

**MASTER ENCROACHMENT AGREEMENT
BETWEEN THE CITY OF CHULA VISTA
AND _____
FOR THE INSTALLATION OF NETWORK FACILITIES
WITHIN PUBLIC RIGHT-OF-WAY**

This Agreement (“Agreement”) dated as of _____, 2018 (“Effective Date”) is entered into by and between the CITY OF CHULA VISTA, a California municipal corporation (“CITY”) and _____, a _____ (“ENCROACHER”).

RECITALS

WHEREAS, ENCROACHER represents to City that (i) it is authorized to provide Communications Services (as defined herein) in the state of California pursuant to a Certificate of Public Convenience and Necessity (CPCN) issued by the Public Utilities Commission of the State of California and (ii) it is a wireline telephone company that is authorized to use public roads and highways pursuant to Public Utilities Code Section 7901; and

WHEREAS, CITY owns, operates, and maintains the Public Right-of-Way (as defined herein) within CITY; and

WHEREAS, ENCROACHER desires to construct Network Facilities (as defined herein) within the Public Right-of-Way within CITY to provide Communications Services; and

WHEREAS, pursuant to Cal. Const., art. XI, § 7, CITY has the authority to make and enforce all local, police, sanitary, and other ordinances and regulations not in conflict with general laws within its jurisdictional limits, including without limitation the authority to regulate the terms and conditions for the use of Public Right-of-Way for the construction, installation, and maintenance of Network Facilities by ENCROACHER.

NOW, THEREFORE, CITY and ENCROACHER agree as follows:

**SECTION 1
DEFINITIONS**

1.1 “**Network Facilities or Facilities**” means any and all cables, lines, conduits, access manholes, handholes, pedestals, boxes, and other similar equipment and devices owned or leased by ENCROACHER. The term does not include antennas, cell towers, other wireless facilities or new utility poles.

1.2 “**Public Right-of-Way**” or “**Public Rights-of-Way**” means the full width of the right of-way of any street, as defined in the California Vehicle Code used by the general public.

1.3 “**Communications Services**” means services that ENCROACHER is authorized to offer and/or provide pursuant to any applicable law or CPCN, including its existing CPCN

_____ which authorizes ENCROACHER to provide facilities-based
_____.

1.4 “**Video Services**” means services provided pursuant to any applicable California Video Franchise Certificate issued by the California Public Utilities Commission pursuant to the *Digital Infrastructure and Video Competition Act* (Public Utilities Code Section 5800 et seq.) and following California Public Utilities Commission decisions pertaining to video services.

SECTION 2 **RESERVATIONS, LIMITATIONS, AND CONDITIONS**

2.1 CITY reserves all rights it may have now or in the future to legally regulate, impose or collect any tax, charge, or fee, or otherwise condition the use of the Network Facilities or Communication Services, or any related activities and services, identified in this Agreement. CITY entering into this Agreement is not a waiver of and is without prejudice to any right CITY may have now or in the future to regulate ENCROACHER or impose or collect taxes, charges, or fees on ENCROACHER. CITY entering into this Agreement does not affect CITY’s power or authority to impose or collect any tax, fee, or charge on users or providers of the services to be provided by ENCROACHER. ENCROACHER is and will be subject to all taxes, fees, and charges that CITY lawfully imposes on the Facilities or Communication Services, or any related activities and services, in the future. Nothing herein is intended to impose regulations or conditions on ENCROACHER that CITY is preempted from imposing by state or federal law.

2.2 Nothing in the Agreement shall be construed as granting or creating any franchise rights.

2.3 ENCROACHER represents and warrants that it has obtained and continues to maintain all authorizations, certifications, permits, and regulatory approvals necessary to provide the Communications Services and related services as required by federal and state laws or regulations. ENCROACHER’s use of the Public-Right-of-Way under this Agreement is expressly conditioned upon ENCROACHER obtaining and maintaining all current and future authorizations, certifications, permits, and regulatory approvals necessary to provide Communications Services and related services as required by federal, state, and local laws, including but not limited to maintaining its existing CPCN and status as a Competitive Local Carrier (CLC).

2.4 All rights and benefits granted under this Agreement are subject and subordinate to the prior and continuing right of CITY and its successors or assigns to use all of the Public Right-of-Way in the performance of its governmental duties and police powers including but not limited to, public use as a street and for the purpose of laying, installing, maintaining, repairing, protecting, replacing and removing sanitary sewers, water mains, storm drains, gas mains, poles, overhead and underground electrics, and telephone lines, streetlights, cable television, and other utility and municipal uses together with appurtenances thereof and with right of ingress and egress, along, over, across and in said Public Right-of-Way. ENCROACHER has a duty to remove, relocate, and rearrange all facilities owned or leased by ENCROACHER, controlled by ENCROACHER, or otherwise installed pursuant to this Agreement within a time frame set forth

by CITY (subject to force majeure and events beyond the control of ENCROACHER) at ENCROACHER's own expense (except as otherwise set forth in this Agreement) in order to accommodate any CITY uses, as further provided in this Agreement and applicable law.

SECTION 3

SCOPE OF USE OF PUBLIC RIGHT-OF-WAY

3.1 CITY grants an encroachment right to ENCROACHER, subject to all reservations, covenants, limitations, and conditions contained in this Agreement and provided by law, to construct, install, maintain, operate, and remove those Network Facilities, as identified with particularity on Exhibit "A", at those specific locations within Public Right-of-Way, as identified with particularity on Exhibit "B", to provide Communications Services, subject to obtaining all required permits and regulatory approvals.

3.2 ENCROACHER is not permitted to commence installation of Network Facilities until ENCROACHER has first obtained a permit to do so in accordance with this Agreement and applicable law. Before ENCROACHER applies for any new permits after the Effective Date of this Agreement, ENCROACHER must submit: (i) a comprehensive master plan ("Master Plan") showing at a minimum the location and specific details (i.e., underground depth, above-ground height, etc.) of all Network Facilities presently installed within the City's limits; (ii) a Master Plan showing a high-level design of all Network Facilities presently intended to be installed over the five-year period from the Effective Date; and (iii) the Bond (as defined in Section 9). ENCROACHER is required to provide an updated Master Plan annually, showing, to the extent applicable, any change to the Master Plan submitted in the prior year. CITY's issuance of any permit pursuant to this Agreement is expressly conditioned on and subject to ENCROACHER's full compliance with the terms and conditions of this Agreement, including but not limited all representations herein, and compliance with all local, state, and federal laws and regulations.

3.3 ENCROACHER is prohibited from installing or erecting any facilities or apparatus in or on other public property, places, or Public Rights-of-Way, or within any privately owned area within CITY which has not yet become a public street but is designated or delineated as a proposed public street on any tentative subdivision or parcel map approved by CITY, except those installed or erected upon public utility facilities now existing without obtaining the prior written approval of the City Engineer.

3.4 ENCROACHER is not authorized to place any facilities other than Network Facilities in the Public Right-of-Way, without first obtaining written authorizations and required permits (including any necessary franchises) from the CITY.

3.5 ENCROACHER agrees to comply with any lawful provision that the CITY may adopt in the future requiring ENCROACHER to obtain a franchise or other authorization, and ENCROACHER agrees that CITY may require ENCROACHER to do so as a condition of the continued effectiveness of this Agreement. The City Engineer and Director of Development Services will, subject to applicable laws, be responsible for determining what written authorization, agreement, and/or permit is required. ENCROACHER agrees that once a written

authorization, agreement, and/or permit is determined to be required, ENCROACHER agrees to first apply or seek the same before challenging the requirement.

3.6 This Agreement does not authorize use of any property other than the Public Rights-of-Way. Any use of any other CITY-owned or CITY-controlled property, including but not limited to poles and conduits and other personal property, will require the parties to enter into a separate written agreement, which the City may, in its sole discretion, decline except as may be otherwise required by applicable federal or California law.

3.7 The use of any Public Right-of-Way or other interest or property under this Agreement will not create or vest in ENCROACHER any ownership or other interest in the Public Right-of-Way, streets, or any other property or interest of the CITY. This Agreement is not a grant by the CITY of any property interest to ENCROACHER.

3.8 CITY's grant of any right or benefit in this Agreement is made subject to all easements, restrictions, conditions, covenants, encumbrances, and claims of title which may affect the Public Right-of Way, and ENCROACHER understands and agrees that it will obtain such permission as may be necessary consistent with any other existing rights at its own costs and expense. No reference herein to a "Public Right-of-Way" shall be deemed to be representation or guarantee by CITY that its interest or other rights to control the use of such property is sufficient to permit its use for such purposes, and ENCROACHER shall be deemed to gain only those rights to use the property as the CITY may have the undisputed right and authority to give, and which do not interfere with CITY's needs for uses within the Public Right-of-Way. In the event of any conflict, the use of the subject Public Right-of-Way by ENCROACHER is secondary and subordinate to the rights and needs of the CITY.

3.9 This Agreement is for the non-exclusive use of the Public Rights-of-Way. By executing this Agreement, CITY does not agree to restrict the use of the Public Rights-of-Way in any part of the CITY by any person in the same business, a related business, or a competing business as ENCROACHER.

3.10 If CITY is not prohibited from charging for use of the Public Rights-of-Way by ENCROACHER by state or federal law, CITY may do so. CITY will notify ENCROACHER if it intends to charge for use of the Public Right-of-Way. Upon receipt of such notice, ENCROACHER agrees to meet-and-confer with CITY to negotiate the amount and type of consideration due to CITY for such use. Until the parties agree upon the amount and type of consideration due to CITY, or in the event the parties fail to agree upon the amount and type of consideration due to CITY, ENCROACHER agrees to pay CITY the greater of the following: (i) five percent (5%) of Gross Annual Receipts (as hereinafter defined) of ENCROACHER within the corporate limits of the CITY, or (ii) the highest rate permissible under applicable laws. The phrase "Gross Annual Receipts" shall mean all gross operating revenues and compensation received by ENCROACHER from the sale, lease, license, permit, and/or use of the Network Facilities, including all related operations and services of the Network Facilities, to ENCROACHER's customers within the corporate limits of the City.

SECTION 4
CONSTRUCTION AND MAINTENANCE STANDARDS

4.1 ENCROACHER and its agents, employees, contractors, subcontractors or any other person or entity acting under ENCROACHER's direction or control (each an "ENCROACHER PARTY"; collectively "ENCROACHER PARTIES") agree to perform and complete all construction, operation, repair, and maintenance of Network Facilities or other facilities pursuant to this Agreement in accordance with all applicable federal, state, and local laws and regulations, including but not limited to all zoning laws, construction codes, and CITY's standard specifications and details, as the same may exist now, or be hereafter issued, amended, or revised; and any supplements thereto or revisions of this Agreement, and any franchise or other authorization now or in the future. Nothing in this Agreement prevents the CITY from establishing additional or stricter conditions (even with respect to the matters specified in those sections), and requiring the ENCROACHER PARTIES to comply with the same. In the event of a conflict among codes and standards, the most stringent code or standard will apply, as determined in the sole judgment of the City Engineer consistent with applicable law.

4.2 All ENCROACHER PARTIES are required to employ reasonable care for all activities undertaken pursuant to this Agreement. All ENCROACHER PARTIES are required to install, maintain, and use commonly accepted methods and devices for preventing failures and accidents that are likely to cause damage, injury, or nuisance to the CITY or the public.

4.3 The ENCROACHER PARTIES are required to construct, operate, repair, and maintain its Network Facilities in a manner that does not endanger any persons or cause any damage to property. The ENCROACHER PARTIES are required to construct, operate, repair, and maintain the Network Facilities in a manner that does not interfere with CITY's municipal operations. The ENCROACHER PARTIES are required not to interfere or obstruct the Public Right-of-Way or legal rights of any property owner or to unreasonably hinder or obstruct pedestrian or vehicular traffic, or otherwise incommode the public's use of the Public Right-of-Way. The ENCROACHER PARTIES are required to place all facilities in strict conformance with the plans and drawings approved in writing by CITY, consistent with applicable law. The ENCROACHER PARTIES are required not to place facilities, equipment, or fixtures where they will interfere with any gas, electric, telephone, telecommunications, water, sewer, or other utility facilities or otherwise obstruct or hinder in any manner such entity's use of any Public Right-of-Way. ENCROACHER is required to repair and restore all damage to any Public Rights-of-Way, public property, or private property that is disturbed or damaged by any ENCROACHER PARTY during the construction, repair, replacement, relocation, operation, maintenance, or construction of a Network Facility. ENCROACHER is required to repair and restore all damage to a condition equal to or better than that which existed prior to the damage, and also to a condition that is compliant with all applicable laws. If the City Engineer reasonably determines that repair and restoration of damage to any facility or improvement within the Public Right-of-Way is insufficient to correct such damage, ENCROACHER will be required to replace such damaged facility and/or improvement. ENCROACHER is required to make all repairs, restorations, and replacements by no later than fourteen (14) calendar days after causing such damage. The City Engineer may agree to a longer period where necessary to complete such repairs, restorations, or replacements.

4.4 If Public Right-of-Way to be used by ENCROACHER has preexisting installation(s) placed in the Right-of-Way, ENCROACHER assumes the responsibility to verify the location of the preexisting installation and notify, consistent with applicable law, CITY and any third party owner of ENCROACHER's proposed installation. ENCROACHER will be responsible for all costs of any work required by any third party owner or CITY to provide adequate space or required clearance to accommodate ENCROACHER's installation. CITY is under no obligation to move its existing utilities out of the way to accommodate ENCROACHER's Network Facilities.

4.5 Within ten business (10) days (or longer period as permitted by CITY) after its receipt of a written request from CITY, ENCROACHER is required, at ENCROACHER's sole cost and expense, to expose its subsurface Network Facility by potholing (digging a test hole) to a depth of one foot (1') below the bottom of such facility. If ENCROACHER fails to perform the potholing, CITY may, but is not obligated to, proceed on ENCROACHER's account as provided in this Agreement and ENCROACHER will promptly reimburse CITY, in addition to any other reimbursements provided for in this Agreement, for the cost of the reimbursement, plus a 15 percent (15%) administrative overhead charge. ENCROACHER will also hold harmless, defend, and indemnify CITY and its officers, employees, agents, and contractors for any loss or damages resulting from the CITY's performance of the required work. These obligations are in addition to, not in lieu of, any other hold harmless, defense, or indemnity obligations existing at contract or at law.

4.6 Any contractor or subcontractor used by ENCROACHER for the construction, installation, operation, maintenance, or repair of any part or aspect of the Network Facility must be properly licensed under the laws of the State of California and all applicable local ordinances. Any contractor or subcontractor used by ENCROACHER has the same obligations with respect to its work as ENCROACHER has under this Agreement and applicable law as if the work were performed by ENCROACHER. ENCROACHER is responsible for the performance of the work of contractors and subcontractors consistent with the requirements of this Agreement and applicable law, including all acts or omissions of contractors or subcontractor of every tier. ENCROACHER is required to implement a quality control program to monitor that the work is properly performed. This section is not meant to alter tort liability of ENCROACHER to third parties.

4.7 ENCROACHER PARTIES agree to keep the Network Facilities in good and safe condition and free from any nuisance to the City or the public.

4.8 ENCROACHER will identify the Network Facilities installed in each Public Right-of-Way by means of an identification method mutually agreed upon by the parties, or as directed by the City Engineer if the parties cannot mutually agree on an identification method. ENCROACHER's identification must be detectable from ground level without opening the street. To prevent conflicts between ENCROACHER's Network Facilities and public facilities in the same location, ENCROACHER must notify Underground Service Alert of the location of the facilities for the benefit of future construction projects which may need to be aware of the presence of the Network Facilities within the Public Right-of-Way. ENCROACHER's compliance with, or failure to comply with its requirement to notify Underground Service Alert

will not create any claim or right against the CITY, and ENCROACHER will hold harmless, defend, and indemnify CITY and its officers, employees, and agents from any and all costs for failure to comply with this Section. These obligations are in addition to, not in lieu of, any other hold harmless, defense, or indemnity obligations existing at contract or at law.

SECTION 5

SERVICE CHANGES

5.1 ENCROACHER hereby represents and warrants that: 1) it has any and all authorizations and approvals from state and federal regulatory agencies including the California Public Utilities Commission and the Federal Communications Commission as are necessary for the activities and Network Facilities contemplated by the Agreement, and is in compliance in all material respects with its obligations under such authorizations; 2) the type of service offered through the Network Facilities in the Public Right-of-Way consists solely of Communications Services; 3) it does not offer Video Services; 4) Network Facilities will be installed only within the Public Rights-of-Way (underground within conduit or aerial on poles); and 5) it will not construct or install any new cell towers, new utility poles, or antennas unless it has obtained written authorization to do so.

5.2 The terms of this Agreement are based on the type of equipment comprising the Network Facilities, and the types of Communications Services which ENCROACHER provides via the Network Facilities installed in the Public Right-of-Way. ENCROACHER acknowledges that any change in service or change in the law may increase the CITY's regulatory authority over such services, product, and ENCROACHER's use of Public Right-of-Way, and may require modification of this Agreement, and require ENCROACHER to obtain additional authorizations consistent with the requirements of an existing or hereinafter-enacted CITY ordinance regulating such services.

5.3 If ENCROACHER is authorized by the California Public Utilities Commission to provide additional and/or alternative services, including but not limited to Video Services, and intends to offer such services to customers within the corporate limits of CITY, ENCROACHER is required to notify CITY in writing, as soon as practicable, after receipt of written approval to provide such services, and to comply with CITY's local ordinances.

SECTION 6

TAXES

6.1 ENCROACHER agrees that it will be solely responsible for the payment of any and all lawful taxes, fees, and assessments relating to its use and maintenance of the Network Facilities including but not limited to all taxes, fees, and assessments listed in ENCROACHER's CPCN issued by the California Public Utilities Commission.

6.2 If applicable, ENCROACHER is required to collect and distribute to CITY the Utility Users Tax from its users of intrastate telecommunications services within the CITY as may hereinafter be adopted, if ENCROACHER's Network Facilities are used to provide revenue producing intrastate telecommunications services, provided that such tax complies with state and federal law.

6.3 At CITY's request, ENCROACHER will pay the cost of an auditor to conduct an audit of taxes paid or owed under this Agreement, if such audit determines that ENCROACHER under paid by more than two and one-half percent (2.5%) of such amounts owed. If that audit discloses an underpayment, ENCROACHER shall pay such amounts discovered by the auditor within sixty (60) days of receipt of the audit report. ENCROACHER shall pay such amounts discovered by the auditor within sixty (60) days of receipt of the audit report. ENCROACHER must provide such records to CITY as CITY may require to confirm compliance with this requirement. Audits shall not be conducted more than once every two (2) years.

6.4 Pursuant to Section 107.6 of the California Revenue and Taxation Code, the CITY hereby advises, and ENCROACHER understands and agrees that should ENCROACHER's use of Public Rights-of-Way create a possessory interest subject to property taxation, ENCROACHER shall be subject to the payment of property taxes levied on such interest.

SECTION 7

REMOVAL AND RELOCATION

7.1 In the event of an emergency, or where Network Facilities create or are contributing to an imminent danger to health, safety, or property, as determined by CITY in CITY's sole discretion, CITY may remove, relay, or relocate any or all parts of those Network Facilities without prior notice; however, CITY shall make reasonable efforts to provide prior notice.

7.2 ENCROACHER is required to promptly relocate its Network Facilities and related facilities to accommodate projects or needs of CITY, as determined by CITY in CITY's sole discretion, or other government agencies and third parties who are authorized to use the Public Rights-of-Way. If ENCROACHER is required to relocate its Network Facilities for any non-governmental third party and for reasons other than the above, the reasonable cost of the relocation will be borne by the third party except where (i) the Network Facilities must be relocated because it was not properly installed or maintained by ENCROACHER, or was installed without obtaining necessary authorizations; or (ii) state or federal law requires otherwise.

7.3 In the event all or any portion of Public Right-of-Way occupied by Network Facilities is needed by CITY for governmental or municipal purposes (including without limitation the construction, maintenance, or operation of any other CITY underground or aboveground facilities), or in the event of the existence of said Network Facilities are considered detrimental to governmental or municipal activities, including without limitation any interference with CITY construction projects, or being in conflict vertically and/or horizontally with any proposed CITY installation, ENCROACHER is required to remove and relocate those Network Facilities to such other location or locations on Public Right-of-Way as may be designated by CITY, without cost or expense to CITY. Said removal or relocation must be completed within ninety (90) calendar days of notification by CITY, except for force majeure events or events beyond the reasonable control of ENCROACHER.

7.4 ENCROACHER is required, by a time specified by the CITY (subject to force majeure events or events beyond the reasonable control of ENCROACHER), to protect, support,

temporarily disconnect, relocate, and/or remove any of its property and/or Facilities when required by CITY or any other governmental entity by reason of traffic conditions; public safety; Public Rights-of-Way construction; Public Rights-of-Way maintenance or repair (including resurfacing or widening); change of Public Rights-of-Way grade; construction, installation, or repair of sewers, drains, water pipes, power lines, signal lines, tracks, or any other type of government-owned communication system, public work, or improvement; any government-owned utility; Public Rights-of-Way vacation; or for any other purpose where the work involved would be aided by the removal or relocation of the Network Facility.

7.5 In those areas and portions of the CITY where the transmission or distribution facilities of either a public utility providing telephone service, a provider of cable services as such term is defined in 47 U.S.C. § 522, or those of the utility providing electric service are underground or hereafter may be placed underground, then ENCROACHER must likewise construct, operate, and maintain all of its Network Facilities underground. The CITY shall not in any manner be responsible for any costs incurred by ENCROACHER in placing ENCROACHER's facilities underground.

7.6 If any portions of the Network Facilities covered under this Agreement are no longer used by ENCROACHER, or are abandoned for a period in excess of one (1) year, ENCROACHER will notify CITY and either promptly vacate and remove the facilities at ENCROACHER's own expense or, upon prior written consent of the City Engineer, may abandon some or all of the facilities in place.

7.7 When removal or relocation is required under this Agreement, ENCROACHER must, after the removal or relocation of the Network Facilities, at ENCROACHER's sole cost, repair and return the Public Right-of-Way in which the Network Facilities were located to a safe and satisfactory condition equal to or better than the condition of the Public Right-of-Way prior to the start of such removal or relocation work, as determined by the City Engineer, in accordance with the construction-related conditions and specifications as established by CITY consistent with applicable law. Before proceeding with removal or relocation work, ENCROACHER must obtain an encroachment permit, construction permit (if applicable), and all other necessary permits from CITY at ENCROACHER's own cost. Should ENCROACHER remove the Network Facilities from the Public Right-of-Way, ENCROACHER must, within ten (10) calendar days after such removal, give notice thereof to CITY specifying the Right-of-Way affected and the location thereof as well as the date of removal.

7.8 In the event that the Network Facilities are not removed or relocated within the timelines specified in any CITY notification, subject to force majeure events or events beyond the reasonable control of ENCROACHER, CITY may, but is not obligated to, remove or relocate the Network Facilities at ENCROACHER's sole cost. In such event, ENCROACHER will reimburse CITY for all actual costs incurred to repair such damage within ten (10) calendar days after ENCROACHER receives the CITY's demand for payment. ENCROACHER's failure to timely make such payment will constitute a material breach of this Agreement.

SECTION 8

PERMITS AND FEES

8.1 ENCROACHER is required to obtain an encroachment permit (and other permits as may be required by CITY) for all work and each project within the Public Right-of-Way. ENCROACHER is required to furnish detailed plans of the work and other such information as required by the City Engineer and to pay all permit fees imposed by CITY for the placement, installation, repair, or upgrading of any communications facilities including but not limited to lines, poles, antennas, or other improvements or encroachments by a telephone corporation, which includes, without limitation, fees for processing, field marking, engineering, inspection, and other fees prior to issuance of permit in accordance with the rates in effect at the time of payment.

8.2 Any encroachment permit must set forth the description of the Network Facilities to be installed and the Public Right-of-Way in which such facilities are proposed to be located. CITY may establish any lawful conditions and specifications in permits to be obtained by ENCROACHER in addition to those in this Agreement. Following construction, ENCROACHER is required to provide as-builts of the facilities to CITY in a format determined by the City Engineer, which may include, without limitation, a native electronic format compatible with CITY's electronic data management software, and further notify Underground Service Alert (USA) of the location of the facilities.

8.3 In addition to any other remedies available in this Agreement or in applicable law, ENCROACHER's failure to comply with the terms and conditions of this Agreement may, at CITY's sole discretion consistent with applicable law, result in the revocation of existing permits affected by such noncompliance, the withholding issuance of any new encroachment permits or other designated permits, and/or other enforcement actions by CITY. Any failure by CITY to strictly or timely enforce the terms or conditions of this Agreement or any conditions of any permits issued in connection with this Agreement shall not be deemed a waiver or continuing waiver by CITY of any of its rights or remedies under this Agreement or applicable law. No practice or course of dealings between CITY and ENCROACHER shall be deemed to waive, modify, amend or alter any terms or conditions in this Agreement.

SECTION 9

PERFORMANCE BOND

9.1 Prior to the issuance of an encroachment permit and undertaking any of the work, installation, improvements, construction, repair, relocation, or maintenance authorized by permits issued for Facilities under this Agreement, ENCROACHER is required to furnish a bond executed by a corporate surety or financial institution authorized to do business in the State of California in a sum to be set and approved by the CITY as sufficient to guarantee performance of all of ENCROACHER's obligations under this Agreement. The bond must be conditioned so that ENCROACHER is required to observe all the covenants, terms, and conditions and faithfully perform all of the obligations of this Agreement at any time during or after the term of this Agreement. ENCROACHER may meet the obligations of this subsection with one or more bonds acceptable to CITY on a form approved by the City Attorney. In lieu of providing a performance bond, ENCROACHER may furnish a cash deposit in an amount approved by CITY and on terms and conditions acceptable to the City Attorney. In the event that a bond issued pursuant to this subsection is canceled by the surety, after proper notice and pursuant to the terms of said bond, ENCROACHER is required to, prior to the expiration of said bond, immediately

notify CITY in writing and procure a replacement bond which complies with the terms of this subsection.

9.2 So long as the cash deposit or bond is in place, it may be utilized by the CITY as provided herein for reimbursement of the CITY by reason of ENCROACHER's failure to pay the CITY for actual costs and expenses incurred by the CITY under this Agreement.

9.3 In the event ENCROACHER has been declared by the CITY to be in default of a material provision of this Agreement relating to removal and if ENCROACHER fails, within 30 days of mailing of the CITY's default notice, to perform any of the conditions of this Agreement with respect to removal, or fails to begin to perform any such condition that may take more than thirty (30) days to complete, CITY may thereafter obtain from the cash deposit or bond, after proper claim is made to the surety, an amount sufficient to compensate the CITY for its damages. Upon such withdrawal from the cash deposit or bond, the CITY shall notify ENCROACHER in writing, by First Class Mail, postage prepaid, of the amount withdrawn and the date thereof.

9.4 Thirty (30) days after the CITY's mailing of notice of the cash deposit or bond forfeiture or withdrawal authorized herein, ENCROACHER is required to deposit such further cash or bond, or other security, as the CITY may require, which is sufficient to meet the requirements of this Agreement.

9.5 The rights reserved to the CITY with respect to any cash deposit or bond are in addition to all other rights of the CITY whether reserved by this Agreement or authorized by law, and no action, proceeding, or exercise of a right with respect to any cash deposit or bond shall constitute an election or waiver of any rights or other remedies the CITY may have.

SECTION 10

DAMAGE TO IMPROVEMENTS IN PUBLIC RIGHT-OF-WAY

10.1 ENCROACHER is responsible for any damage to CITY street pavements, existing utilities, curbs, gutters, sidewalks, and all other public or private improvements and facilities due to its construction, operation, installation, maintenance, repair, or removal of its Network Facilities in Public Right-of-Way, or any other actions or omissions of ENCROACHER under this Agreement. ENCROACHER is required to repair, replace, and restore in kind all damaged improvements or facilities at its sole expense by no later than fourteen (14) calendar days (or such longer period of time as permitted by CITY) after causing such damage. In the event that ENCROACHER fails to timely cure any such damage, CITY may, but is not obligated to, repair the damage at ENCROACHER's sole expense. In such event, ENCROACHER will reimburse CITY for all costs incurred to repair such damage within ten (10) calendar days after ENCROACHER receives the CITY's demand for payment and ENCROACHER's failure to do so will be a material breach of this Agreement.

10.2 ENCROACHER is responsible for all premature deterioration of surface and subsurface improvements, such as pavement or concrete over the facility or trench and/or appurtenant areas, or reduction in the life of the Public Right-of-Way as determined by City Engineer, normal wear and tear excepted, which results from ENCROACHER's acts or omissions under this Agreement. In the event that ENCROACHER cuts, trenches, excavates, or

otherwise opens any street placed under a street-cut moratorium or similar restriction by CITY, ENCROACHER shall also be responsible for any additional repairs, replacements, repaving, and/or resurfacing for other areas in the Public Rights-of-Way as determined by the City Engineer and in accordance with such moratorium or other restriction. ENCROACHER is required to complete all necessary repairs within thirty (30) days of notification by City Engineer, or such other longer period of time as permitted by the City Engineer. If ENCROACHER fails to make repairs within thirty (30) days of notice, CITY may, but is not obligated to, have repairs made at ENCROACHER's sole cost and expense. In such event, ENCROACHER will pay for all costs for repairs. If the repairs cannot fully reverse the deterioration or loss of life, the CITY may require ENCROACHER to pay for the damage suffered as a result.

SECTION 11

PARTICIPATION WITH UTILITIES

11.1 ENCROACHER agrees to cooperate in the planning, locating, and constructing of its Network Facilities in joint trenches or common duct banks and to participate in cost-sharing for the joint trench and ducts, when two or more service or utility providers are proposing placement of facilities in the same Public Right-of-Way or when an underground project is being planned by CITY. ENCROACHER shall timely comply with all reasonable requests from the City Engineer for cooperation, which may include, without limitation, participation in regular meetings with other service or utility providers and the filing of annual or quarterly capital improvement forecasts.

11.2 The requirements of this section shall not apply when ENCROACHER's excavation work is due to an emergency or other maintenance or repair event that requires urgent action.

SECTION 12

MAPS, RECORDS, AND FIELD LOCATIONS

12.1 ENCROACHER is required to maintain accurate maps and improvement plans of all Network Facilities located within the City of Chula Vista. ENCROACHER is required, upon demand of the City Engineer, to deliver free-of-charge to the office of the Public Works Department and/or Department of Engineering & Capital Projects within thirty (30) days after such demand, such maps and plans as may be required to show in detail the exact location, size, depth, and description of all Network Facilities installed within the Public Right-of-Way. Regardless of receipt of a demand by CITY, if additions/modifications were made to ENCROACHER's Network Facilities during the prior calendar year, ENCROACHER is required to deliver free-of-charge to the office of the Public Works Department and/or Department of Engineering & Capital Projects, such maps and plans as may be required to show in detail the exact location, size, depth, and description of all Network Facilities installed within the Public Right-of-Way by no later than December 31 of each calendar year. ENCROACHER is required to submit the plan to CITY in digital electronic format as specified by CITY.

12.2 ENCROACHER is required to be a member of USA, the regional notification center for subsurface installations, and is required to field mark, at its sole cost, the locations of its underground Network Facilities upon notification in accordance with the requirements of Section

4216 of the State of California Government Code, as it now reads or may herein after be amended.

12.3 ENCROACHER is required to maintain a copy of all maps, books, and records identified in this Agreement within the State of California, and to provide such maps, books, and records for copying and inspection by CITY. ENCROACHER's facilities will be subject to inspection by the CITY, as the CITY finds appropriate to request in the exercise of its rights under this Agreement and its jurisdiction over ENCROACHER.

SECTION 13

HOLD HARMLESS AND INDEMNIFICATION

13.1 ENCROACHER, jointly and severally, for itself, its successors, agents, and ENCROACHER's employees, agrees to indemnify, defend (with reasonable notice to ENCROACHER and with counsel reasonably acceptable to CITY), and hold harmless CITY, its elected officials, appointed officials, officers, directors, employees, volunteers and agents and any successors to CITY's interest (each an "Indemnified Party"; collectively, the "Indemnified Parties") from and against any and all claims, demands, losses, damages, liabilities, fines, penalties, charges, administrative and judicial proceedings and orders, judgments, remedial actions of any kind, and all costs and cleanup actions of any kind, all costs and expenses incurred in connection therewith, including, without limitation, reasonable attorney's fees and costs of defense (collectively, the "Losses") arising directly or indirectly out of (i) ENCROACHER's activities described in this Agreement, (ii) actions or omissions in connection with or related to this Agreement, (iii) ENCROACHER's actions or omissions in connection with or related to any permit issued pursuant to this Agreement, (iv) the performance, condition, or existence of the Network Facilities described in this Agreement, and/or (v) the installation, construction, operation, maintenance, removal, and/or repair of the Network Facilities or any related improvement or facility thereto. However, ENCROACHER shall not be required to indemnify the Indemnified Parties for Losses arising from the CITY's sole gross negligence or willful misconduct. CITY shall not be responsible for any damages, losses, or liability of any kind occurring by reason of anything done or omitted to be done by any third party or CITY, except for acts which constitute the CITY's sole gross negligence or willful misconduct..

13.2 ENCROACHER, for itself and its successors and assigns, hereby waives all claims and causes of action, whether now existing or hereafter arising, against the Indemnified Parties, and each of them, for damages, physical or otherwise, to any of the facilities covered by this Agreement from any cause whatsoever excluding those arising as a result of the CITY's sole gross negligence or willful misconduct. Under no circumstances will either party be liable to the other party or otherwise be responsible for any loss of service downtime, lost revenue or profits, third party damages, or punitive, consequential, or special damages under any theory of liability.

SECTION 14

INSURANCE

14.1 Types; Amounts. ENCROACHER is required to procure and maintain, and required to require its contractors and subcontractors of every tier to procure and maintain, pursuant to this Agreement, insurance of the types and in the amounts described below ("Required

Insurance”). If any of the Required Insurance contains a general aggregate limit, such insurance will apply separately to this Agreement or be no less than two times the specified occurrence limit.

14.1.1 General Liability. ENCROACHER and its contractors and subcontractors of every tier are required to procure and maintain occurrence version general liability insurance, or equivalent form, which shall cover liability arising from premises and operations, XCU (explosions, underground, and collapse), independent contractors, products/completed operations, personal injury and advertising injury, and bodily injury, with a combined single limit of not less than \$1,000,000 per occurrence for bodily injury, personal injury, and property damage., and \$1,000,000 per Products/Completed Operations.

14.1.2 Business Automobile Liability. ENCROACHER and its contractors and subcontractors of every tier are required to procure and maintain business automobile liability insurance, or equivalent form, with a combined single limit of not less than \$1,000,000 per occurrence. Such insurance must include coverage for the ownership, operation, maintenance, use, loading, or unloading of any vehicle owned, leased, hired, or borrowed by the insured or for which the insured is responsible.

14.1.3 Workers’ Compensation. ENCROACHER and its contractors and subcontractors of every tier are required to procure and maintain workers’ compensation insurance with limits as required by the Labor Code of the State of California and employers’ liability insurance with limits of not less than \$1,000,000 per occurrence, at all times during which insured retains employees.

14.1.4 Professional Liability. For any consultant or other professional who will engineer or design the Public Improvements, liability insurance for errors and omissions with limits not less than \$1,000,000 per occurrence, must be procured and maintained for a period of five (5) years following completion of the Public Improvements. Such insurance must be endorsed to include contractual liability.

14.1.5 Pollution Liability. ENCROACHER and its contractors and subcontractors of every tier are required to procure and maintain Contractors Pollution Liability Insurance appropriate to cover such activities in an amount not less than \$1,000,000 Combined Single Limit per occurrence/aggregate for bodily injury, property damage and remediation.

14.2 Deductibles. Any deductibles or self-insured retentions must be declared to and approved by CITY. At the option of CITY, either: (a) the insurer will reduce or eliminate such deductibles or self-insured retentions as respects City, its elected officials, officers, employees, agents, and volunteers; or (b) ENCROACHER and its contractors are required to provide a

financial guarantee satisfactory to City guaranteeing payment of losses and related investigation costs, claims, and administrative and defense expenses.

14.3 Additional Insured; Separation of Insureds. The Required Insurance, except for Professional Liability and Worker's Compensation, must name CITY, its elected and appointed officials, officers, employees, agents, and volunteers as additional insureds with respect to work performed by or on behalf of ENCROACHER or its contractors, including materials, parts, or equipment furnished in connection therewith. The Required Insurance must contain standard separation of insureds provisions, and must contain no special limitations on the scope of its protection to CITY, its elected officials, officers, employees, agents, and volunteers.

14.4 Primary Insurance; Waiver of Subrogation. The Required Insurance is primary with respect to any insurance or self-insurance programs covering CITY, its elected officials, officers, employees, agents, and volunteers. All policies for the Required Insurance must provide that the insurance company waives all right of recovery by way of subrogation against CITY in connection with any damage or harm covered by such policy.

14.5 Certificates; Verification. ENCROACHER and its contractors are required to furnish CITY with original certificates of insurance and endorsements effecting coverage for the Required Insurance. The certificates and endorsements for each insurance policy are required to be signed by a person authorized by that insurer to bind coverage on its behalf. All certificates and endorsements must be received and approved by CITY before work pursuant to this Agreement can begin. CITY reserves the right to require complete, certified copies of all required insurance policies, at any time.

14.6 Term; Cancellation Notice. ENCROACHER is required to maintain the Required Insurance for the term of this Agreement and replace any certificate, policy, or endorsement which will expire prior to that date. ENCROACHER is required to ensure any contractors who perform work for ENCROACHER in the Public Rights-of-Way also maintain the Required Insurance. ENCROACHER is required to provide City thirty (30) days prior written notice of the suspension, expiration, cancellation or reduction below the minimums set forth in this Section 14 for all applicable policies.

14.7 Insurer Rating. Unless approved in writing by CITY, all Required Insurance must be placed with insurers licensed to do business in the State of California and with a current A.M. Best rating of at least A:-VIII.

SECTION 15 **ASSIGNMENT**

15.1 ENCROACHER may not assign, sublet, or transfer any interest in this Agreement , or the performance of any ENCROACHER's obligations hereunder, without the prior written consent of CITY, which shall not be unreasonably withheld, and any attempt by ENCROACHER to so assign this Agreement or any rights, duties or obligations arising hereunder shall be void and of no effect. The transfer of the rights and obligations of ENCROACHER to a parent, successor, or subsidiary of ENCROACHER shall not be deemed an assignment for the purposes of this section, but ENCROACHER is required to immediately notify CITY of any transfer of

rights and obligations of ENCROACHER to a parent, successor, or subsidiary of ENCROACHER. For the purposes of this section, the leasing or granting in the ordinary course of business of indefeasible rights of use or similar rights in dark fiber, fiber optic capacity, conduit, and other network elements shall not require the express consent of the CITY, so long as ENCROACHER remains solely responsible for locating, placing, installing, maintaining, relocating, and removing the Network Facilities.

SECTION 16

TERM AND TERMINATION

16.1 This Agreement will terminate ten (10) years from the Effective Date unless the parties agree to extend the Agreement in a writing executed by the parties prior to said termination date, except that this Agreement may be terminated sooner under the following circumstances and consistent with applicable law.

- a. This Agreement may be terminated by CITY upon at least thirty (30) days written notice to ENCROACHER if CITY reasonably determines that the provisions herein interfere with the use or disposal of said Public Right-of-Way or any part thereof by CITY. Where only a portion of ENCROACHER's Network Facilities interferes with the use or disposal of said Public Right-of-Way, CITY may allow ENCROACHER to relocate the said portion in accordance with this Agreement.
- b. This Agreement may be terminated by CITY for failure, neglect, or refusal by ENCROACHER to fully and promptly comply with any and all of the conditions of this Agreement, or for nonuse in accordance with this Agreement, upon thirty (30) days written notice, unless ENCROACHER confirms with thirty (30) days of receipt of the notice that the cited condition has ceased, been corrected or, subject to CITY's agreement, is diligently being pursued by ENCROACHER, which agreement shall not be unreasonably withheld.
- c. The Agreement may be terminated if CITY determines in good faith and after conducting reasonable efforts that any material term hereof is unenforceable.
- d. This Agreement shall be terminated if ENCROACHER's Certificate of Public Convenience and Necessity terminates, is revoked, or is abandoned, or if ENCROACHER fails to maintain its status as a CLC.

16.2 Upon termination of the Agreement, and upon written request by CITY, ENCROACHER, at its own cost and expense, agrees to remove, or at CITY's discretion, abandon in place its Network Facilities from the Public Right-of-Way and restore the Public Right-of-Way as set forth in the Removal and Relocation provisions of this Agreement. Should ENCROACHER in such event fail, neglect, or refuse to make such removals or restoration within one hundred eighty (180) days of CITY's written request, at the sole option of CITY, such removal and restoration may be performed by CITY at the expense of ENCROACHER, which

expense includes administrative and legal costs. ENCROACHER agrees to pay CITY for such costs by no later than ten (10) days after CITY tenders a demand. If City allows ENCROACHER to abandon its Network Facilities in place, title to those Network Facilities will pass to CITY and ENCROACHER must, upon demand, promptly execute and deliver to CITY all documentation (in a form approved by the City Attorney) necessary to effectuate such transfer of ownership of the Network Facilities.

SECTION 17 **NOTICES**

17.1 All notices given or which may be given pursuant to this Agreement must be in writing and transmitted by United States mail or by private delivery systems if followed by United States mail or by private delivery systems as follows:

To CITY at:

City of Chula Vista
Attn: City Engineer
276 Fourth Avenue
Chula Vista, CA 91911

To ENCROACHER at:

SECTION 18 **MISCELLANEOUS**

18.1 In the event that ENCROACHER fails to timely perform, remedy, or cure any obligation in this Agreement, or fails to satisfy any condition in this Agreement, the CITY may, but is not obligated to, perform, remedy, or cure any obligation in this Agreement, or satisfy any condition in this Agreement, at ENCROACHER's sole cost and expense. In such event, ENCROACHER will reimburse CITY for all costs incurred within ten (10) calendar days after ENCROACHER receives the CITY's demand for payment. ENCROACHER's failure to timely make such payment will constitute a material breach of this Agreement, and, any sums that remain unpaid after the 10th calendar day shall bear interest at 10% per annum or the highest rate permissible under applicable laws.

18.2 This Agreement contains the entire understanding between the parties with respect to the subject matter herein. There are no representations, agreements, or understandings (whether oral or written) between or among the parties relating to the subject matter of this Agreement

which are not fully expressed herein. This Agreement may be not amended except pursuant to a written instruction signed by all parties.

18.3 The failure of either party hereto to enforce any of the provisions of this Agreement, or the waiver thereof in any instance shall not be construed as a general waiver or relinquishment on its part of any such provision, but the same shall nevertheless be and remain in full force and effect.

18.4 If any term, provision, or portion of any term or provision of the Agreement is declared invalid or unenforceable by any court of lawful jurisdiction, then the remaining terms and provisions or portions of terms or provisions will not be affected thereby and will remain in full force and effect.

18.5 This Agreement may be executed in one or more counterparts, all of which taken together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed in duplicate.

CITY

ENCROACHER

A California municipal corporation

APPROVED:

Gary Halbert City Manager

By: _____

Name: _____

Title: _____

Date: _____

APPROVED AS TO FORM:

Glen R. Googins
City Attorney

EXHIBITS

A – Network Facilities

B – Facilities Locations