33.3 Assessment. If the City Engineer concludes that Level 3 may be liable for liquidated damages, the City Engineer shall issue to Level 3 a Notice of Intention to Assess Liquidated Damages and allow Level 3 an opportunity to cure in the time period specified in Sections 33.2.1 through 33.2.5. The Notice shall set forth the nature of the violation and the amount of the proposed assessment. Level 3 shall pay the liquidated damage amount within ten (10) business days of receipt or the City shall deduct the amount from the security fund.

33.3.1 If, however, the liquidated damages exceed Three Thousand Five Hundred Dollars (\$3,500.00), then the following shall apply:

33.3.2 Level 3 shall have thirty (30) days of receipt of such notice to pay the liquidated damage amount or give City notice contesting the assertion of noncompliance.

33.3.3 In the event that Level 3 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 Level 3 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, Level 3 will be given the opportunity to be heard and present evidence. If the result of the hearing is that Level 3 is responsible for the liquidated damage amount, then the amount determined at the hearing will be due ten (10) days after the hearing decision is announced.

33.3.4 Level 3 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 Level 3 fails to comply with the material terms and conditions of the Agreement or applicable law, including but not limited to failing to maintain any insurance, security fund, letter of credit, and/or a performance bond.

34.1.2 Level 3 fails to make payments in the amounts and at the time specified in this Agreement after a final determination that the payments were owed.

34.1.3 Level 3 ceases doing business in the CITY.

34.1.4 Level 3 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 Level 3 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 Level 3 as a going concern, or if there is any similar action that affects Level 3's capability to perform its obligations under this License and/or Agreement.

34.1.6 Level 3 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 Level 3's use of any portion of the ROW and remaining in force for a period of at least thirty (30) consecutive days.

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 Level 3 of the defect in performance and give Level 3 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 Level 3 has already had notice and opportunity to cure.

34.4 The City Manager has the authority to terminate, subject to Level 3'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 Level 3.

34.6 Termination by Mutual Agreement. This License and/or Agreement may be terminated prior to its date of expiration by Level 3 by providing the City with ninety (90) days written notice and only upon making arrangements satisfactory with the City Engineer to remove all Level 3's Facilities from public property and the ROW, unless the City Engineer agrees in writing to allow Level 3 to abandon part or all of its Facilities in place. If the City Engineer agrees to allow Level 3 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 Level 3 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, Level 3 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 Level 3 ceases to provide services or abandons use of any of its Facilities, upon cancellation or termination of the Agreement, Level 3 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 Level 3, 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, Level 3 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. Level 3 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 Level 3 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 Level 3 to remove Facilities that the Level 3 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 its execution without penalty or further obligation if any person significantly involved in initiating, negotiating, securing, drafting or creating this Agreement is, at any time while the Agreement or an extension of the Agreement is in effect, an employee or agent of any other party to this Agreement in any capacity or a consultant to any other party of this Agreement with respect to the subject matter of the Agreement. The cancellation shall be effective when Level 3 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 Level 3 or a representative of Level 3 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 Level 3.

SECTION 38. Condemnation

The following shall govern any condemnation of any part of or interest in the area used and/or occupied by Level 3 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. Level 3 acknowledges that City and others from time to time may sue the power to condemn the area used by Level 3 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 Level 3. City does not warrant that it will not condemn the area(s) used and/or occupied by Level 3 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 Level 3 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 Level 3.

SECTION 39. NOTICE

39.1 All notices, which shall or may be given pursuant to this Agreement, shall be in writing and transmitted through the U.S. certified or registered mail, postage prepaid, by

means of prepaid private delivery systems, or by facsimile or email transmission showing a valid delivery receipt if a hard copy of the same is followed by delivery through the U.S. mail or by private delivery systems, addressed as follows:

CITY OF TEMPE:

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

With copies to:

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

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

Level 3:

Level 3 Communications LLC
Attn: NIS - ROW
1025 Eldorado Blvd.
Broomfield, CO 80021
Phone: (720) 888-2541
Fax: (720) 567-3945

With copy to:

Attn: General Counsel (at the same mailing address as above)

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 Level 3 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 federal or state 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 LEVEL 3 ACKNOWLEDGES AND AGREES THAT CITY DOES NOT WARRANT THE CONDITION OR SAFETY OF ITS ROW OR THE PREMISES SURROUNDING THE SAME, AND LEVEL 3 HEREBY ASSUMES ALL RISKS OF ANY DAMAGE, INJURY OR LOSS OF ANY NATURE WHATSOEVER CAUSED BY OR IN CONNECTION WITH THE USE OF ANY CITY ROW.

SECTION 43. Non-Waiver

Neither party shall be excused from complying with any of the terms and conditions of this Agreement by any failure of the other party upon any one or more occasions to insist upon or to seek compliance with any such terms or conditions.

SECTION 44. Remedies Not Exclusive

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

SECTION 45. Force Majeure

With respect to any provision of this Agreement, the violation or non-compliance of which could result in the imposition of a financial penalty, liquidated damages, forfeiture or other sanction upon Level 3, 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 Level 3 and is beyond its reasonable control.

SECTION 46. Dispute Resolution

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

be free to use other remedies such as nonbinding arbitration or litigation to resolve the dispute.

SECTION 47. Exhibits

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

SECTION 48. Survival of Liability

All obligations of Level 3 and City hereunder and all warranties and indemnities of Level 3 hereunder shall survive termination of this Agreement.

This Agreement executed this ____ day of December 2016.

City of Tempe,
an Arizona municipal corporation

Level 3 Communications, LLC,
a Delaware limited liability corporation

By: 

Mark W. Mitchell, Mayor

Title: Steven C. Gordon
Senior Director

Attest:

Attest:


Title: Brigitte M. Kuiper

Brigitte M. Kuiper, City Clerk

APPROVED AS TO FORM:

Judith R. Baumann, City Attorney

Exhibit A – Confidential Map

Exhibit B – Letter of Credit form

Exhibit C – Insurance Certificate

EXHIBIT A

CONFIDENTIAL

[Map on file with Public Works]