

**POLE INFRASTRUCTURE LICENSE AGREEMENT BETWEEN
AUSTIN ENERGY AND LICENSEE**

This License Agreement is between Austin Energy (“AE”), an electric utility wholly owned by the City of Austin, a Texas home-rule municipal corporation, and Licensee (“Licensee”).

WHEREAS, Licensee desires to provide cable, internet, data transmission, and telecommunication services within AE’s service area; and

WHEREAS, Licensee will need to place and maintain cables, equipment, and facilities within AE’s service area and desires to place such cables, equipment, and facilities on various Poles and easements owned by AE; and

WHEREAS, AE is willing to grant Licensee revocable, non-exclusive licenses to use certain Poles on the strict terms and conditions set forth in this Agreement and subject to the terms of the City of Austin's Infrastructure Usage Ordinance (Austin City Code Chapter 18-7) as it may be amended from time to time; and

WHEREAS, AE is willing to allow Licensee to undertake the Make-Ready construction work necessary to prepare certain Poles to accommodate Licensee’s cables, equipment, and facilities under the strict terms and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants, terms and conditions herein contained, AE and Licensee do hereby mutually covenant and agree as follows:

**ARTICLE 1
DEFINITIONS AND CONSTRUCTION**

1.1 **Definitions:** For purposes of this Agreement, capitalized terms are defined as follows:

A. **AE Distribution Construction Standards** means those engineering and construction standards, specifications, and designs maintained and referenced internally by AE for its own Pole distribution construction and engineering efforts.

B. **Annual Usage Charge** means the recurring charge that Licensee is to pay AE annually under this Agreement for the use of AE’s Poles. The Annual Usage Charge is in addition to any Costs and Filing Fees Licensee may incur during a Contract Year, and shall be determined by AE as of December 1 of each Contract Year, other than the first Contract Year. To the extent lawfully permitted, the Annual Usage Charge for any Contract Year shall be the number of Attachments shown on AE’s records to exist as of December 1 of the preceding

Contract Year multiplied by the Usage Rate for the new Contract Year. Provided, however, that the calculation of the Annual Usage Charge will not include Attachments overlashed to any of Licensee's Attachment for which a Usage Rate is chargeable, unless applicable state or federal law is amended to allow such a charge. Unless otherwise expressly provided in this Agreement, Annual Usage Charges are not refundable.

C. **Application** means the AE prescribed application sheet, together with all required prints, maps, proposed routes, project descriptions, and proposed schedules that Licensee must submit, in full, to AE in order to request and be granted an Attachment License for a particular Pole or group of Poles. Exhibit C provides the cost for available formats of maps from AE's Geographical Information System.

D. **Attachment** means:

1. each Cable owned, controlled, or used by Licensee, together with its associated messenger strand, guy wires, anchors, and other appurtenant and incidental facilities (other than those covered by parts 2 and 3 of this definition), affixed to a Pole regardless of the means by which affixed (a Cable lashed to another Cable and each Cable lashed to a common messenger is a separate Attachment);

2. each amplifier, repeater, controller, box, cabinet, appliance, device, or piece of equipment owned, controlled, or used by Licensee and affixed to a Pole, regardless of the means by which it is affixed, except that an Attachment shall not be an antennae, wireless transceiver, or other similar device used for or associated with wireless communication or wireless data transmission; and

3. each amplifier, repeater, controller, box, cabinet, appliance, device, or piece of equipment owned, controlled, or used by Licensee that is resting on the ground but is connected to a Pole, Attachment, or AE line by a conductor, except that an Attachment shall not be an antennae, wireless transceiver, or other similar device used for or associated with wireless communication or wireless data transmission.

E. **Attachment License** means the revocable, non-exclusive right of Licensee to make an Attachment to a Pole under this Agreement, pursuant to AE's approval of an Application and subject to (1) any modifications, conditions, and specifications imposed by AE when approving the Application and (2) all Design Documents issued by AE with respect to the Attachment and Pole in question. An Attachment License authorizes Attachments solely for lawful communications purposes. The use of any Attachment for any purpose other than providing services authorized by (1) City franchise or (2) Chapter 283 of the

Texas Local Government Code is prohibited and shall constitute a material breach of this Agreement.

F. **Cable** means a conductor, wire, or fiber or a bound or sheathed assembly of conductors, wires, or fibers used as a wire communications or transmission medium (a bare messenger is also a Cable).

G. **Communications Space** means the area on any given Pole, below and sufficiently remote from the Supply Space as required by Electrical Code, within which Attachments and Pole Contacts may lie. The term Communications Space has the equivalent meaning as that used in the Electrical Code. The top surface of the Communications Space must remain at least 40 inches from the lowest surface of the Supply Space and from any other electrical lines, conductors, or equipment. The bottom surface of the Communications Space must maintain a clearance of at least 18 feet above the ground.

H. **Contract Year** means any calendar year during which this Agreement is in effect, beginning January 1 and ending December 31, except that the first Contract Year shall run from the Effective Date until December 31 of that year and the final Contract Year shall run from January 1 of that year until the date of termination.

I. **Contractor** includes subcontractors.

J. **Cost** means the total reasonable cost to AE for any particular task under this Agreement, and includes without limitation reasonable labor, material, equipment usage, outside Contractor and vendor charges, overhead, and general and administrative expenses. Costs may be incurred for, without limitation, engineering and engineering review, Make-Ready construction, inspections and oversight, auditing, public relations and intervention, and other services. Certain Cost rates are specified in Exhibit A to this Agreement, which AE may change no more than once per year upon 60-days notice to Licensee. Costs shall be determined by AE in its sole judgment and reasonable discretion, and shall be paid by Licensee in accordance with either of the following, at AE's sole option:

1. Any advance estimate provided by AE, in which event AE shall have the right to refuse to incur the Costs until the estimate is paid; and/or

2. Any final invoice submitted by AE. In the event an advance estimate was paid by Licensee for Costs, the final invoice will reflect such payment.

K. **Design Documents** mean all specifications, drawings, schematics, blueprints, engineering documents, and written requirements for materials, equipment, design, construction, and workmanship issued by AE to Licensee with

respect to Make-Ready and installation work on a particular Attachment or Pole or group of Attachments or Poles.

L. **Effective Date** means the date AE signs this Agreement as shown on the signature page of this Agreement.

M. **Electrical Code** means the National Electrical Safety Code (NESC), the National Electrical Code (NEC), and Chapter 752 of the Texas Health and Safety Code.

N. **Filing Fee** means the initial, non-refundable fee charged to Licensee for filing an Application for an Attachment License. Filing Fees are currently set by city ordinance, though will be set by AE to the extent they are no longer set by ordinance. The Filing Fee is solely to compensate AE for reviewing and processing an Application and does not include or offset Costs or Annual Usage Charges.

O. **Infrastructure Usage Ordinance** means Austin City Code Chapter 18-7 and any other City ordinance that may be enacted to govern electric utility infrastructure usage or rental.

P. **Pole** means any electric distribution pole owned by AE that supports electric lines having a nominal voltage of not more than 35kv. Unless otherwise agreed by AE with respect to a particular pole, the term Pole does not include (1) street lighting, traffic signal, or night watchman poles, (2) poles or towers supporting transmission lines carrying a nominal voltage greater than 35kv, (3) any structure or facility within a substation, (4) conduits, or (5) any structure not used for electric power distribution.

Q. **Pole Contact** means the point or contiguous area on a Pole at which one or more of Licensee's Attachments make physical contact with (1) a Pole or (2) a Third Party User's Attachment, during a Contract Year, regardless of the duration for which the Pole Contact existed.

R. **Make-Ready** means all work, as determined by AE in its sole judgment and discretion, required to accommodate Licensee's Attachments on a Pole with respect to AE and Third Party User needs and in compliance with Electrical Code, AE Distribution Construction Standards, generally accepted engineering and construction practices, and applicable laws.

S. **Maximum Lawful Usage Rate** means the maximum amount that AE may lawfully charge for an Attachment under applicable state and federal law, rules and regulations in effect from time to time. If, within a particular Attachment, Licensee bundles services having regulated attachment rates with services for which attachment rates are not regulated, the Maximum Lawful Rate may, to the extent lawfully permitted, include separate rates for the regulated and

the unregulated services. If for any Contract Year, applicable state or federal law does not limit the amount AE may charge Licensee for a particular Attachment or service under this Agreement, the Maximum Lawful Rate for the Attachment or service shall be the amount that AE determines, in its sole judgment and discretion, to constitute a reasonable and non-discriminatory annual Usage Rate.

T. **Supply Space** means the area on any given Pole, above the Communications Space, that is reserved for the placement of electric supply lines, electrical equipment, and other AE facilities. The term Supply Space has the equivalent meaning as that used in the Electrical Code. Licensee may not place any Attachments or Pole Contacts in the Supply Space.

U. **Third Party User** means any third party that has, or may be granted, an Attachment License or other right to attach with respect to a Pole.

V. **Unauthorized Attachment** means an Attachment or any other affixing or placing of Licensee's facilities onto AE property for which Licensee does not have a valid Attachment License.

W. **Usage Rate** means, for each given Contract Year, the amount Licensee must pay AE for each Attachment.

1.2 **Syntax** Except as otherwise expressly provided herein, all nouns, pronouns and variations thereof shall be deemed to refer to the singular and plural.

1.3 **Amendments** Any reference to a law, code, or document shall mean such law, code, or document as it may be amended from time to time.

1.4 **Third Party User Agreements** AE has in the past entered into other Pole usage agreements with Third Party Users. In construing this Agreement, no variations between this Agreement and other agreements with Third Party Users shall have any evidentiary value or be construed against AE.

1.5 **Infrastructure Usage Ordinance** This Agreement is intended to further the goals and policies of the Infrastructure Usage Ordinance. To the extent they do not directly and irreconcilably conflict, this Agreement and the Infrastructure Usage Ordinance are cumulative and applicable to Licensee. To the extent a provision of the Infrastructure Usage Ordinance has been rendered invalid or preempted by state or federal law, this Agreement shall control. The absence in this Agreement of an Infrastructure Usage Ordinance provision, or vice versa, shall not be construed to relieve Licensee from complying with or being subject to such provision.

1.6 **No Construction against AE** The rule of construction that ambiguities in a contract are to be construed against the drafting party shall not apply to this Agreement.

1.7 **Headings** The descriptive headings in this Agreement are only for the convenience of the parties and shall not be deemed to affect the meaning or construction of any provision.

ARTICLE 2 SCOPE AND TERM OF AGREEMENT

2.1 **General Purpose** In accordance with the provisions of this Agreement, AE may issue Attachment Licenses to Licensee on the terms and conditions set forth herein. Before Licensee makes any Attachment to or begins any work on a Pole, it shall file an Application and await AE's issuance of an Attachment License and Design Documents with respect to that particular Attachment or Pole. Nothing in this Agreement shall be construed to obligate AE to grant an Attachment License with respect to any particular Pole.

2.2 **Term** The initial term of this Agreement is five years, beginning on the Effective Date. Licensee may be allowed to opt to extend the term of this Agreement for up to four additional terms of five years each as provided in this paragraph. At the end of each then-current five-year term, Licensee shall, if it intends to renew, give AE written notice of its request to renew at least 60 days before the end of the then-current term. If, in AE's sole determination, Licensee has not materially defaulted during the course of the then-current term, the request to renew will be allowed. Otherwise, AE will give written notice of the reasons for denial and this Agreement will expire at the term's end. This paragraph is subject to and conditioned upon any lawful requirements or limits imposed by City franchise.

2.3 **Existing Facilities Only** AE is under no obligation to add, build, keep, maintain, or replace Poles or any other facilities for the use or convenience of Licensee. The maintenance, replacement, removal, relocation, or addition of AE Poles and facilities shall remain within the sole province and discretion of AE.

2.4 **Poles Only** This Agreement addresses only Attachments to AE Poles. Attaching to or using other AE property and facilities, including without limitation conduits, buildings, and towers, is prohibited without further written agreement by AE.

2.5 **Wireless Communications** Nothing in this Agreement shall be construed to permit Licensee to place wireless communication facilities or equipment on AE facilities or property.

2.6 **City Rights-of-Ways** Nothing in this Agreement shall be construed to grant Licensee any right or authorization to use or occupy the public streets or rights-of-way of the City of Austin, except for the placement of Attachments on Poles or other facilities covered by this Agreement which may be located in the public streets or rights-of-way.

2.7 **Private Easements** Licensee understands that some Poles are located on dedicated easements over private property that, by their terms, restrict the use of the easement to AE for the sole purpose of electric distribution or transmission. Nothing in this Agreement shall compel AE to extend any property rights it does not have. Nothing in this Agreement and no action by AE shall be construed to offer, grant or approve any right or license to use such easement or to affix an Attachment to a Pole within such easement without the consent of the owner of the property to which the easement is appurtenant, unless otherwise allowed by law. AE has no obligation to expand or obtain rights in such easement on Licensee's behalf. It is the sole obligation of Licensee to obtain the necessary consent or additional easement rights, if any, at Licensee's own expense. In submitting an Application for a Pole on private property, Licensee shall provide AE with sufficient evidence that it has obtained all necessary and recordable easement rights and owner consents.

2.8 **Eminent Domain** AE is under no obligation to exercise any power of eminent domain on Licensee's behalf.

2.9 **No Property Rights In Poles** All Poles shall remain the property of AE and no payment made by Licensee shall create or vest in Licensee any ownership right, title, or interest in any Pole, but Licensee's interest shall remain a bare license. The existence of such a license shall not in any way alter or affect AE's right to use, change, operate, maintain, or remove its Poles and facilities as it sees fit, and AE shall not be liable to Licensee for any damage to or interference with the maintenance or the operation of Licensee's Attachments resulting from AE's use, operation, maintenance, or removal of its Poles and facilities. If AE's use of its Poles materially and adversely affects Licensee's use and operation of an Attachment, Licensee may, by written notice to AE, remove its Attachments from any adversely affected Pole. Such termination shall be implemented by written notice to Austin Energy. For each such termination, Licensee shall be entitled to a pro-rata refund of any pre-paid Annual Usage Charge attributable to the terminated Attachment.

2.10 **License not Exclusive** Licensee acknowledges that AE has entered into before, and may enter into in the future, similar or other agreements concerning the use of Poles by third parties, including Licensee's competitors. Nothing in this Agreement shall be construed to limit or in any way affect AE's right or ability to enter into or honor other agreements, or to grant any rights, licenses, or access concerning any Pole, irrespective of the character or degree of economic competition or loss caused to Licensee.

2.11 **AE Priority** The primary purpose of a Pole is electric distribution, and AE reserves to itself first priority in the use of a Pole. In the event of any conflict between the use of a Pole by AE and Licensee, the use of a Pole for the distribution of electric power to AE customers shall prevail and have priority over Licensee's use of the Pole. AE retains and shall have exclusive use of the Supply Space. All of Licensee's aerial Attachments shall remain within the Communications Space.

2.12 **Discretion of AE Final** AE reserves the right to deny any Application, reserve any Pole to its own use, or modify any Pole for legal, safety, mechanical, structural, engineering, environmental, reliability, or service reasons. Determination of these issues shall at all times remain within the sole and final discretion of AE.

2.13 **No Cost or Expense to AE** The engineering, construction, installation, use, operation, and maintenance of Licensee's Attachments shall be at Licensee's sole expense. Unless otherwise expressly provided, nothing in this Agreement shall be construed to require AE to expend any funds or to incur or bear any cost or expense.

ARTICLE 3 USAGE RATES AND CHARGES

3.1 **Payment Due upon License Approval** AE's approval of an Attachment License shall be conditioned on Licensee's payment, within 30 days of approval, of the then current Usage Rate for each approved Attachment, prorated to reflect the number of months remaining in the Contract Year after AE's invoice, with any partial month being considered to be a full month.

3.2 **Calculation of Usage Rates** For each Contract Year, the Usage Rate shall be the Maximum Lawful Usage Rate. Before each new Contract Year, AE will notify Licensee of the Maximum Lawful Usage Rate for such Contract Year (failure to provide such notice, however, shall not affect AE's ability to implement such Usage Rate). The Maximum Lawful Rate may take into account changes in applicable law that are to go into effect during the upcoming Contract Year. If Licensee disagrees in good faith with AE's determination of the Maximum Lawful Usage Rate, Licensee may protest in writing within 30 days of receipt of the notice. The protest shall include copies of all records and other documentation that support Licensee's position. Failure to timely protest AE's proposed Usage Rate shall constitute agreement to and acceptance of AE's determination. If Licensee does timely protest a proposed Usage Rate, the parties shall endeavor in good faith to negotiate a resolution of the dispute. If the parties are unable to resolve the dispute within 60 days from the date of Licensee's protest, then either party may refer the matter to non-binding arbitration in accordance with Chapter 171 of the Texas Civil Practice and Remedies Code. If the dispute is not resolved by the time the Annual Usage Charge invoice is issued, Licensee shall nonetheless pay the invoice based upon the disputed Usage Rate. Payment by Licensee of the invoice shall not prejudice Licensee's ability to continue to contest the Usage Rate.

3.3 **Subsequent Annual Usage Charges** In each January of each contract year and continuing thereafter until the expiration or termination of this Agreement, AE will invoice for, and Licensee shall pay, within 30 days after receipt of invoice, the Annual Usage Charge for the new Contract Year.

3.4 **Invoice Disputes**. If Licensee believes in good faith that an Attachment count contained in an Annual Usage Charge invoice is incorrect, it may pay the invoice under protest. To protest an invoice, Licensee must give AE written notice of the nature

of its protest no later than the due date for payment 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 to determine the correct Attachment count. If the parties are unable to resolve a discrepancy as to the correct count, the parties shall jointly conduct a physical inventory of a statistically significant number of geographical grids or other mutually agreeable census to determine the correct count. The cost to conduct such inventory or census shall be equally divided between the parties.

3.5 **Adjustments** If upon resolution of a dispute between the parties under paragraph 3.2 or paragraph 3.4, a refund is due to Licensee, AE shall refund the amount of the overcharge together with interest at the rate specified in paragraph 17.5 from the date of AE's receipt of the protested Annual Usage Charge payment. If Licensee owes additional money, a corrected invoice shall be issued by AE for the additional Annual Usage Charge due, plus accrued interest at the rate specified in paragraph 17.5 from the due date of the original invoice.

3.6 **No Allowances** Unless otherwise expressly stated in this Agreement, there shall be no offsets against any sums due under this Agreement, or any other allowances, for system improvement, materials or labor supplied, upgrading, life extension, or other direct or incidental benefits conferred by Licensee upon AE or its poles, system, or facilities. All such improvements and benefits belong solely to AE, and the fact that such improvements or benefits may accrue shall in no way alter or affect Licensee's obligations under this Agreement.

ARTICLE 4 ATTACHMENT LICENSES

4.1 **Attachment License Required** Before Licensee may make any Contact or Attachment or perform any work on a Pole other than inspections necessary for preparing an Attachment Application, and before Licensee may place any Attachment or other facility on AE property or easements, Licensee must first obtain and accept an Attachment License. Licensee must have an Attachment License for each Pole to which Licensee's Attachments are to be affixed and for each separate Attachment to the Pole.

4.2 **Overlapping** Licensee may not overlap to an existing Licensee or Third Party User Attachment or Pole Contact without an additional and separate Attachment License for the overlapped Attachment. Licensee may not allow another party to overlap to Licensee's facilities without such party first having an agreement with an Attachment License from AE. Poles are the sole property of AE, and Licensee shall not charge or accept any financial consideration for allowing a third party to overlap to an Attachment or Pole Contact without AE's written consent.

4.3 **Application Process** The Application must be submitted in the then-approved AE format. The Application form, and all required supporting documentation and other procedures, are within the discretion of AE and may change from time to time without prior notice. Applications made on a multiple pole or project basis are subject to

further AE policies and procedures that may change from time to time without prior notice. AE may reject entirely an incomplete Application, or it may request additional information to support the Application, in which event the requested information shall be promptly furnished.

4.4 **Filing Fee** The Filing Fee shall be paid at the time the Application is submitted. No Application will be considered before payment of the Filing Fee.

4.5 **Approval** AE retains sole and complete discretion to deny or modify any Attachment Application in order to be able to preserve the safety, reliability, integrity, and effectiveness of the electric distribution system that constitutes the core of its business and its governmental mandate. The denial, approval, or modification of an Attachment License shall be governed exclusively by the terms of this Agreement, and shall not be subject to appeal under the Infrastructure Usage Ordinance. However, Licensee may request AE to reconsider a denial or modification of an Attachment Application. AE may approve an Application as submitted, approve it on a modified or conditional basis, or may deny the Application in accordance with the procedures set forth in the Infrastructure Usage Ordinance and the policies adopted by AE pursuant thereto. AE may also refuse to issue an Attachment License when, in its sole discretion, it determines that the space on a Pole is required for its own exclusive use or that Pole may not reasonably be arranged or replaced to accommodate Licensee's proposed Attachment. By way of example only and not by limitation, an Application may be denied if the proposed Attachment:

- A. is of excessive size or weight or would otherwise subject an AE Pole to unacceptable levels of stress;
- B. would jeopardize the reliability or integrity of the electric system or of individual Poles;
- C. would present a safety hazard to AE employees or the public;
- D. would impair AE's ability to operate or maintain a Pole;
- E. would require an unacceptable change or addition to a Pole;
- F. would expose the city, AE, its ratepayers, or other users to increased liability or financial risk.

4.6 **Order of Approval** Applications concerning a particular Pole will be considered and acted upon by AE in the order in which they are filed. For purposes of evaluating an Application with respect to Pole capacity and existing Third Party User Attachments, AE will consider not only all existing attachments but also all valid Attachment Licenses and reserved AE space as existing Attachments.

4.7 **Engineering** When processing an Application, AE shall have the right to perform, or have a firm retained by AE perform, its own engineering and field evaluation, irrespective of whether Licensee has performed such services for its own benefit. All Costs for such engineering and field evaluation shall be paid by Licensee. AE's engineering requirements and determinations shall be within its sole discretion and final. AE may consider but is not bound by Licensee's own engineering determinations. With respect to a particular Pole, AE's engineering shall take into account and allow space for all Attachment Licenses which are valid for that Pole. In granting an Attachment License, AE shall issue to Licensee the Design Documents governing the approved Attachment(s).

4.8 **Attachment License Expiration** All Attachment Licenses and Design Documents and any rights conferred thereunder shall expire within 90 days of issuance (or such longer period as the parties may agree to in writing), unless all Make-Ready and installation work has occurred in accordance with the Design Documents before the end of such period. If an Attachment License for a Pole expires, Licensee shall re-apply, *de novo*, for an Attachment License before working on or making an Attachment to that Pole.

ARTICLE 5 GENERAL REQUIREMENTS

5.1 **Work Site Safety** In performing any work on or near Poles supporting energized electric lines, Licensee, and its Contractors, agents and employees shall comply with Chapter 752 of the Texas Health and Safety Code and all federal, state and local laws, rules and regulations governing work in proximity to energized electric lines, including without limitation, those promulgated by the Occupational Safety and Health Administration. LICENSEE SHALL DEFEND, INDEMNIFY AND HOLD THE CITY HARMLESS FROM AND AGAINST ALL CLAIMS, DEMANDS, ACTIONS, SUITS AND JUDGMENTS ARISING FROM OR CONCERNING A BREACH BY LICENSEE OF ITS OBLIGATIONS UNDER THIS PARAGRAPH.

5.2 **Electrical Code** Licensee, and its Contractors, agents and employees, and all work, Contacts, and Attachments on a Pole shall at all times comply with then current Electrical Code.

5.3 **Design Documents** All Make-Ready, installation, and other work performed by Licensee on a Pole or Attachment shall at all times comply with the Design Documents and AE Distribution Construction Standards.

5.4 **Service Interruptions** Licensee shall not cause any interruption of AE or Third Party User services without first obtaining AE's express written consent as provided by Article 6. If it is necessary for AE to de-energize any equipment or lines for Licensee's benefit, Licensee shall reimburse AE in full for all Costs and lost revenue in doing so. In the event Licensee damages any of AE's equipment or lines or causes any service interruption, Licensee, at its sole expense, shall immediately do all things

reasonable to avoid injury and further damage, direct and incidental, resulting therefrom and shall notify AE immediately. Licensee shall be liable for all Costs resulting from such damage and any necessary repairs and for any lost revenue resulting from a service interruption.

5.5 **AE Oversight** AE shall have the right to conduct on-site field oversight and inspections of Licensee's Attachments, work, and operations on Poles and in AE easements. AE shall at all times have unrestricted access to Poles and to all work sites of Licensee and Licensee's Contractors. Both AE and AE's representative at any Pole site shall have complete and final authority to order the immediate suspension of Licensee's construction or installation activities if AE or AE's representative, in its sole discretion and judgment, deems such action necessary for reasons of safety, engineering, electrical service reliability, or property owner complaint. In the event of an oral suspension order, AE shall send written notice to Licensee within three business days after such suspension, identifying the alleged violation. Such suspension shall be in effect until such time as the Licensee cures, at Licensee's sole Cost, the alleged violation. In no event shall AE be responsible for any damages, losses, or costs incurred by Licensee as a result of such work stoppage unless such stoppage is a result of willful or intentional misconduct on the part of AE. Licensee's failure to obey a suspension order shall constitute a material breach of this Agreement and shall entitle AE to terminate any or all of Licensee's Attachment Licenses without concern for any cure period provided by other provisions of this Agreement.

5.6 **Laws** To the extent that the Code of the City of Austin lawfully requires Licensee to possess a valid franchise or construction permit before engaging in a particular act, Licensee must comply with such requirement before beginning Make-Ready construction or installing Attachments. Nothing in this Agreement shall be construed as waiving other City requirements or permitting the construction of facilities other than Attachments. Attachments must conform to local, state, or federal law. Licensee's use of any Pole and Licensee's Attachments shall at all times conform to the requirements of the City Code, the Infrastructure Usage Ordinance, and the policies promulgated by the City pursuant thereto.

5.7 **Other Permits** Licensee shall apply for and obtain all licenses, permits or other authorizations required to provide its service or to use, operate or maintain its Attachments. If Licensee is denied any required license, permit or authorization, Licensee may, upon written notice to AE, terminate any permit granted hereunder that was predicated upon the grant of such license, permit or authorization. However, no termination by Licensee under this section shall entitle Licensee to any refund of prepaid Filing Fees or Annual Usage Charges.

5.8 **Taxes and Liens** Licensee shall pay all taxes and assessments lawfully levied on Licensee's Attachments and any tax, assessments, fee, or charge levied on Poles solely because of their use by Licensee. In no event shall Licensee permit any lien to be filed or to exist upon any Poles or AE property as a result of any claim against Licensee. Licensee shall promptly pay upon receipt of written notice from AE all such liens

together with all fees and costs necessary to discharge same, or shall bond around such liens in the manner provided by law.

5.9 **Electrical Code Conflicts** In the event of a difference, conflict, or discrepancy between or among the requirements or practices of any Electrical Code or safety regulations, laws, or industry standards the following rules shall apply: (A) if one specification or practice is more stringent than the other, the more stringent shall apply; (B) if one is not more stringent than the other, the NESC shall govern to the extent permitted by law; (3) if the first two rules are insufficient to resolve the conflict in a clear and unambiguous manner, AE shall determine which standard shall apply, giving highest priority to safety considerations.

5.10 **Design Document Conflicts** In the event of a difference, conflict, or discrepancy between or among the requirements or practices of the Design Documents and AE Distribution Construction Standard, the Design Documents shall govern. In the event Licensee believes a Design Document or AE Distribution Construction Standard is inconsistent with Electrical Code or applicable law, Licensee shall refer the matter to AE for determination.

ARTICLE 6

MAKE-READY CONSTRUCTION

PART A - GENERAL PROVISIONS

6.1 **Performance of Make-Ready Work** AE shall be under no obligation to change, modify or replace any Pole to accommodate Licensee. If, however, AE elects, in its sole discretion, to change, modify or replace a Pole or any existing attachments to accommodate a proposed Attachment, all Make-Ready Costs shall be borne solely by Licensee, including without limitation, costs of planning, engineering, construction, and pole replacement. AE may in its sole discretion:

A. opt to perform the necessary Make-Ready work itself, in which case Part B of this Article 6 shall apply, though in no event shall this Agreement be construed to require AE to undertake Make-Ready construction, or

B. opt to authorize Licensee or another applicant to perform the necessary Make-Ready work, in which case Part C of this Article 6 shall apply.

6.2 **Third Party Facilities** Make-Ready Costs that are to be paid by Licensee include all cost and expense to relocate or alter the attachments or facilities of any pre-existing Third Party User as may be necessary to accommodate Licensee's Attachment. Licensee shall provide at least 30 days notice to each Third Party User of its intent to relocate or alter their facilities and make all other necessary arrangements directly with the affected Third Party Users.

PART B - CONSTRUCTION BY AE

6.3 **Scope** This Part B of Article 6 shall apply only in the event AE has opted to perform the Make-Ready Work on a Pole.

6.4 **Construction by AE** If Licensee's proposed Attachment necessitates changes in or additions to a Pole or the relocation or modification of AE or Third Party User facilities on a Poles, and AE opts in its sole discretion to perform the necessary Make-Ready work, AE shall, within thirty (30) days after approving the Attachment License, submit to Licensee an estimate of the Cost for such Make-Ready work and an estimated completion date. Upon receipt of Licensee's written approval of the Cost estimate, AE will proceed with the work in substantial compliance with the proposed schedule. In no event, however, shall AE be liable to Licensee or any other person for failure to complete the work in accordance with the proposed schedule.

6.5 **Cost Allocation for Multiple Applications** Notwithstanding any other provision of this Agreement, if another entity files an Application concerning the same Pole within 30 days before or after Licensee's Application, AE shall equitably divide the engineering and Make-Ready and Pole replacement Costs incurred to accommodate all approved Attachments, taking into account the order in which the Applications were filed and the Costs occasioned by each applicant. AE's allocation of Costs shall be final and binding.

PART C - CONSTRUCTION BY LICENSEE

6.6 **Scope** This Part C of Article 6 shall apply only in the event Licensee has been given approval by AE to perform Make-Ready work on a Pole.

6.7 **Construction by Licensee** All work performed by or on behalf of Licensee pursuant to an Attachment License shall be done in a good and workmanlike manner. Licensee shall also comply with the provisions of Exhibit B, which AE may change upon 60 days written notice to Licensee. Licensee's acceptance of an Attachment License constitutes Licensee's agreement to be bound by its terms and conditions. All Attachments, Contacts, Make-Ready work, and other work performed or maintained by Licensee on a Pole shall strictly comply with Electrical Code, the Design Documents, and other laws and standards as provided by Article 5. Any deviation shall constitute a material default under this Agreement and shall afford AE all lawful remedies it may have available to it, including without limitation the right to suspend Licensee's Make-Ready and installation operations, deem the violation an Unauthorized Attachment, and to seek specific performance of this Agreement in accordance with the Design Documents.

6.8 **Pole Replacement** AE retains sole discretion to determine whether a Pole will be replaced and to determine the maximum height a Pole may reach. Replacement Poles shall be a minimum of 5 feet higher than the replaced Pole. Pole replacement Costs

shall be borne by Licensee if, because of inadequate capacity, approval of Licensee's Attachment first causes the need for the replacement.

6.9 **Coordination of Make-Ready Efforts** In the event multiple entities have been granted Attachment Licenses for the same Pole and a disagreement arises between them as to construction and installation schedules, AE shall have the right to require a representative of Licensee who has authority to agree on these issues to attend a meeting called by AE to discuss and agree on these issues. Failure to reach an agreement shall result in mandatory submittal of these issues to binding arbitration at the applicants' expense; provided, however, that if AE in its sole reasonable discretion determines that Licensee is not bargaining in good faith, AE may revoke or modify Licensee's Attachment License.

6.10 **Authority to Proceed** An Attachment License is not an authority to proceed with Make-Ready work on a Pole. Before beginning Make-Ready work on a Pole, Licensee shall give AE not less than 14 days written notice of the Pole location, the proposed date on which work will commence, and whether any electrical service interruptions or de-energizations will be required. If AE does not approve of such date, the parties shall mutually agree on a date for construction to take place and shall make all necessary arrangements and schedules for line and equipment de-energization. Licensee shall not begin Make-Ready work without authority to proceed from AE, and shall comply with the agreed upon construction and de-energization schedule. Licensee shall be responsible for coordinating its efforts with AE field inspection personnel and for any actions or notifications required by the AE Energy Control Center. LICENSEE SHALL INDEMNIFY AE FROM ALL CLAIMS FOR LOSS, HARM, PROPERTY DAMAGE, AND BODILY INJURY OR DEATH IN CONNECTION WITH ANY WORK PERFORMED WITHOUT THE NOTICE AND ARRANGEMENTS CONTEMPLATED BY THIS PARAGRAPH.

6.11 **Service Interruptions** In the event Licensee's Make-Ready construction efforts require a scheduled interruption in AE or Third Party User services or otherwise require de-energization of AE lines, time shall be of the essence. If Licensee fails to comply with the construction schedule as agreed upon pursuant to the preceding paragraph, AE may opt to immediately revoke Licensee's Attachment License(s) for the Poles in question and restore the interrupted power and services at Licensee's sole Cost, unless Licensee's failure results from Force Majeure or through the fault of AE.

6.12 **Contractors** All work performed by or on behalf of Licensee pursuant to an Attachment License shall be done by a Contractor selected from an AE issued list of approved Contractors. Licensee may propose Contractors for inclusion in such list, and AE may or may not approve such proposed Contractor in its sole judgment and discretion. Only orderly and competent workers shall be used. Neither Licensee's workers nor those of its Contractors may 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 a Pole. If AE finds any Licensee or contract worker to be incompetent, disorderly, in the possession of any weapon, in the

possession of or under the influence of alcohol or drugs, Licensee shall promptly remove such worker from all work on or around Poles, and may not again use such worker on work on or around Poles without the prior written consent of AE.

6.13 **Materials** Licensee shall furnish all necessary materials and hardware including but not limited to: poles, crossarms, mounting hardware, guys, anchors, insulators, conductors, and any associated miscellaneous hardware. All materials used by Licensee for Make-Ready work on Poles shall be obtained from AE approved vendors and shall be new and of good quality and free from material defects. The use of attachment arms is prohibited without AE's prior written consent.

6.14 **Licensee to Bear Costs** All Costs and expenses to complete the Make-Ready construction, including the transfer of AE facilities and Third Party User Attachments, shall be borne entirely by Licensee.

6.15 **AE Property** Notwithstanding paragraphs 6.13 and 6.14, all Poles, materials, and equipment installed in the Make-Ready process shall become and remain AE's sole property, regardless of which entity procured or paid for it. Licensee shall execute any documents reasonably requested by AE to evidence the transfer of title to such Poles, materials, and equipment to AE, and Licensee shall brand and tag all new poles to indicate AE ownership. Licensee's performance of Make-Ready Work or payment of any Costs (A) shall in no way create or vest in Licensee any ownership right, title, or interest in any Pole or electrical facilities, (B) shall not entitle Licensee to any offsets, credits, payments, or income from AE's operation of the Pole or facilities, (C) alter or affect AE's rights under this Agreement, including those under Article 12, or (D) restrict AE's ability to allow access to a Pole by Third Party Users. Licensee's interest shall at all times remain a bare revocable license that is subject to the terms of this Agreement.

6.16 **Tree Trimming** Licensee shall be responsible for all tree trimming necessary for the safe and reliable installation, use, and maintenance of its Attachments, and to avoid stress on Poles caused by contact between tree limbs and Licensee's Attachments. All tree trimming shall be performed in accordance with then current AE tree-trimming policies, including without limitation those relating to owner notification and consent.

6.17 **Anchors and Guying** Licensee shall provide all anchors and guying necessary to accommodate the additional stress and load placed upon a Pole by its Attachments. Anchors shall not be placed outside of the easement in which a Pole stands.

ARTICLE 7 INSTALLATION AND MAINTENANCE OF ATTACHMENTS

7.1 **Installation** Upon (A) AE's acceptance of the completed Make-Ready work, and (B) AE's receipt of full payment of all sums owing to AE for engineering,

Make-Ready, and other Costs, Licensee may affix its Attachments to the Pole as set forth in the Attachment License and Design Documents.

7.2 **Communication Space** All Attachments and Contacts on a Pole must remain in the Communications Space. Licensee operations in the Supply Space or in the space separating the Communication and Supply Spaces are prohibited.

7.3 **Maintenance** Licensee shall, at its sole expense, make and maintain its Attachments in a safe condition and in good repair, and in such a manner as to not interfere with or interrupt AE's lines, facilities, and services or with Third Party User attachments, facilities, and services.

7.4 **No Damage** Licensee shall not cause damage to AE or Third Party User facilities or operations. If Licensee, its Contractors, agents, employees, or Attachments cause damage to AE or Third Party User facilities or operations, Licensee assumes all responsibility for, and shall, as determined by AE, either repair or promptly reimburse AE or the Third Party User for all loss and expense caused by such damage. Licensee shall immediately inform AE and all damaged Third Party Users of any damage to their facilities.

7.5 **Sag and Mid-Span Clearances** Licensee shall leave proper sag in its lines and cables and shall observe the established sag of power line conductors and other cables so that during the life of the Attachment minimum clearances are (A) achieved at Poles located on both sides of the span and (B) maintained throughout the span. A minimum clearance between surfaces must be maintained between Licensee's and others' Cables at mid-span and between Licensee's and other's Attachments and Pole Contacts on the Poles.

7.6 **Climbing Space** An unobstructed climbing space must be maintained at all times on the face of all Poles as required by Electrical Code, as well as adequate ground access to Poles. All Attachments must be placed as to allow and maintain a clear and proper climbing space. Licensee shall place its Attachments on the same side of the Pole as the majority of existing Attachments, if any.

7.7 **Tagging** Each Attachment shall be identified at all times by an identifying marker approved by AE that, at minimum, (A) is permanent in duration and not degradable by rain or sunlight (B) has coloring and numbering or lettering unique to Licensee, and (C) is capable of being read unaided from the ground by a person with normal vision.

ARTICLE 8 MODIFICATION OF ATTACHMENTS

8.1 **No Unauthorized Modifications** Except for routine modifications as provided in Section 8.2, Licensee shall not change the type, nature, or location of any Attachment or alter its use of a Pole without prior written AE consent. Licensee shall not

construct any other or additional Attachments except as authorized by this Agreement together with all separate Attachment Licenses. Any Attachment changed or added in violation of this section shall be deemed to be an Unauthorized Attachment.

8.2 **Routine Modifications** Licensee does not need AE consent for (A) changes incident to routine maintenance and repair; (B) installations of service drops; or (C) removal of Licensee's Attachments. Licensee shall nonetheless provide AE with a comprehensive report each month identifying all such changes in Attachments in the previous month.

8.3 **AE Mandated Modifications** Within 30 days of written request by AE, Licensee shall move or rearrange its Attachments in order to maximize the usable available Pole space and/or to accommodate AE facilities. Licensee shall do so at its sole cost and risk. If Licensee fails or refuses to comply with the directions of AE to change, alter, improve, move, remove or rearrange any of its Attachments, such Attachments shall thereafter be deemed to be Unauthorized Attachments. AE may then opt to change, alter, improve, move, remove or rearrange such Attachments without incurring any liability to Licensee and at Licensee's sole cost, or AE may proceed under Articles 10 and 11 of this Agreement.

8.4 **Emergencies** In case of an emergency, as determined by AE in its sole judgment and discretion, AE may move, rearrange or transfer Licensee's Attachments without notice and without liability to Licensee or to any other person, in which event Licensee shall also be responsible for all Costs.

8.5 **Destroyed Poles** If any Pole on which Licensee has an Attachment is substantially destroyed or damaged by fire, storm, accident, or otherwise, AE shall be under no obligation to rebuild or replace such Pole, but may elect to terminate Licensee's Attachment License for such Pole without any liability to Licensee. AE shall notify Licensee in writing of a termination under this paragraph, and Licensee shall be entitled to a pro-rata refund of any prepaid but unearned Annual Usage Charge attributable to the Attachments on such damaged or destroyed Pole. Nothing herein shall prohibit Licensee from repairing or replacing such damaged or destroyed Poles at Licensee's sole cost and expense if: (A) AE elects not to repair or replace same, and (B) Licensee is permitted to do so under the City Code, the terms of Licensee's franchise, if applicable, and any applicable easements.

8.6 **Pole Transfers** If AE replaces an existing Pole supporting an Attachment with a new Pole, AE will transfer, if reasonably feasible and at Licensee's sole risk, the Attachment to the replacement Pole when AE transfers its own lines and facilities, unless (A) Licensee notifies AE in writing that it does not desire to occupy the new Pole, or (B) other transfer arrangements satisfactory to AE are made in advance. Except in an AE determined emergency, Austin Energy shall try to give Licensee reasonable advance notice of Pole replacements. Failure of Licensee to timely respond to AE's notice shall be deemed an election to occupy the new Pole. If Licensee opts not to occupy the new Pole, Licensee's Attachment License to the replaced Pole shall terminate as of the date of

replacement. Licensee shall not be entitled to a refund of any Annual Usage Charge as a result. For each Attachment transferred by AE, Licensee shall pay a transfer Fee as set forth in Exhibit A.

8.7 **Underground Conversion** Upon written notice, Licensee agrees that it will bear all Costs associated with the relocation or re-routing of its Attachments in the event AE facilities are removed from a Pole and re-routed through underground conduits. In such event, AE shall be under no obligation to maintain any Poles that no longer support AE supply lines and may remove Licensee's Attachments when removing the abandoned Pole at Licensee's sole Cost and risk. AE will afford Licensee the opportunity to relocate underground, at Licensee's expense, where reasonably practicable.

ARTICLE 9 INVENTORY AND INSPECTIONS

9.1 **Right to Inspect** AE may inspect Licensee's work and Attachments at any time. AE may conduct these inspections for any purpose relating to this Agreement, including without limitation: (A) determining compliance with the Design Documents or other design and installation requirements; (B) determining compliance with Electrical Code; or (3) auditing and inventorying. The making of an inspection by AE shall not operate in any way to relieve Licensee or Licensee's insurers of any responsibility, duty, obligation, or liability under this Agreement or otherwise, nor does AE's ability to make inspections relieve Licensee from its obligations to exercise due care in the operation and inspection of its Attachments.

9.2 **Compliance** In the event any inspection of an existing Attachment reveals that corrections or other actions are required of Licensee under this Agreement, including without limitation those required for reasons of safety or structural integrity, Licensee shall make such corrections or take the requested actions within 30 days after the date AE sends Licensee a written notice informing Licensee of the corrections to be made. AE may also perform such work without notice, at Licensee's sole Cost and risk, if AE determines in its sole judgment and discretion that emergency, public welfare, or safety considerations do not permit full advance notice to Licensee. If Licensee fails or refuses to comply with the directions of AE, the Attachments in question shall thereafter be deemed to be Unauthorized Attachments. AE may opt to change, alter, improve, move, remove or rearrange such Attachments without incurring any liability to Licensee, and at Licensee's sole Cost and risk, or proceed under Articles 10 and 11 of this Agreement.

9.3 **System-wide Inventory** Not more than once in a Contract Year, AE may, but is under no obligation to, conduct a system-wide inventory of all Licensee and Third-Party User Attachments on its Poles, for which Licensee shall bear its proportionate share of Costs. AE will notify Licensee of the times and places of such inventory, and Licensee may have representatives accompany AE on the inventory. AE may use the results of the inventory for purposes of calculating the Annual Usage Charge, but may

also rely upon statistically significant number of geographical grids or other mutually agreeable census to determine the correct count.

ARTICLE 10 UNAUTHORIZED ATTACHMENTS

10.1 **Unauthorized Attachments** Licensee shall not place any Attachments on a Pole or other AE infrastructure except as authorized by an Attachment License. If one or more Unauthorized Attachments are discovered, Licensee shall comply with this Article 10 or AE may, but shall not be required to, remove the Unauthorized Attachment without incurring any liability to Licensee and at Licensee's sole Cost. With respect to any Unauthorized Attachment, AE may opt to:

A. Require that Licensee remove such Unauthorized Attachment upon demand or, if Licensee fails to do so, remove such Attachment at Licensee's sole Cost and risk; or

B. Require that Licensee submit an Application for each such Unauthorized Attachment, together with the then-current Filing Fee and Annual Usage Charge relating back to the inception of this Agreement. If such Application and charges are not received by AE within 15 days of notice of the Unauthorized Attachment, AE may then opt to proceed under part A of this paragraph 10.1.

10.2 **Remedies Cumulative** The remedies afforded AE under this Article 10 are in addition to any civil or criminal penalties provided by the Infrastructure Usage Ordinance for Unauthorized Attachments.

10.3 **No Ratification of Unauthorized Use** No act or failure to act by AE with respect to an Unauthorized Attachment or any other unauthorized use of AE Poles or property shall be considered to be a ratification, licensing, or permitting of the unauthorized use, irrespective of any otherwise applicable doctrine of waiver or laches.

10.4 **Excessive Unauthorized Attachments** If AE determines that Licensee has made more than 50 Unauthorized Attachments cumulatively during any Contract Year, Licensee shall be considered to be in material breach of this Agreement and AE will have the right to terminate this Agreement and require removal of Licensee's Attachments in accordance with Article 12 of this Agreement.

ARTICLE 11 CUSTOMER INTERACTION

11.1 **Purpose** Licensee acknowledges that the scope of its proposed project and the amount of Make-Ready construction and Attachment installation it intends to undertake under this Agreement will require Licensee to make extensive and repeated intrusions onto the private property of AE customers in order to access Poles. The

purpose of this Article is to establish minimum standards of conduct with respect to property owners and AE customers.

11.2 **Owner Consent** Before entering onto private property to access a Pole, Licensee shall obtain the owner's consent.

11.3 **Licensee Conduct** Before engaging in Make-Ready or installation work on the property of an AE customer, Licensee shall, at minimum:

A. Place hangers or fliers, explaining in general the nature, extent, and purpose of the work to be done and listing Licensee's telephone numbers and web site where additional information can be found, on the front door of each customer whose property is to be entered upon at least 48 hours prior to entry;

B. Require all field crews, and those of its Contractors, to carry and distribute upon request information packets explaining in detail the nature, extent, and purpose of the work being done and listing the telephone number and web site where additional information can be found;

C. Establish and maintain a local call-center telephone number during all hours during which field work is being done that is staffed by knowledgeable personnel who can answer and resolve customer questions and complaints concerning the work being done on their premises;

D. Establish and maintain a web site containing a project summary, work schedules, FAQs, and telephone numbers;

E. Require all field crews to wear I.D. badges and uniforms identifying themselves as employees or Contractors of Licensee;

F. Have all vehicles used in field work bear Licensee logo; and

G. Require all field crews to seek permission of the premises owner before entering into a back yard.

H. Have readily available, during all hours in which field work is being done, one or more knowledgeable personnel who can communicate with and assist the City Manager's Office and City Council members regarding property owner complaints, and also have available qualified personnel to conduct on-site resolution of property owner complaints.

11.4 **No AE or City Affiliation** Licensee, and its employees, Contractors, and agents shall not at any time represent themselves to the public, any AE customer, or any resident as being associated with, having the permission of, or having been requested by AE or the City of Austin to be on private property. Licensee shall inform any such

persons that it is allowed to work on AE Poles by virtue of state and federal law, not by voluntary association with AE or the City.

11.5 **Service Interruptions** Licensee shall provide written notice to AE customers of any planned electrical service interruptions that will affect them not less than 48 hours in advance of such interruption. Such notice shall contain the specific dates and times for such interruptions and the reasons therefor.

ARTICLE 12 TERMINATION

12.1 **Termination of Attachment Licenses** Attachment Licenses for specific Attachments shall terminate upon any of the following events or conditions:

A. Licensee has not completed all necessary Make-Ready work and Attachment installation within 90 days of issuance of the Attachment License, unless Licensee and AE agree in writing for a longer period;

B. Licensee removes the Attachment other than in the course of routine maintenance or replacement;

C. Licensee ceases to offer services, or provides services unlawfully, through the Attachment;

D. Licensee fails to comply with either paragraph 8.3, 8.7, or 9.2 of this Agreement.

12.2 **Right of Suspension** If Licensee fails either to make any payment required under this Agreement, including timely payments to Contractors for Make-Ready Work, or to perform timely any material obligation under this Agreement, and such default continues for 30 days after the date the payment or performance is due, then, in addition to any other available right or remedy, AE may, upon written notice to Licensee, immediately suspend all Attachment Licenses of Licensee hereunder until such time as the default is cured. The payment under protest of a disputed amount in order to avoid, or lift, suspension of Attachment Licenses shall not prejudice the rights of Licensee to continue the payment dispute. A suspension of Attachment Licenses under this paragraph shall not prevent Licensee from operating, maintaining, repairing or removing its existing Attachments, but Licensee shall not install any new or additional Attachments or make any changes to existing Attachments (except for removal or routine repair or maintenance necessary to continue to provide services to then existing Licensee customers) during the period of suspension.

12.3 **Termination of Agreement by AE** If Licensee fails either to pay any payment required under this Agreement, including timely payments to Contractors for Make-Ready Work, or timely perform any material obligation under this Agreement, and if such default has not been cured within three months of Licensee's receipt of written

notice of default, AE may terminate this Agreement and all Attachment Licenses upon written notice to Licensee. Upon receipt of a notice of termination, Licensee shall promptly begin the process of removing all Attachments from Poles. All such Attachments shall be removed within 30 days after the date of the notice of termination, or within such time as AE may agree. Until all of Licensee's Attachments are removed, Licensee shall continue to comply with all of the terms of this Agreement and perform all of its duties and obligations hereunder, including without limitation the obligation to pay Annual Usage Charges for its Attachments. Such payment by Licensee or acceptance by AE of Annual Usage Charges shall not act to cure the default that triggered the termination nor shall it reinstate this Agreement or Licensee's Attachment Licenses hereunder.

12.4 **Failure to Remove Attachments** If Licensee has not removed all its Attachments within the period of time specified in the preceding paragraph, or such additional period of time granted by AE in writing, then AE may remove Licensee's Attachments at Licensee's sole Cost and risk, in which event Licensee shall pay to AE as liquidated damages, and not as a penalty, for the use and occupancy of AE Poles a sum equal to one half of the Usage Rate for each Pole Contact for each month (or part thereof) until all such Attachments have been removed. Alternatively, AE may, in its sole discretion and upon written notice to Licensee, deem the Attachments to have been abandoned and assume ownership thereof.

12.5 **Appeal** The periods of time in which Licensee's Attachments are required to be removed after termination by AE will be tolled while any proper appeal is pending in accordance with the Infrastructure Usage Ordinance. During this time Licensee may not, however, install any new or additional Attachments or make any changes to existing Attachments, except for removal.

12.6 **Termination of Agreement by Licensee** Licensee may terminate this Agreement upon 60 days written notice to AE, in which event all Attachments shall be removed within 120 days after the date of the notice of termination or within such other time as AE agrees. Until all of Licensee's Attachments are removed, Licensee shall continue to comply with all of the terms of this Agreement and perform all of its duties and obligations hereunder, including without limitation the obligation to pay Annual Usage Charges for its Attachments. Termination by Licensee during a Contract Year shall not relieve Licensee from payment for the full Annual Usage Charge for that Contract Year or any other sums owing AE.

12.7 **Survival** Licensee's obligations under this Article 12 shall survive termination of this Agreement.

ARTICLE 13 ASSIGNMENTS

13.1 **Permissible Assignments** Licensee may not assign or otherwise transfer this Agreement or any Attachment Licenses without AE's prior written consent, except that Licensee may without consent:

A. transfer or assign this agreement to an affiliate or subsidiary of Licensee to whom Licensee has been duly authorized by the City to transfer or assign Licensee's franchise. Licensee's rights and obligations hereunder shall pass to such successor only upon receipt by AE of written notice of such transfer or assignment of the franchise, together with true copies of the documents specified in paragraph 13.2 below;

B. lease capacity on its telecommunications system and network to another service provider that provides telecommunications services, as defined in the Telecommunications Act of 1996. No such lease of capacity shall relieve Licensee of any of its obligations or duties hereunder, and any failure of performance, non-payment or other default by such lessee, shall be deemed to be a failure of performance, non-payment or default by Licensee, for which AE may assert all available rights and remedies under this Agreement or under law or in equity. In the event of a lease of capacity, Licensee shall deliver to AE contemporaneous copies of all information and documents that Licensee is required to provide AE under its franchise. Nothing in this section shall be construed to grant any Attachment Licenses to any party leasing capacity from Licensee; and

C. mortgage any or all of its property, rights, privileges and franchises, or to enter into any merger, consolidation, or sale of its assets in the area served by Austin Energy substantially in their entirety. Licensee shall provide advance written notice of such foreclosure, merger, consolidation or sale, together with true copies of the documents specified in section 13.2 below within 30 days of closing such transaction.

13.2 **Information to AE** In the event of a transfer or assignment of this Agreement, Licensee shall provide AE with true and complete copies of the transfer or assignment documents; documents showing the ownership of the assignee and its relationship to Licensee, if any; a copy of the assignee's most current audited annual financial statement; a copy of the assignee's franchise with the City, if any; copies of all insurance policies and bonds required by this Agreement; and such other information as Austin Energy may reasonably request.

13.3 **Other Assignments Void** A purported assignment or transfer made in violation of the provisions of this Article 13 shall not be binding upon AE and shall be deemed to be a material default of this Agreement.

13.4 **Assignment by AE** AE and the City of Austin may assign this Agreement in whole or in part without the consent of Licensee. AE shall give Licensee written notice of the transaction within ten days after closing.

13.5 **Partial Assignments** If Licensee sells, conveys, or transfers some, but not all, of Licensee's Attachments, and such assignment complies with this Article 13,

the assignee must nonetheless obtain a separate agreement from AE for the assignee's Attachments in accordance with City of Austin and AE policies, rules, regulations and Ordinances in effect at that time. Until the assignee executes a separate agreement, the assignment is not binding upon AE and the assignee's Attachments shall continue to be deemed to be the Attachments of Licensee for all purposes hereunder, including billing and payment of Annual Usage Charges.

ARTICLE 14 SURETY

14.1 **Payment Bond** Within 30 days of the Effective Date of this Agreement, Licensee shall provide a payment bond in the amount of \$5,000 for the first 1,000 Poles for which Application has been made and \$5,000 for each additional 1,000 Poles, but not exceeding \$100,000. The payment bond will serve as security for the faithful payment of all of Licensee's obligations for contracts, subcontracts, work, labor, equipment, supplies, and materials performed under this Agreement. The payment bond shall be issued by a solvent company authorized to do business in the State of Texas, and shall meet any other requirements established by law or by the City pursuant to applicable law. During the course of this Agreement, Licensee shall maintain such bond in the amount of \$5 for each Pole for which an Attachment Licensee has been granted but for which Make-Ready work has not been complete for more than 90 days.

14.2 **Performance Bond** Within 30 days of the Effective Date of this Agreement, Licensee shall provide a Performance Bond in the amount of \$50,000 for the first 5,000 Poles for which Application is made and \$50,000 for each additional 5,000 Poles, but not to exceed \$1.5 million, to guarantee the performance of Licensee's obligations under this Agreement, including, but not limited to, the removal of Licensee's Attachments upon termination of this Agreement. Licensee agrees to maintain the performance bond in full force and effect during the entire term of this Agreement and until AE is reimbursed for all Costs incurred as a result of removing Licensee's Attachments upon termination of this Agreement. The performance bond shall be issued by a solvent company authorized to do business in the State of Texas, and shall meet any other requirements established by law or by the City pursuant to applicable law. The amount of the bond or financial security does not operate as a limitation upon obligations of the Licensee under this Agreement

ARTICLE 15 LIABILITY, INDEMNITY, AND INSURANCE

15.1 **AE Liability** AE reserves to itself the right to maintain and operate its Poles in such manner as will best enable it to fulfill its own service requirements. AE shall not be liable for any damages incurred by Licensee for damage or interruption to its Attachments except for actual repair costs caused by the negligence of AE; provided, however, that AE shall not be liable to Licensee for any interruption of Licensee's service or for interference with the operation of Licensee's Attachments. **NEITHER AE NOR LICENSEE SHALL BE LIABLE TO THE OTHER FOR ANY SPECIAL, INDIRECT, PUNITIVE, OR CONSEQUENTIAL DAMAGES ARISING IN**

CONNECTION WITH THE USE OF OR DAMAGE TO AE'S OR LICENSEE'S FACILITIES.

15.2 **No Warranties by AE** Licensee is expected to inspect the Poles on which its Attachments will be placed and shall rely solely on such inspection to determine the suitability of the Poles for its purposes. **AE DOES NOT MAKE, AND HEREBY EXPRESSLY DISCLAIMS, ANY EXPRESS OR IMPLIED WARRANTIES CONCERNING ANY POLE, INCLUDING WITHOUT LIMITATION THE WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. LICENSEE ACCEPTS THE USE OF ALL POLES AS IS, WHERE IS, AND WITH ALL FAULTS.**

15.3 **Unsafe Poles** Licensee acknowledges and agrees that AE does not warrant the condition or safety of AE's Poles, or the premises surrounding the Poles, and LICENSEE HEREBY ASSUMES ALL RISKS OF AND INDEMNIFIES AE FROM ANY DAMAGE, INJURY OR LOSS OF ANY NATURE WHATSOEVER CAUSED BY OR IN CONNECTION WITH LICENSEE'S OR LICENSEE'S CONTRACTORS' USE OF THE POLES AND ASSOCIATED FACILITIES AND EQUIPMENT ON, WITHIN, OR SURROUNDING THE POLES. Licensee expressly agrees that it will undertake responsibility for inspecting and evaluating the condition of any Pole before allowing any workers, whether those of Licensee or Licensee's Contractors, to climb or otherwise work on such Pole. If Licensee discovers any Poles that are rotten or otherwise unsafe for climbing or Attachment installation, Licensee shall immediately report such unsafe condition to AE. Licensee further acknowledges that AE does not warrant that all poles are properly labeled, and agrees that AE is not liable for any injuries or damages caused by or in connection with missing labels or otherwise improperly labeled pole. Licensee further agrees to immediately notify AE if labels or tags are missing or otherwise improper.

15.4 **Dangerous Nature of the Work** Licensee acknowledges that in performing the work contemplated by this Agreement, Licensee and its agents, servants, employees, and Contractors will work near electrically energized lines, transformers, and other electrical equipment, and it is the intention that the power flowing through such facilities will not be interrupted except by AE. Licensee shall ensure that its employees, servants, agents, and Contractors have the necessary qualifications, skill, knowledge, training, and experience to protect themselves, their fellow employees, employees of AE, and the general public, from harm or injury while performing work permitted by this Agreement. In addition, Licensee shall furnish its employees, and shall require its agents and Contractors to furnish their employees, with competent supervision and sufficient and adequate tools and equipment for their work to be performed in a safe manner. Licensee further warrants that it is apprised of, conscious of, and understands the imminent dangers (INCLUDING SERIOUS BODILY INJURY OR DEATH FROM ELECTROCUTION) inherent in the work necessary to make installations on AE's Poles by Licensee's employees, servants, agents, and Contractors, and accepts it as its duty and sole responsibility to notify and inform Licensee's employees, and to require its agents,

and Contractors to inform their employees of such dangers, and to keep them informed regarding same.

15.5 **Licensee Liability and Indemnity** Subject only to paragraph 15.7, Licensee shall defend, indemnify and hold harmless AE and the City of Austin and all associated, affiliated, allied and subsidiary entities of AE and the City of Austin, whether existing now or in the future, and their respective officials, officers, departments, agencies, counties, boards, representatives, employees, agents, Contractors and attorneys against any and all liability, claims, costs, damages, fines, taxes, special charges by others, penalties, punitive damages, expenses, demands, lawsuits or disputes (including reasonable attorney fees of counsel selected by AE and all other costs and expenses of litigation) arising from or related to any of the following:

A. All acts or omissions by Licensee or its Contractors done in the course of Make-Ready or installation construction or in the maintenance, use, or operation of Licensee's Attachments;

B. Any work performed by AE that was necessitated by the installation, maintenance, presence, use or removal of Licensee's Attachments or from any work this Agreement authorizes AE to perform on Licensee's behalf;

C. All claims or causes of action for damage to property or injury to or death of any persons, including payments made by AE under any Worker's Compensation Laws or under any plan for employees' disability and death benefits, arising out of the erection, maintenance, repair, presence, use, relocation, transfer or removal of Licensee's Attachments or the proximity of Licensee's Attachments to AE's Facilities or the property of any other Third Party User, or by any act or omission of Licensee on or in the vicinity of AE's Poles;

D. All claims or causes of action for property damage, bodily injury or death arising out of the performance or nonperformance of any work or obligation undertaken by Licensee pursuant to this Agreement;

E. Any occurrence related to Licensee's erection, maintenance, repair, presence, use, relocation, transfer or removal of Licensee's Attachments, including liabilities incurred as a result of violation of any law, rule, or regulation of the United States, State of Texas or any other governmental entity or administrative agency;

F. A violation of any state or federal law arising out of Licensee's erection, maintenance, repair, presence or use, relocation, transfer or removal of Licensee's Attachments or the proximity of Licensee's Attachments to AE's Facilities or the property of any Attaching Entity, or by any act or omission of Licensee on or in the vicinity of AE's Poles, whether such violation is the result of a violation of a statute by AE or the Licensee solely or any joint violation thereof.

G. Claims of governmental bodies, property owners or others alleging that Licensee does not have a sufficient right or authority for placing and maintaining Licensee's Facilities at the locations of poles owned by AE or joint users.

H. Claims for taxes or special charges by others that arise directly or indirectly from the construction, maintenance or operation of Licensee's Facilities.

I. Claims or causes of action caused by or relating in any manner to a breach of this Agreement or a failure to follow the terms of this Agreement by Licensee or its agents and employees or by Licensee's Contractors or their agents and employees.

J. All claims or causes of action of Third Party Users alleging interference from Licensee's Attachments or damage to Third Party User Attachments or facilities.

K. All claims or causes of action relating to Licensee's use of its Attachments, including without limitation claims of libel and slander and claims based upon infringement of intellectual property rights.

15.6 AE Fault SUBJECT ONLY TO PARAGRAPH 15.7, IT IS THE EXPRESS INTENT OF THE PARTIES THAT THE FOREGOING INDEMNITY IS TO PROTECT AND INDEMNIFY AE AND THE CITY OF AUSTIN AGAINST THE CONSEQUENCES OF ITS OWN FAULT WHERE AE'S OR THE CITY'S FAULT IS A CONCURRENT CAUSE OF THE INDEMNIFIED LIABILITY.

15.7 **Joint Liability** The indemnity obligations set forth in paragraphs 15.5 and 15.6 shall apply to fully protect and indemnify AE and the City of Austin from all such claimed damages regardless of whether AE or the City of Austin is a joint tortfeasor unless (1) the indemnified liability was the result of intentional or reckless misconduct on the part of AE or the City of Austin, or their agents, servants, employees, or contractors, or (2) by virtue of a final judgment, a finder of fact determines AE's and/or the City of Austin's percentage of responsibility for the indemnified liability to be 60% or greater, in which case each party shall then be liable for its found percentage of damages in accordance with Texas law.

15.8 **Governmental Immunity** No provision of this Agreement is intended, or shall be construed, to be a waiver for any purpose by AE of the provisions of the Texas Tort Claims Act or any other law limiting municipal liability.

15.9 **Other Indemnification Provisions** No indemnification provision contained in this Article shall be construed in any way to limit any other indemnification provision contained in this Agreement.

15.10 **Survival** This Article 15 shall survive the termination of this Agreement.

ARTICLE 16
INSURANCE

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

16.2 **Minimum Coverages** At a minimum, Licensee 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 \$2,000,000 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 \$1,000,000 bodily injury per accident, \$1,000,000 bodily injury per disease and \$1,000,000 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.

16.3 **AE as Named Insured** The Commercial General Liability and Business Liability Policies shall name AE and 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 Licensee and the City shall be considered primary coverage. Each policy shall contain a waiver of all rights of recovery or subrogation against AE and the City, its officers, agents, employees, and elected officials.

16.4 **Contractors** Any Contractor (excluding subcontractors) retained by Licensee to perform work or services for Licensee under this Agreement shall be required to carry insurance to the same extent as provided above as a condition of being granted access to Poles.

ARTICLE 17
MISCELLANEOUS PROVISIONS

17.1 **Integration** This Agreement constitutes the entire understanding of the parties relating to the use of Utility Poles hereunder; and there shall be no modification or waiver hereof except by writing, signed by the party asserted to be bound thereby. There are no oral representations or agreements between the parties. All previous agreements, correspondence, statements, and negotiations are superseded by this Agreement.

17.2 **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.

17.3 **Applicable Law** The parties hereto agree and intend that all disputes that 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.

17.4 **Severability** 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 Contract shall remain in full force and effect. But in such event, if either party believes in good faith that the balance of mutual benefit and obligations under the Agreement has been thereby materially 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, effective six months after giving written notice to the other party, in which event all Attachments shall be removed within 120 days after the date of the notice of termination or within such other time as AE agrees. Until all of Licensee's Attachments are removed, Licensee shall continue to comply with all of the terms of this Agreement and perform all of its duties and obligations hereunder, including without limitation the obligation to pay Annual Usage Charges for its Attachments. Termination by Licensee during a Contract Year shall not relieve Licensee from payment for the full Annual Usage Charge for that Contract Year or any other sums owing AE.

17.5 **Payments & Interest** All monetary payments under this Agreement shall be due and payable within 30 days after receipt of invoice. All overdue balances shall accrue interest at the rate of 1% per month from the due date until paid, or the maximum rate allowed by law, whichever is less.

17.6 **Notices** When notice is required to be given under this Agreement by either party, it shall be in writing mailed or delivered to the other 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.

AUSTIN ENERGY
721 Barton Springs Road
Austin TX 78704
Attn.: Vice President, Finance
Fax No. (512) 322-6558

Licensee

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:

(LICENSEE) _____

Secretary

By: _____
Name: _____
Title: _____
Date: _____