



## **INFRASTRUCTURE USAGE AGREEMENT BETWEEN THE CITY OF AUSTIN AND**

THIS INFRASTRUCTURE USAGE AGREEMENT (the "Agreement"), made and entered into as of the \_\_\_ day of \_\_\_\_\_, 20XX (the "Effective Date") by and between the CITY OF AUSTIN, a home rule municipal corporation acting by and through its Electric Utility Department ("Austin Energy"), and \_\_\_\_\_ ("User"), a Texas corporation, for the purposes and consideration hereinafter stated.

For and in consideration of the premises and the mutual covenants in this Agreement, Austin Energy and User agree as follows:

### **I. RECITALS**

1.1 The City of Austin owns and operates a municipal electric utility engaged in the generation, transmission and distribution of electric power serving the City of Austin and portions of Travis and Williamson Counties, Texas; and

1.2 User seeks the right to use existing Utility Structures and Communications Sites owned or controlled by Austin Energy to support User's Facilities to receive or transmit communications signals to provide wireless telecommunications services to its customers; and

1.3 Austin Energy is willing to grant User the non-exclusive right to use existing Austin Energy Utility Structures and Communications Sites on the terms and conditions hereinafter set forth, and subject to the terms of the City of Austin's Infrastructure Usage Ordinance (Austin City Code Chapter 15-7);

### **II. DEFINITIONS**

2.1 Attachments shall mean User Facilities located on or affixed to Utility Structures.

2.2 Attachment Rights shall mean all rights of User to place, install, construct, replace, move, remove, keep, maintain, operate or use User Facilities on Utility Structures or Communications Sites under this contract.

2.3 Austin Energy shall mean the Electric Utility Department of the City of Austin.

2.4 City shall mean the City of Austin, Texas, a home-rule municipal corporation.

2.5 Code shall mean the National Electrical Safety Code, and/or the National Electric Code, as applicable, as said codes may be amended from time to time. In the event of a conflict between the National Electrical Safety Code and the National Electric Code, the more stringent provision shall apply.



2.6 Communications Site shall mean land, including but not limited to electric substation sites, and Easements owned or controlled by Austin Energy which are used, or proposed to be used, as a location for User Facilities.

2.7 Contract Year shall mean a calendar year, except that the initial Contract year shall commence on the Effective Date and end on December 31st of that year.

2.8 Cost shall mean the total cost to Austin Energy to perform a specified task, including, labor, material, equipment usage, outside contractor and vendor expense, overhead, general and administrative expense, and general fund transfer. The Cost to perform a task may, at the option of Austin Energy, be a specified price quoted by Austin Energy and accepted by User, or its actual cost as determined above. Current costs are identified in Exhibit A.

2.9 Days shall mean calendar days.

2.10 Easements shall mean electric transmission easements owned by Austin Energy whose use for Communications Sites have been applied for by User in a permit application and approved by Austin Energy.

2.11 Emergency shall mean an unexpected or sudden occurrence that warrants urgent and immediate action to protect lives or property, to promptly restore utility or communications services which have been materially impaired.

2.12 Equipment Building shall mean a shelter or small building constructed, installed and used for the purpose of housing and protecting User's electronic equipment located at or near a Communication Site authorized hereunder.

2.13 Filing Fee shall mean a non-refundable fee charged by Austin Energy to review and process an application to use Utility Structures. The Filing Fee in effect as of the Effective Date are \$1,000 per Communications Site per application, subject to change not more than once every twelve (12) months, upon thirty days' prior written notice to User.

2.14 Improvements shall mean additions or upgrades of Utility Structures at Communications Sites made by User under this Agreement, as approved by Austin Energy upon application by User, but excluding User Facilities and Attachments. Improvements include, without limitation, modifications to existing transmission structures or communications towers, non-portable Equipment Buildings, fencing including gates, access roads, and grounding.

2.15 Infrastructure Ordinance shall refer to the City of Austin Infrastructure Usage Ordinance (Austin City Code Chapter 15-7).

2.16 User Facilities shall refer to antennas, electronic equipment, self-contained equipment cabinets, skid mounted portable equipment buildings which can be removed without demolition, supporting removable equipment, "power mounts", portable generators, and associated conduits, wiring and cables used by User for the purpose of receiving or transmitting communications signals to provide telecommunications services to its customers.



2.17 Third Party Users shall mean persons or companies other than Austin Energy or User who have, or may be in the future, granted Attachment Rights on Utility Structures.

2.18 Usage Charges shall mean Annual use and occupancy charges payable to Austin Energy for the Attachment Rights granted to User hereunder, including, but not limited to space on Austin Energy Utility Structures and Communications Sites.

2.19 Utility Structures mean Austin Energy communications towers, structures, and appurtenant buildings, and the rooftops of office and other buildings managed and controlled by Austin Energy.

### III. PURPOSE

3.1 This Agreement shall set forth the covenants, terms and conditions under which Austin Energy may grant User a non-exclusive license and right to use existing Utility Structures and Communications Sites to locate, construct, operate, maintain, repair and use Improvements and User Facilities for the sole and exclusive purpose of receiving or transmitting communications signals to provide wireless telecommunications services to User's customers. The use of Utility Structures or Communications Sites for any purpose other than that expressly set forth in this section is prohibited and shall be a material default of this Agreement. User does not, by virtue of entering into this Agreement, acquire Attachment Rights to any individual Communications Site or Utility Structure. Attachment Rights to specific Communications Sites or Utility Structures may be acquired only through the issuance by Austin Energy of a permit under Section V below. Nothing herein is intended to be, nor shall be construed as, a grant or authorization to use or occupy the public streets or rights of way of the City of Austin. If User seeks to use a Utility Structure or a Communications Site that is located in whole or in part on a public street or right of way in Austin, User must first acquire a Municipal Consent from the City in accordance with Chapter 15-8 of the Austin City Code. User shall notify Austin Energy in writing within ten days if any such Municipal Consent expires, terminates, or is revoked.

3.2 Austin Energy expressly disclaims all warranties, expressed or implied, including without limitation warranties of merchantability, habitability, developability, condition, or fitness for any proposed or actual use or purpose by User, with respect to the Utility Structures and Communications Sites. User accepts the Utility Structures and Communications Sites **AS IS, WHERE IS, and WITH ALL FAULTS**. During the permitting process, User will have the opportunity to inspect Communications Sites and Utility Structures to determine their fitness or suitability. Austin Energy shall provide the User upon request with copies of the applicable Easement, lease, deed or other title documentation on the Communication Site(s) under consideration, and User may request a "no-default" letter from Austin Energy regarding such Communications Site.

3.3 Austin Energy shall have the first priority in the use of Utility Structures and Communication Sites. In the event of any conflict between the use of Utility Structures or Communications Sites by Austin Energy and User, the use of Utility Structures or



Communications Sites for the generation, transmission or distribution of electricity to Austin Energy's customers shall have priority over User's use thereof.

3.4 This Agreement shall exclude Utility Structures, Easements, and Communications Sites, which in Austin Energy's sole judgment, are necessary for Austin Energy's own sole use due to legal, safety, technical, structural, environmental, space or service requirements. For each Utility Structure or Communication Site which User seeks to use hereunder, User must submit an application on Austin Energy's then current form, together with the applicable Filing Fee and such additional information as Austin Energy may reasonably require to evaluate the proposed installation, including, but not limited to, a complete design and layout of each proposed User Facility, Communications Site, and Improvement.

3.5 Notice is hereby given that the terms of Austin Energy's Easements may not authorize the use of the easement as a Communications Site or for the purpose of telecommunications (including wireless communications) or the placement of Improvements or other surface facilities. Notice is further given that potential Communications Sites owned by Austin Energy may be subject to rights, restrictions or covenants which would limit or prevent its use by User. Nothing herein shall be deemed to grant User any rights in such easements or Communication Sites which would violate the terms of such Easements or any rights, restrictions or encumbrances or record. If Austin Energy authorizes a particular location as a potential Communications Site, it shall be the obligation of User to obtain any necessary additional consents, waivers or rights at User's sole cost and expense. USER SHALL DEFEND, INDEMNIFY AND HOLD AUSTIN ENERGY HARMLESS FROM ALL CLAIMS, DEMANDS, SUITS, ACTIONS, JUDGMENTS AND LIABILITY (INCLUDING, BUT NOT LIMITED TO CLAIMS OR ACTIONS IN THE NATURE OF TRESPASS, INVERSE CONDEMNATION, WRONGFUL DEATH, BODILY INJURY AND PROPERTY DAMAGE, AND ALL COSTS OF LITIGATION, ATTORNEY'S FEES AND COURT COSTS) (COLLECTIVELY "INDEMNIFIED CLAIMS") TO THE FULL EXTENT THE INDEMNIFIED CLAIMS ARISE OUT OF OR CONCERN THE CONSTRUCTION, PLACEMENT, OPERATION, USE, MAINTENANCE, REPAIR OR REPLACEMENT OF USER FACILITIES OR IMPROVEMENTS ON UTILITY STRUCTURES OR COMMUNICATIONS SITES BY USER, OR ITS AGENTS, EMPLOYEES, OR CONTRACTORS, IN VIOLATION OF THE TERMS OF ANY EASEMENT OR OF RIGHTS, RESTRICTIONS OR ENCUMBRANCES OF RECORD.

3.6 Utility Structures and Communication Sites shall remain the property of Austin Energy and no payment, nor any upgrade or improvement to such Utility Structures or Communications Sites made by User, shall create in User any ownership right, title, or interest in any Utility Structure or Communications Site. All Improvements constructed by User at a Communications Site shall become the property of Austin Energy effective upon completion of construction and acceptance by Austin Energy. User shall execute and deliver to Austin Energy a bill of sale and other documents evidencing Austin Energy's title to the Improvement free and clear of all liens, encumbrances and security interests.

3.7 Upon conveyance of the Improvement to Austin Energy, Austin Energy shall have full rights of ownership and control of the Improvement to the same extent as if Austin Energy had constructed the Improvement, subject only to User's right to use and occupy the Improvement as provided in this Agreement. User shall also deliver to Austin Energy a set of as built designs or engineering drawings of the Improvement.



3.8 Title to User Facilities shall be held by User. User Facilities shall remain User's personal property, and shall not be deemed to be fixtures. User may remove User Facilities at User's sole expense from a Communications Site or Utility Structure at any time during the term of this Agreement, provided that User repairs any damage to the Communications site or Utility Structure cause by the removal. Austin Energy waives any landlord's or other lien rights it may have against User Facilities, including those arising under Chapter 54 of the Texas Property code.

3.9 Nothing contained in this Agreement shall be construed as in any way affecting the rights, privileges, or duties previously conferred and imposed by Austin Energy by contract, or otherwise, to and upon Third Party Users or others not parties hereto. Subject to the non-interference provisions of Article VII, Austin Energy reserves the right to continue and extend such rights, privileges, or duties, and to hereafter admit other and different Third Party Users, irrespective of the character or degree of economic competition thereby created. Austin Energy shall identify upon request all existing Third Party Users on a Communications Site for which User has submitted an application.

#### **IV. COMPLIANCE WITH LAWS**

4.1 User shall construct, install, use, operate and maintain permitted User Facilities and Improvements in full compliance with the Code, Austin Energy Distribution Standards, Austin Energy Transmission Standards, Austin Energy operating procedures, the Infrastructure Ordinance and the policies promulgated by the City pursuant thereto, the rules, regulations and requirements of the Federal Communications Commission or successor agency ("FCC"), and all applicable State and Federal laws, rules, and regulations, as such may exist from time to time.

4.2 User shall be solely responsible to apply for and obtain all licenses, permits or other authorizations, including but not limited to City zoning, site development and other development permits, and FCC licenses, required to provide its service or to construct, install, use, operate or maintain User Facilities and Improvements. If User is denied any required license, permit or authorization, User may, upon written notice to Austin Energy, terminate any permit granted hereunder which was predicated upon the grant of such license, permit or authorization. User shall notify Austin Energy within ten days if any such license, permit, or other authorization expires, terminates or is revoked,

4.3 This Agreement is entered into by the parties under, and shall be governed by, the Infrastructure Ordinance.

4.4 USER SHALL DEFEND, INDEMNIFY AND HOLD THE CITY HARMLESS FROM ALL CLAIMS, DEMANDS, FINES, SUITS, ACTIONS, JUDGMENTS AND LIABILITY (INCLUDING BOTH CIVIL AND CRIMINAL) AND ALL COSTS OF LITIGATION, ATTORNEY'S FEES AND COURT COSTS, (COLLECTIVELY "INDEMNIFIED CLAIMS") TO THE FULL EXTENT THE INDEMNIFIED CLAIMS ARISE OUT OF OR CONCERN THE VIOLATION BY USER OF ANY APPLICABLE FEDERAL, STATE OR LOCAL LAW, STATUTE, RULE OR REGULATION, INCLUDING WITHOUT LIMITATION THE RULES AND REGULATIONS



PROMULGATED BY THE FCC, GOVERNING THE CONSTRUCTION, PLACEMENT, OPERATION, USE, MAINTENANCE, REPAIR OR REPLACEMENT OF USER FACILITIES OR IMPROVEMENTS.

4.5 This Agreement is subject to all applicable and valid existing and future laws, orders, rules and regulations of any State, Federal or other governmental or regulatory body having jurisdiction over the subject matter of this Agreement; provided, however, that:

(a) nothing herein shall be construed to prevent either party from contesting the validity or applicability of any such law, order, rule or regulation, or the jurisdiction of such governmental or regulatory body, and

(b) if a law, order, rule or regulation is enacted during the term of this Agreement which a party determines in good faith materially impairs its rights, benefits, and obligations under this Agreement, or would impose upon a party unacceptable new or additional burdens or regulation, and the parties are unable or unwilling to amend this Agreement to cure such problem, then the party adversely affected by such future law, order, rule or regulation may terminate this Agreement, or any permit granted hereunder, upon written notice to the other party, to be effective sixty (60) days after the date of the notice or the effective date of the law, order, rule or regulation, whichever is the earlier.

4.6 If User's Facilities are to be installed on an unmodified existing Utility Structure, Austin Energy shall be responsible to comply with all marking and lighting requirements of the Federal Aviation Administration and the FCC; provided, however, that User shall pay for any Costs which the City incurs to comply with such regulations resulting from User's Facilities. If User's Facilities are to be installed on an Improvement to an existing Utility Structure constructed by User, User shall design and construct the Improvement to comply with all such marking and lighting requirements, and thereafter, Austin Energy shall be responsible for continuing compliance with such marking and lighting requirements. If lighting requirements apply and a lighting automatic alarm system has been installed by Austin Energy, Austin Energy shall allow User to bridge-in to the system to permit a parallel alarm or to install a second alarm (to the extent permitted under any Prime Lease) if a bridge would interfere with Austin Energy's alarm. User shall be responsible for the cost and expense of maintaining the bridge or parallel alarm. Should User be cited because the Communications Site is not in compliance and, should Austin Energy fail to cure the conditions of noncompliance, User may either terminate the affected permit or proceed to cure the conditions of noncompliance at Austin Energy's expense.

## **V. ESTABLISHING USAGE**

5.1 The construction, installation, use, operation, repair, replacement, removal, and maintenance of User Facilities shall be performed by User at User's sole expense.

5.2 Before User may use any Utility Structure or Communications Site, install any User Facility, or construct any Improvement, it must obtain a permit for such Structure or Site from Austin Energy. User shall file an application with Austin Energy on a copy of the then current Austin Energy form for such purpose, and shall pay the applicable Filing Fee. User shall supplement its application with additional information upon request from Austin Energy.



Applications may be made on a multiple site or project basis in accordance with Austin Energy's policies and procedures in effect from time to time. Austin Energy shall endeavor to complete a preliminary review of an application and provide User with the results of that preliminary review within two weeks of the submission date. If, within one hundred twenty days after submission, Austin Energy has not completed its review of an application due to the failure of the applicant to complete its due diligence investigations or provide any information needed by Austin Energy to evaluate the application, the applicant may request an extension of time in writing up to an additional one hundred twenty days. The extension request shall be accompanied by payment of an extension fee as stated on Exhibit A. Austin Energy may, in its discretion, deny the request for extension, grant the extension as requested, or grant an extension subject to modifications or conditions as determined by Austin Energy.

5.3 User, at User's sole expense, shall be solely responsible to perform all necessary or appropriate due diligence investigations, including without limitation, technological, soil, structural analysis, engineering, title, legal, regulatory, and economic studies or examinations, to determine if a Communications Site is suitable for User's intended use. Austin Energy shall provide User with such information in its possession as User reasonably requests to evaluate a possible Communications Site or Utility Structure. Austin Energy shall grant User reasonable access to the Communications Site for the purpose of conducting such investigations. If User determines in its discretion that a Communications Site is not suitable, it may upon written notice to Austin Energy terminate its permit application for such site; or if a permit has been granted, User may terminate the permit. Austin Energy may require User to provide, at User's cost, an independent engineering analysis of the proposed structure(s) performed by a Professional Engineer registered in the State of Texas acceptable to Austin Energy. All Costs incurred by Austin Energy to support the engineering analysis shall be reimbursed by the User.

5.4 Austin Energy may grant the permit as applied for, approve the permit on a modified basis, approve the permit on a conditional basis, or may deny the permit in accordance with the procedures set forth in the Infrastructure Ordinance and the policies adopted by Austin Energy pursuant thereto. If feasible, Austin Energy may condition any permit for the construction of Improvements upon User designing in sufficient space or capacity to accommodate the facilities of two additional users, including Austin Energy, if applicable. Austin Energy may condition any permit upon the installation or construction of User Facilities or Improvements being commenced and/or completed on or before a specified date. If User fails to install or construct its Facilities or Improvements by such time (or such other time as Austin Energy may agree to in writing), and the failure is not due to a delay on the part of Austin Energy, or other cause or condition outside of User's control, Austin Energy may revoke such permit upon thirty (30) days' prior written notice, unless User completes its installation within such thirty day period. In the event of a denial, revocation or conditional approval of an application, User may appeal the decision of Austin Energy as provided in the Infrastructure Ordinance. If Austin Energy revokes a permit for failure to timely install or construct Facilities, or Improvements, User, at User's cost, shall promptly remove any partially constructed Facilities or Improvements leaving the Communication Site in the same condition it was in prior to commencement of User's installation or construction work, except for reasonable wear and tear or damage by casualty or other cause not attributable to User. If User fails to remove any partially constructed Facilities or Improvements within sixty (60) days from the revocation date of the permit, Austin Energy



may, in its discretion, remove same at User's expense, or Austin Energy may deem such Facilities or Improvements to have been abandoned by User, and take title to such Facilities or Improvements AS IS and WHERE IS.

5.5 If User seeks to construct Improvements at a Communications Site which would either be situated in an Austin Energy substation or otherwise in close proximity to Austin Energy electric lines, transformers or other energized equipment, User shall employ only contractors who are experienced and fully qualified to work on or near high voltage electric lines and energized equipment. Austin Energy shall have the right to reasonably approve the selection of User's contractors; except that Austin Energy's approval shall not be required if User's proposed contractor is then currently under contract with Austin Energy for overhead utility construction work. If Austin Energy denies approval of a User contractor, User shall either substitute another contractor satisfactory to Austin Energy, or User may request Austin Energy to construct such Improvements.

5.6 Austin Energy shall be under no obligation to change, modify or replace any Utility Structure or any Communications Site to accommodate proposed User Facilities or Improvements. But, if Austin Energy elects, in its sole discretion, to do so, User shall pay Austin Energy a contribution in aid of construction to be determined by Austin Energy based on the nature, location, and design of the proposed Improvement, and Austin Energy's Cost of planning, engineering, procurement and construction, or User may withdraw the application. There shall be no allowances for system betterment or for life extension of the system or any Utility Structure or Communications Site.

5.7 If Austin Energy elects to construct an Improvement itself, User shall provide the plans to Austin Energy; but Austin Energy may reject such plans and design the Improvement itself. Within sixty (60) days after receiving all required information concerning construction of a proposed Improvement, Austin Energy shall send User written notice of the required contribution in aid of construction, together with an estimated construction schedule and completion date for User's approval. Final approval of any permit seeking construction of an Improvement by Austin Energy shall be conditional upon User's written acceptance of the contribution in aid of construction. Austin Energy must have received payment in full of the contribution in aid of construction before Austin Energy will commence construction of the new Improvement. In no event shall Austin Energy be liable to User or any other person for failure to complete the work in accordance with the estimated schedule.

5.8 Upon issuance of a permit by Austin Energy, User shall be authorized to enter onto the applicable Communications Site(s) and construct and install the User Facilities and Improvements authorized under the permit in strict accordance with the designs, schedule, and other information submitted to Austin Energy in support of User's permit application.

5.9 If User is seeking Attachment Rights to a Utility Structure or Improvement originally constructed, or paid for, by a Third Party User, User shall as a condition precedent to the granting of a permit, directly reimburse the Third Party User for a proportionate share of the depreciated book value of such Utility Structure or Improvement, as shown on the books and records of the Third Party User who originally constructed or paid for the Utility Structure or



Improvement. By way of example, if the User is the second party to attach, the User's proportionate share would be one half. Nothing herein shall grant User the right to compel the relocation of a prior authorized Third Party User's Facilities.

5.10 Each User Facility shall have a mark or label unique to User acceptable to Austin Energy which identifies the Facility as being owned by User.

5.11 If there are any manufacturer's or other third party warranties applicable to the purchase, design or construction of the Improvements, or any component part thereof, User shall, to the extent possible, assign such third party warranties to Austin Energy upon transfer of title, and shall upon request from Austin Energy, cooperate with and assist Austin Energy in enforcing such third party warranties. Unless otherwise agreed by Austin Energy, no Improvement constructed on an Austin Energy Communications Site may be taller than the maximum height permitted under applicable zoning regulations without having to apply for an exception or conditional use permit.

## **VI. USER FACILITIES CHANGES AFTER INSTALLATION**

6.1 User shall not change the type, nature, or location of any of User Facilities or Improvements, or alter its use of Utility Structures or Communications Sites without prior written Austin Energy consent. Nor may User construct any other or additional User Facilities or Improvements except as authorized by permit granted by Austin Energy. Any User Facilities or Improvements which are changed or added in violation of this section shall be deemed to be unauthorized, for which Austin Energy shall have the rights and remedies set forth in this Agreement and the Infrastructure Ordinance.

6.2 Upon written notice by Austin Energy, User, at User's expense and risk, shall change, alter, improve, or move any of User Facilities or Improvements as Austin Energy may reasonably direct, to avoid interference (either physical or electronic) with the lines, equipment, substations, or other facilities of Austin Energy or to accommodate changes in the Utility Structures and appurtenant facilities. However, in case of an Emergency, as determined by Austin Energy, written notice shall not be required and Austin Energy may remove or alter User Facilities without incurring any liability to User or to any other person. Austin Energy will notify User of any Emergency actions taken by Austin Energy affecting User as soon as practicable in accordance with Emergency notification procedures to be mutually agreed upon by the parties. User may elect to terminate its permit for a particular site instead of changing, altering, improving or moving User Facilities as directed by Austin Energy. If User elects to terminate its permit for a particular site under this section, it shall send Austin Energy written notice within sixty (60) days after receipt of Austin Energy's original notice, and shall thereafter undertake the removal of User Facilities with all due diligence. In such event, User shall be entitled to a pro-rata refund of unearned pre-paid Usage Fees attributable to the terminated location.

6.3 Other than in case of an Emergency, if User fails or refuses to change, alter, improve, or move any of User Facilities or Improvements within sixty (60) days after receipt of Austin Energy's written notice (or as otherwise provided in such notice), and does not notify Austin Energy that User is electing to terminate its permit for that location, Austin Energy shall have the



right (but not the obligation) to perform such work at User's sole risk and expense. User shall pay Austin Energy upon receipt of invoice for Austin Energy's full Cost for performing such work including a mobilization fee determined by Austin Energy, but not less than \$100 per occurrence.

6.4 Austin Energy may use, change, operate, and maintain its lines, equipment, substations, Utility Structures, and Communications Sites as it sees fit to provide safe and reliable electric service to its customers, and shall not be liable to User for any interference with the maintenance or the operation of User's facilities and appurtenances resulting from Austin Energy's use, operation, and maintenance of its lines, facilities, substations, Utility Structures and Communications Sites. If Austin Energy's use of its Utility Structures have a material adverse affect on the operation or use of User Facilities or Improvements, User shall have the right to terminate this Agreement as to any location at which a material adverse affect exists without incurring any liability to Austin Energy as a result of such termination. Such termination shall be effected by written notice to Austin Energy.

6.5 If any Utility Structure on which User has Facilities has been substantially destroyed or damaged by fire, storm, accident or other catastrophe, Austin Energy shall be under no obligation to rebuild or replace such Utility Structure, but may elect to terminate this Agreement as to the Facilities on such Utility Structure without incurring any liability to User as a result of such termination. Austin Energy shall notify User in writing of a termination under this section. If Austin Energy elects not to rebuild or replace a damaged or destroyed Utility Structure, User may apply for a permit to attach to substitute Utility Structure or Communications Site, if available, in accordance with the provisions of Section V above, and User shall not be required to pay an Filing Fee to process the permit application for the substitute Utility Structure.

6.6 Austin Energy shall perform routine and preventative maintenance on the Utility Structures and Equipment Buildings at Austin Energy's expense. However, if a Utility Structure or Equipment Building requires major overhaul or structural repair, the cost of such major overhaul or structural repair shall be shared proportionately by Austin Energy and all users. Except in an emergency, Austin Energy shall notify all users of the projected cost and schedule of the work in writing at least thirty (30) days before commencement of the work. User may elect to terminate its permit for a particular site if it determines that its share of the cost for such work renders the location uneconomical for its continued use. If User elects to terminate its permit for a particular site under this section, it shall send Austin Energy written notice within thirty (30) days after receipt of Austin Energy's original notice, and shall thereafter undertake the removal of User Facilities with all due diligence.

## **VII. USER OPERATIONS**

7.1 User shall operate, maintain, repair, and replace its User Facilities and Improvements installed by User at User's expense. All work performed by or on behalf of User on Utility Structures or at a Communications Site shall be done in a good and thoroughly workmanlike manner, consistent with the best modern practice of utility construction, operation and maintenance requirements. In the performance of such work, User shall use employ only orderly and competent workers. User's workers may not possess any weapon, or use, possess or be



under the influence of any alcoholic or other intoxicating beverage, drug or controlled substance while performing any work on or around Utility Structures. If Austin Energy finds any User worker to be incompetent, disorderly, in the possession of any weapon, in the possession of or under the influence of alcohol or drugs, User shall promptly remove such worker from all work on or around Utility Structures and Communications Sites, and may not again use such worker on work on or around Utility Structures or Communications Sites without the prior written consent of Austin Energy. User shall provide each of its workers with a identification card bearing the worker's photograph. Austin Energy may remove from a Communications Site any User worker without proper identification.

7.2 User shall construct, install, use, operate, repair, and maintain User Facilities and Improvements so as not to interfere, either physically or electronically, with the use of Utility Structures and Communications Sites or prior authorized Third Party Users. In the event of electronic interference affecting a prior authorized Third Party User, User shall cooperate in good faith with the affected party to identify the cause of the interference. If interference is caused by User Facilities, User shall use its best commercially reasonable efforts to promptly eliminate the interference, including as necessary the replacement, relocation or modification of User Facilities. If the interference attributable to User Facilities cannot be eliminated within thirty (30) days' written notice from Austin Energy, then either Austin Energy or User may terminate the permit for the location at which interference is occurring by written notice to the other party without incurring any liability to the other party by reason of such termination.

7.3 If, subsequent to establishment of non interfering operation of User's Facilities, User experiences interference (either physical or electronic) caused by the facilities of a subsequent Third Party User or by the modifications of equipment or operations of a prior Third Party User, Austin Energy agrees to exercise such contractual rights as it may have with such subsequent Third Party User concerning elimination of interference (including, if applicable, termination of the interfering party's Attachment Rights at that site); provided, however, that Austin Energy shall never be obligated hereunder to file suit against such subsequent Third Party User. User may exercise such rights and remedies it may have against the subsequent Third Party User. If the Third Party interference cannot be eliminated within a reasonable time, User may terminate this license as to the location at which interference is occurring by written notice to Austin Energy without incurring liability to Austin Energy by reason of such termination.

7.4 Austin Energy agrees to include substantially similar non-interference language as set forth in Sections 7.2 and 7.3 in Infrastructure Usage Agreements with subsequent Third Party Users for Communications Sites or Utility Structures occupied by User which are capable of supporting Attachments of additional users.

7.5 User shall be responsible to perform all tree trimming and right of way clearing necessary for the safe and reliable operation, use and maintenance of User Facilities and Improvements, and to prevent stress on Utility Structures caused by contact between tree limbs and User's Facilities. All tree trimming shall be performed in accordance with standards promulgated by the City Urban Forestry Board, City Arborist, or successors. Nothing herein shall be deemed to preclude User from entering into a separate contract with Austin Energy for the performance of compensated tree trimming and right of way clearance on User's behalf.



7.6 User shall pay all taxes and assessments lawfully levied on User Facilities, and any tax, assessments, fee, or charge levied on Utility Structures or Communications Sites solely because of their use by User. In no event shall User permit any lien to be filed or exist upon City Utility Structures, Communications Sites or other property as a result of any claim against User. User shall promptly pay upon receipt of written notice from Austin Energy all such liens together with all fees and costs necessary to discharge same.

7.7 In performing any work on User facilities on Utility Structures supporting energized electric utility lines, User, and its contractors, agents and employees shall comply with the provisions of all applicable statutes, laws, rules and regulations, including, but not limited to Chapter 752 of the Texas Health and Safety Code and the Occupational Safety and Health Act. Before performing any work near or above City transmission lines, User shall notify Austin Energy's Energy Control Center and receive express prior authorization.

7.8 Promptly upon completion of any work on City streets, rights of way or Communications Sites, User shall clean up and remove all construction or other debris and the leave the work site in a clean and neat condition. Upon completion of initial installation or any subsequent work at a Communications Site, User shall repair or restore any damage to the Communications Site resulting from such work, including, but not limited to restoring any damage to landscaping or vegetative buffer at or around the Communications Site.

7.9 Access to certain Communications Sites, including without limitation, Austin Energy electrical substations and transmission poles and structures, may be restricted. In granting a permit for the use of a Communications Site, Austin Energy may identify that Site as a limited access site. User must give Austin Energy at least 24 hours prior notice before going onto a limited access Communications Site, except in an Emergency. In no event, even in an emergency, may User personnel enter a limited access Communications Site unless accompanied by an Austin Energy employee, who shall remain there during all work. Austin Energy shall use reasonable efforts to provide an escort for User personnel at a limited access site within six hours of receipt of a request. User shall pay Austin Energy upon receipt of invoice for the Cost incurred for providing an Austin Energy escort, unless Austin Energy personnel are at the Communications Site performing Austin Energy work. Subject to the terms of Austin Energy's Easements, and other rights or restrictions applicable to Austin Energy Communication Sites, Austin Energy grants User the non-exclusive right to access unrestricted Communications Sites at all reasonable times to construct, install, operate, inspect, maintain, repair, replace or remove, User's Facilities. User's ingress and egress to Communications Sites across private property shall be through the same roadways or rights of way as Austin Energy accesses its own facilities at that location, unless User shall have acquired other or additional rights from the property owner.

7.10 User shall coordinate with Austin Energy the schedule and timing of all work to install or maintain Facilities located on Austin Energy transmission poles or towers or in Austin Energy substations in order to minimize the number and duration of electric transmission circuit outages. Austin Energy will grant transmission outages to enable User to access its Facilities on transmission towers or structures or in Austin Energy substations at such times as designated by



Austin Energy in its reasonable discretion, subject to priority of electric system requirements and payment by User of Austin Energy's Cost to take such outage. At the time User requests an outage, Austin Energy shall provide User an estimate of the Cost for such outage, and User may in its discretion, withdraw or defer its outage request to another time.

7.11 If User abandons any Utility Structure or Communications Site, Austin Energy may terminate its Attachment Rights with respect to such Utility Structure or Communications Site upon thirty days prior written notice, unless User resumes use of such Utility Structure or Communications Site within such thirty day period. A Utility Structure or Communications Site shall be deemed abandoned if (i) User removes its Facilities or Improvements and does not replace same within six (6) months, or (ii) if User ceases to operate the Facilities or Improvements for a period of twelve (12) consecutive months.

7.12 User shall not use, generate, store, discharge, or dispose of any Hazardous Substance on, under, about, or within any Communications Site, except that User may use or store Hazardous Substance at a Communications site if (i) User's use, storage, and ultimate disposal is in strict compliance with all applicable, laws, rules, ordinances and regulations, (ii) such use or storage is expressly authorized by the permit for the Communications Site. In the event of any spill or discharge of Hazardous Substances, User, at User's sole cost, shall promptly remediate all affected areas including, without limitation, the Communications Site, to background levels in full and complete compliance with all applicable laws, rules, ordinances and regulations. As used herein, Hazardous Substances shall mean any substance, product, waste or other material of any nature that is or becomes listed or regulated under any Federal, State or local law, rule, regulation or ordinance concerning hazardous, toxic or dangerous substances, wastes or materials including, but not limited to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), (42 U.S.C. ' 1801, et seq.), the Resource Conservation and Recovery Act ("RCRA"), (42 U.S.C. '6901 et seq.), the Hazardous Substances Act ("HSA"), (15 U.S.C. '1261 et seq.), the Toxic Substances Control Act ("TSCA"), (15 U.S.C. '2601 et seq.), the Hazardous Substances Act, (Texas Health and Safety Code '501.001 et seq.), and the Water Quality Control Act, (Texas Water Code '26.001 et seq.). USER SHALL DEFEND, INDEMNIFY AND HOLD AUSTIN ENERGY HARMLESS FROM ALL CLAIMS, DEMANDS, FINES, SUITS, ACTIONS, JUDGMENTS AND LIABILITY (INCLUDING BOTH CIVIL AND CRIMINAL) AND ALL COSTS OF LITIGATION, ATTORNEY'S FEES AND COURT COSTS, TO THE FULL EXTENT ARISING OUT OF OR CONCERNING THE USE, GENERATION, STORAGE, DISPOSAL, DISCHARGE, OR CLEAN-UP OF HAZARDOUS SUBSTANCES BY USER AT A COMMUNICATIONS SITE.

## VIII. INDEMNITY AND LIMITATION OF LIABILITY

**8.1 User shall defend (at the option of the City), indemnify, and hold the City, its successors, assigns, officers, elected and non-elected officials and employees harmless from and against any and all claims, demands, suits, causes of action, judgments and liability of every character type or description, including all expenses of litigation, court costs and attorney's fees (collectively "Indemnified Liability") arising out of or concerning this Agreement, or the installation, use, operation, maintenance, transfer, rearrangement or removal of User Facilities on Utility Structures or Improvements on Communications Sites, including, but not limited to Indemnified Liability for:**



- (a) damage to or loss of the Utility Structures and all lines, facilities and Attachments thereon, whether the property of the City, User or any third party;**
- (b) damage to any other property of any person (including, but not limited to User, the City and their respective contractors), and**
- (c) death, bodily injury, illness, disease, worker's compensation, loss of services, or loss of income or wages to any person (including, but not limited to employees of User, the City and their respective contractors),**

**arising out of , or caused, by the negligence, gross negligence, willful misconduct or strict liability (collectively "Fault") of User or its agents, employees or contractors. In the event of an Indemnified Claim caused by the concurrent Fault of City and User, it is the expressed intent of the parties that the foregoing indemnity is intended to protect the City against the consequences of its own Fault, to the full proportionate extent the Indemnified Liability is attributable to User's Fault.**

8.2 If any contractor performs any work or services for User under this Agreement, such contractor shall be required to indemnify the City in writing to the same extent as provided above as a condition of being granted access to the Utility Structures and Communications Sites.

8.3 Neither party to this Agreement shall be liable to the other for consequential, incidental, punitive or special damages arising out of any claim for damage to the other's Attachments on Utility Structures. As used in this section, consequential damages shall include, without limitation, loss of profits or revenues, loss of use of equipment or property, cost of capital, and claims of the other party's customers.



## **IX. INSURANCE**

9.1 During the term of this Agreement User shall at all times carry insurance with companies duly licensed to provide insurance in the State of Texas and approved by the City (which shall not be unreasonably withheld) to protect User and the City against any and all claims, demands, actions, judgments, costs, expenses, or liabilities of every kind which may arise, directly or indirectly, from or by reason of losses, injuries, or damages described in this Agreement.

9.2 At a minimum, User shall carry and maintain the following coverages and shall furnish the City Risk Manager Certificates of Insurance as evidence thereof:

- (a) Commercial General Liability coverage in the minimum amount of \$1,000,000 per occurrence;
- (b) Worker's Compensation coverage with statutory benefits as set forth in the Texas worker's Compensation Act and Employer's Liability coverage of not less than \$250,000 bodily injury per accident, \$500,000 bodily injury per disease and \$250,000 per disease per employee;
- (c) Business Automobile Liability Insurance for all owned, non-owned and hired vehicles with a minimum combined single limit of \$1,000,000.

9.3 The Commercial General Liability and Business Liability Policies shall name the City of Austin as an additional named insured as its interest may appear. Each policy shall contain an endorsement obligating the insurer to notify the City Risk Manager at least thirty days before any non-renewal, cancellation or material change in coverage. The "other insurance" clause shall not apply to the City; it being the intention of the parties that the above policies covering User and the City shall be considered primary coverage. Each policy shall contain a waiver of all rights of recovery or subrogation against the City, its officers, agents, employees, and elected officials.

9.4 If any contractor performs any work or services for User under this Agreement, such contractor shall be required to carry insurance to the same extent as provided above as a condition of being granted access to the Utility Structures.

## **X. USAGE CHARGES AND PAYMENT**

10.1 For the Attachment Rights granted under this Agreement for the Initial Term, User shall pay to Austin Energy annual Usage Charges, and other fees as specified on Exhibit A, attached hereto and incorporated herein. Usage Charges shall accrue from the earlier of the date User is to have completed installation of its Facilities at a Communications Site in accordance with the applicable permit, or the actual date installation is complete; provided, however, if User is unable to timely complete its installation due to a delay on the part of Austin Energy or other cause or condition outside of its control, Usage Charges shall accrue from the actual date installation is complete. Usage Charges for the initial Contract Year shall be due and payable upon receipt of invoice as provided in section 10.4, below, and shall be pro-rated based on the number of months remaining in the then current Contract Year. Regardless of the date of the



month in which Austin Energy approves User's application for a permit, such month shall be considered a full month for purposes of Usage Charges due.

10.2 The annual Usage Charge in effect for the Initial Term, as shown on Exhibit A, shall be escalated each year throughout the term of this Agreement, including any renewals, by an amount equal to three (3%) percent each year of the Usage Charge in effect for the previous year. Austin Energy may revise the other fees and charges shown on Exhibit A effective sixty days after written notice to User to reflect changes in Austin Energy's cost of labor, materials, equipment, overhead or contractual services.

10.3 If User has paid for the construction of an Improvement which can accommodate the Attachments of one or more additional users, and a Third Party User subsequently applies for Attachment Rights to such Improvement, the Third Party User shall as a condition precedent to the granting of a permit, be required to directly reimburse User for a proportionate share of the depreciated book value of such Utility Structure or Improvement, as shown on the books and records of User. By way of example, if the Third Party User is the second party to attach, the proportionate share would be one-half.

10.4 On or about January 1st of each Contract Year, Austin Energy shall send User an invoice for the next Contract Year's Usage Charges based on the number of Utility Structures and Communications Sites permitted for User's use as shown on Austin Energy's records as of the preceding December 1st. If User believes in good faith that Austin Energy's records are inaccurate, it may pay such Usage Charge invoice under protest. To protest an invoice, User must give Austin Energy written notice of the nature of its protest no later than the due date of the invoice together with copies of records and other documentation supporting its position. The parties shall promptly meet to resolve the discrepancies in their records. If the parties are unable to resolve such discrepancies, the parties shall jointly conduct a physical inventory or other mutually agreeable method to determine the correct charge. The cost to conduct such inventory or census shall be equally divided between the parties. If upon determination of the correct amount, a refund is due User, Austin Energy shall refund the amount of the overcharge together with interest, at the rate specified in Section 10.5, from the date of Austin Energy's receipt of protested Usage Charge payment. If it is determined that User has been undercharged, a corrected invoice shall be issued by Austin Energy for the additional Usage Charges due, plus accrued interest at the rate specified in Section 10.5, from the due date of the original invoice.

10.5 All monetary payments under this Agreement shall be due and payable within thirty (30) after receipt of invoice. If payment is not timely made, interest shall accrue on the unpaid balance at the lesser of the maximum lawful rate, or one percent per month, from the due date until paid.

## **XI. TERM**

11.1 The initial term of this Agreement ("Initial Term") shall be five (5) years commencing on the Effective Date, unless terminated earlier in accordance with section XII below.



11.2 If User is not then in default hereunder, User shall have the right to renew the term of this Agreement for up to four additional terms of five (5) years each (“Renewal Term(s)”) Renewal shall be upon the same terms and conditions, except that Usage Charges shall be increased as provided in Section 10.2 above.

11.3 User’s Attachment Rights under a permit granted pursuant to this Agreement shall be effective on the date issued by Austin Energy, and shall remain in force and effect for the duration of the term of this Agreement, unless earlier terminated by Austin Energy or User as provided herein.

## **XII. DEFAULT AND TERMINATION**

12.1 Right of Suspension. If User shall fail to either make any payment required under this Agreement, within ten (10) days after the date payment is due or timely perform any material obligation under this Agreement, and such failure of performance continues for thirty (30) days after the date the payment or performance is due, then, in addition to any other available right or remedy, Austin Energy may, upon written notice to User, immediately suspend all Attachment Rights of User hereunder until such time as the failure of performance is cured, or payment, including accrued interest, has been received. During a period of suspension of Attachment Rights, User may operate and maintain its then permitted User Facilities, but may not add to, modify, remove, or alter any of its existing Facilities, or install or construct any new Facilities, and Austin Energy shall suspend all review or approval of pending permit applications by User. The payment under protest of a disputed amount in order to avoid, or lift, suspension of Attachment Rights shall not prejudice the rights of User to contest the payment dispute.

12.2 Events of Default. Each of the following shall be an Event of Default under this Agreement:

- a) the failure of a party to make any payment when due, and such nonpayment continues for thirty days after written notice from the other party;
- b) the failure of a party to comply with the terms of a permit granted under this Agreement, and such failure has not been cured within thirty days after written notice from the other party;
- c) the failure of a party to substantially perform its material obligations under this Agreement, and such failure default has not been cured within three months from its receipt of written notice from the other party;
- d) the expiration, revocation, or termination of User’s license from the FCC, and such license has not been restored or renewed within sixty days after written notice from Austin Energy;
- e) the expiration, revocation, or termination of a Municipal Consent from the City of Austin authorizing User to occupy the City’s streets and rights of way, and such Municipal Consent has not been restored or renewed within sixty days after written notice from Austin Energy;
- f) the making of an assignment for the benefit of a party’s creditors, the appointment of a receiver over the assets of a party, the filing by a party of a petition for relief under the Bankruptcy laws of the United States, or the filing of an involuntary Bankruptcy



petition against a party which is not dismissed within thirty days from the date of original filing.

### 12.3. Termination.

(a). Upon the occurrence of an Event of Default, the party not in default may immediately terminate this Agreement upon written notice to the party in default; provided, however, if the Event of Default is limited to a specific Communications Site or Utility Structure, then this Agreement may be terminated only as to the applicable Communications Site or Utility Structure and appurtenant permits and Attachment Rights.

(b) Austin Energy may terminate this Agreement upon written notice to User if Austin Energy reasonably determines that this Agreement would adversely affect the tax-exempt status of its system utility bonds. In the event of a termination under this subsection 12.3(b), Austin Energy agrees to reimburse User its reasonable and actual costs incurred to remove its Facilities from Austin Energy Communications Sites and to acquire comparable telecommunications site(s) elsewhere in the Austin area; BUT, AUSTIN ENERGY SHALL NEVER BE LIABLE TO USER FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES, INCLUDING WITHOUT LIMITATION, LOST REVENUE, LOST PROFITS, COST OF CAPITAL, OR CLAIMS OF USER'S CUSTOMERS, ARISING OUT OF A TERMINATION BY AUSTIN ENERGY UNDER THIS SECTION.

(c) User may terminate this Agreement with respect to a specific Communications Site or Utility Structure for convenience effective six months after written notice of termination to Austin Energy. User may terminate this Agreement in its entirety for convenience effective twelve months after written notice of termination to Austin Energy.

### 12.4 Removal of Attachments upon Termination.

(a) If this Agreement is terminated, User shall promptly remove its User Facilities, and restore the Utility Structures and Communications Sites it occupied to substantially the same condition they were in prior to User's occupancy thereof, reasonable wear and tear excepted. If any permit granted hereunder is terminated, User shall promptly remove its User Facilities from the Utility Structure(s) and Communications Site(s) covered by the terminated permit, and restore such Utility Structures and Communications Sites to substantially the same condition they were in prior to User's occupancy thereof, reasonable wear and tear excepted.

(b) In the event of a termination by either party due to interference under Articles VI or VII, or a termination by Austin Energy under section 12.3 for a Default by User, affected User Facilities shall be removed and the Utility Structures and Communications Sites restored within 90 days after the date of the notice of termination.

(c) In the event of a termination by either party under section 4.5, or by Austin Energy under section 12.3b, affected User Facilities shall be removed and the Utility



Structures and Communications Sites restored within one year after the date of the notice of termination. In the event of a termination by User for convenience under section 12.3c, User shall remove its Attachments from the Utility Structures and Communications Sites and restore same to substantially the same condition they were in prior to User's occupancy thereof, reasonable wear and tear excepted, on or before the effective date of termination.

(d) Until such time as all of User's Facilities are removed, User shall continue to comply with all of the terms of this Agreement and perform all of its duties and obligations hereunder, including, but not limited to the obligation to pay Usage Charges. Such payment by User or acceptance by Austin Energy of Usage Charges shall not act to cure the default which triggered termination or restore User's Attachment Rights hereunder.

(e). If User has not removed all its User Facilities and Attachments from the Utility Structures and Communications Sites and restored the Utility Structures and Communications Sites within the period of time specified above in this Section 12.4, or such additional period of time granted by Austin Energy in writing, then:

i. Austin Energy may treat such User Facilities and Attachments as having been abandoned by User and assume full ownership and control thereof, or

ii. Austin Energy may remove User Facilities and Attachments and restore the Utility Structures and Communications Sites to substantially the same condition they were in prior to User's occupancy thereof, reasonable wear and tear excepted at User's sole expense and risk. Until such time as User Facilities and Attachments are removed, User shall pay to Austin Energy as liquidated damages, and not as a penalty, for the use and occupancy of said Utility Structures and Communications Sites a sum equal to one half of the annual Usage Charge for each Utility Structure and Equipment Building for each month (or part thereof) that the User Facilities or Attachments continue to contact the Utility Structures or Communications Sites.

(f). The periods of time in which User's Facilities and Attachments are required to be removed provided in this section shall be suspended during the pendency of a proper appeal of termination of Attachment Rights under the Infrastructure Ordinance. However, User may not install any new or additional User Facilities or Attachments, make any Improvements, or make any changes to existing Attachments (except for removal) during the pendency of any appeal.

12.5 Refund of Unearned Usage Fees upon Termination. If this Agreement, or any permit granted hereunder, is terminated for any reason except the occurrence of an Event of Default by User or for User's convenience, Austin Energy shall refund to User the unearned portion of User's pre-paid Usage Charges within thirty days after the effective date of termination.



### **XIII. ASSIGNMENTS**

13.1 User may not assign, sublet, or otherwise transfer this Agreement, in whole or in part, without the prior written consent of Austin Energy, except that User may, without such consent:

- a) mortgage, pledge, hypothecate, or grant a security interest in, any or all of its property, rights, privileges and franchises, including its interest in this Agreement or any permits granted hereunder, to any financing entity or agent on behalf of any financing entity to whom User (i) has obligations for borrowed money or in respect of guaranties thereof, (ii) has obligations evidenced by bonds, debentures, notes or similar instruments, or (iii) has obligations under or with respect to letters of credit, bankers acceptances and similar facilities or in respect of guaranties thereof;
- b) enter into any merger, consolidation, or sale of its assets in the area served by Austin Energy substantially in their entirety; or
- c) assign its interest to its parent company, any subsidiary or affiliate of it or its parent company or to any successor-in-interest or entity acquiring fifty-one percent (51%) or more of its stock or assets, subject to any financing entity's interest, if any, in this Agreement.

Within ten days of the effective date of the foreclosure of a mortgage or security interest granted to a financing entity, a merger, consolidation, or sale of User's Austin area assets substantially in their entirety, or an authorized assignment to an affiliate, User shall notify Austin Energy in writing. Upon receipt by Austin Energy of such notice, and the assumption in writing by the transferee of all of the duties obligations of User hereunder, User shall be relieved of all future performance, liabilities and obligations under such Site License.

13.2 A purported assignment or transfer made in violation of the provisions of this section shall not be binding upon Austin Energy, but shall be deemed to be a material default of this Agreement by User.

13.3 Austin Energy may assign this Agreement in whole or in part without the consent of User to a successor utility acquiring (by merger, sale or otherwise) the Utility Structures or Communications Sites occupied by User Facilities, where transfer is subject to User's rights hereunder. Austin Energy shall give User written notice of the transaction within ten days after closing.

13.4 The attachments of each party hereto or of any Third Party User shall at all times be and remain its or their respective property, with the full right of removal, and shall not become subject to any liens against any other party.

### **XIV. NOTICES**

14.1 Wherever in this Agreement notice is required to be given by either party hereto to the other, such notice shall be in writing mailed or delivered to such party at the following address or to such other address as either party may from time to time designate in writing for that purpose.



All notices shall be effective upon receipt. Routine communications may be sent by first class mail, telefax, or other commercially acceptable means.

AUSTIN ENERGY \_\_\_\_\_  
721 Barton Springs Road \_\_\_\_\_  
Austin TX 78704 \_\_\_\_\_  
Attn.: Vice President, Power Delivery \_\_\_\_\_  
Fax No. (512) 322-6037 \_\_\_\_\_  
\_\_\_\_\_

## XV. MISCELLANEOUS

15.1 Integration. This Agreement constitutes the entire understanding of the parties relating to the use of Utility Structures and Communications Sites hereunder; and there shall be no modification or waiver hereof except by writing, signed by the party asserted to be bound thereby.

15.2 No Waiver. The failure of either party to enforce or insist upon compliance with any of the terms or conditions of this Agreement shall not constitute a general waiver or relinquishment of any such terms or conditions, but the same shall be and remain at all times in duly force and effect.

15.3 Headings. The descriptive headings of the provisions of this Agreement are formulated and are intended to be used only for the convenience of the parties, and shall not be deemed to affect the meaning or construction of any provision hereof.

15.4 No Third Party Beneficiary. There is no third party beneficiary to this Agreement, and the provisions of this Agreement shall not impart any rights enforceable by any person, firm, corporation or organization not a party hereto or a successor or assign of a party hereto.

15.5 Applicable Law. The parties hereto agree and intend that all disputes which may arise from, out of, under or respecting the terms and conditions of this Agreement, or concerning the rights or obligations of the parties hereunder, or respecting any performance or failure of performance by either party hereunder, shall be governed by the laws of the State of Texas, without application of its Conflict of Laws provisions. The parties further agree and intend that venue shall be proper and shall lie exclusively in Travis County, Texas.

15.6 Partial Invalidity. If any term, covenant, or condition of this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remainder of the terms, covenants and provisions of this Agreement shall remain in full force and effect. But in such event, if either party believes that the balance of mutual benefit and obligations under the Agreement has been thereby impaired, such party may, upon written notice to the other party, initiate a renegotiation of the Agreement to redress such imbalance. If the parties are unable to agree upon a renegotiated Agreement within thirty days, then either party may terminate the



Agreement upon written notice to the other party, without incurring any liability to the other party by reason of such premature termination.

15.7 Tense, Number and Gender. Unless otherwise specifically provided, the present tense includes the future tense; the singular includes the plural, and the plural the singular; and words of one gender include the other genders.

15.8 Future Amendment. Either party may propose contract amendments intended to address any substantially changed or unforeseen circumstances relevant to the performance of the Agreement or the use, maintenance or operation of Utility Structures. Neither party, however, shall ever be obligated to propose, consider or accept any amendment.

IN WITNESS WHEREOF, the undersigned have executed this Agreement at Austin, Travis County, Texas through their duly authorized representatives.

Approved as to form:

THE CITY OF AUSTIN

\_\_\_\_\_  
City Attorney

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

Attest:

\_\_\_\_\_

\_\_\_\_\_  
Secretary

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_



**AMENDMENT TO  
INFRASTRUCTURE USAGE AGREEMENT  
BETWEEN THE CITY OF AUSTIN AND  
[Licensee]**

THIS AMENDMENT TO INFRASTRUCTURE USAGE AGREEMENT (the "Amendment"), made and entered into as of the \_\_\_ day of \_\_\_\_\_, 20XX by and between the CITY OF AUSTIN, a home rule municipal corporation acting by and through its Electric Utility Department ("Austin Energy"), and [Licensee] ("User"), a [state of incorporation] corporation, for the purposes and consideration hereinafter stated.

WHEREAS, the parties entered into an INFRASTRUCTURE USAGE AGREEMENT signed by User on [date of original contract];

WHEREAS, the parties desire to amend the INFRASTRUCTURE USAGE AGREEMENT as reflected herein;

NOW, THEREFORE, in consideration of the premises and the mutual covenants in this Amendment, Austin Energy and User agree as follows:

Article 2.14 is amended to read as follows:

“2.14 Improvements shall mean additions or upgrades of Utility Structures at Communications Sites made by User under this Agreement, as approved by Austin Energy upon application by User, but excluding User Facilities and Attachments. Improvements include, without limitation, new communications towers, modifications to existing transmission structures or communications towers, non-portable Equipment Buildings, fencing including gates, access roads, and grounding.”

Article 3.6 is amended by adding the following:

“If an Improvement is a new communication tower, it shall be designed and constructed for use by no fewer than three antenna arrays from separate wireless communication providers, unless otherwise approved by Austin Energy. User shall maintain and provide to Austin Energy records of construction costs of the Improvement. Upon acceptance by Austin Energy and after conveyance of title to such Improvement to Austin Energy, User’s Usage Charge related to such Improvement will be reduced by one half. Additionally, if Austin Energy permits a Third Party User to place an Attachment on such new communication tower, Austin Energy shall reimburse User for one-third of User’s reasonable and verifiable cost of constructing the Improvement, less any reimbursement to Austin Energy for prior reductions in Usage Charges. The reduction in Usage Charge shall continue until the total of such reductions and reimbursements is equal to two-thirds of User’s reasonable and verifiable cost of constructing the Improvement. In no event shall the total of the reduction in User’s Usage Charges related to such Improvement plus reimbursements to User for the construction cost of such Improvement exceed two-thirds of User’s reasonable and verifiable cost of constructing such Improvement. Thereafter, User’s Usage Charge related to such Improvement will be the full value of such Usage Charge as shown in Exhibit A.



Any payment made to Austin Energy by a Third Party User as compensation for attachment rights to such Improvement shall be applied first to reimburse Austin Energy for prior reductions in Usage Charges related to such Improvement and then to User as stated above.”

Article 5.9 is amended to read as follows:

“If User is seeking Attachment Rights to a Utility Structure or Improvement originally constructed, or paid for, by a Third Party User, User shall as a condition precedent to the granting of a permit pay to Austin Energy one-third of the construction cost of such Utility Structure or Improvement. Nothing herein shall grant User the right to compel the relocation of a prior authorized Third Party User's Facilities.”

Except as amended herein, the INFRASTRUCTURE USAGE AGREEMENT signed by User on [date of original contract], shall remain in full force and effect.

IN WITNESS WHEREOF, the undersigned have executed this Agreement at Austin, Travis County, Texas through their duly authorized representatives.

Approved as to form:

THE CITY OF AUSTIN

\_\_\_\_\_  
City Attorney

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

Attest:

USER

\_\_\_\_\_  
Secretary

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_