

ORDINANCE NO. F-1953

ORDINANCE AMENDING ARTICLE VIII, "CONSTRUCTION OF FACILITIES IN THE PUBLIC WAYS" SECTIONS 58-224 – 58-246 OF CHAPTER 58 "STREETS, SIDEWALKS AND OTHER PUBLIC PLACES" OF THE WHEATON CITY CODE

WHEREAS, the Corporate Authorities of the City of Wheaton deem it necessary and appropriate to amend Article VIII "Construction of Facilities in the Public Ways" of Chapter 58 "Streets, Sidewalks and Other Public Places" of the Wheaton City Code to address issues associated with the deployment of new telecommunication technologies in City ways; and

WHEREAS, Corporate Authorities of the City of Wheaton do not intend that these Amendments impinge in areas of state and federal law which partially pre-empt local municipal control; and

WHEREAS, the purpose of these Amendments is to encourage the strengthening of the telecommunication backbone and the efficiency of digital data systems while managing the limited space in City ways so as to protect existing facilities, minimize conflicts between users; and promote management of the right-of-ways in the overall interests of the public health, safety and welfare.

NOW THEREFORE BE IT ORDAINED by the Mayor and City Council of the City of Wheaton, DuPage County, Illinois, pursuant to its home rule powers, as follows:

SECTION 1: That Article VIII "Construction of Facilities in the Public Ways" Sections 58-224 – Sections 58-246, and all of its subparts, are hereby repealed and rescinded in its entirety and replaced with a new Article VIII to be entitled "Construction of Facilities in the Public Ways," Sections 58-224 – 58-246, of Chapter 58 "Streets, Sidewalks in the Public Ways," which shall read as follows:

ARTICLE VIII. - CONSTRUCTION OF FACILITIES IN THE PUBLIC WAYS

Sec. 58-224. - Purpose and scope.

- (a) *Purpose.* The purpose and intent of this Article is for the City to exercise its lawful authority to regulate the Construction of Facilities on public streets and Public Ways within the City's jurisdiction. The regulations set forth in this Article are intended to provide a benefit to the public consistent with the preservation of the integrity, safe usage, and visual qualities of said streets and Public Ways, and the City as a whole by proper management for the finite space located within Public Ways.
- (b) *Facilities subject to this Article.* This Article applies to all Facilities within the Public Ways as that term is defined herein, except as otherwise provided in any applicable franchise, license or similar agreement. In no event shall this Article apply to the City of Wheaton or facilities owned or operated by the City.

- (c) *Franchises, licenses, or similar agreements.* The City, only as limited by law, may require a franchise, license or similar agreement in conformance with the Article for the privilege of locating Facilities within the City's Public Ways.
- (d) *Master License Agreement Required.* Every Entity having legal authority under Federal or State law to install Facilities in the Public Way, excluding those holding a franchise with the City of Wheaton, and which retains ownership of the Facilities after installation, shall possess a City license secured by execution of the uniform Master License Agreement set forth in Appendix A. The Master License Agreement shall be executed prior to the person applying for site specific permits. The Master License Agreement shall control the installation, maintenance, operation and removal of the support enhancement Facilities and supersede any inconsistent provisions of this Ordinance to the extent of the inconsistencies only. Facility deployment on private property shall be controlled by the City Zoning Ordinance. In all other respects, this Article shall remain applicable to those Master License Agreements.
- (e) *Conflicts with other ordinances.* This Article supersedes all policies, resolutions, ordinances, or parts thereof adopted prior hereto that are in conflict herewith, to the extent of such conflict.
- (f) *Conflicts with state and federal laws.* In the event that applicable federal or state laws or regulations conflict with the requirements of this Article, the requirements of this Article shall apply to the maximum extent possible without violating the Federal or State laws or regulations.
- (g) *Sound Engineering Judgment.* The City shall use Sound Engineering Judgment when administering this Article and may vary the standards, conditions, and requirements expressed in this Article when the City Engineer determines that application of the standards, conditions and requirements set forth herein are substantially impractical or inconsistent with sound engineering practices. Such variations shall not include variations from the permit prohibitions set forth in 58-227(g) of this Article. Nothing herein shall be construed to limit the ability of the City to regulate its Public Ways for the protection of the public health, safety and welfare.

Sec. 58-225. - Definitions.

- (a) For the purposes of this Article, the following terms, phrases, words, and their derivations shall have the meaning given herein. When not inconsistent with the context, words used in the present tense include the future, words in the plural include the singular, and words in the singular include the plural. Any term not defined in this section shall have the meaning ascribed to it in 92 Ill. Adm. Code § 530.30, the Illinois Municipal Code (65 ILCS 5/1-1 et seq.), the Illinois Telecommunications Municipal Infrastructure Maintenance Fee Act (35 ILCS 635/1 et seq.), the Illinois Telephone Company Act (220 ILCS 65/0.01 et seq.), the Cable and Video Competition Law of 2007 (220 ILCS 5/21-100 et seq.) and the Illinois Highway Code, (605 ILCS 5/1-101 et seq.), unless the context clearly requires otherwise. In

the event that a term is not defined by this Article, said term shall have its common and/ordinary meaning.

(b) Definitions:

AASHTO means the American Association of State Highway and Transportation Officials.

Above Ground Service Facility shall mean above ground structure, used by an Entity to provide Service to the public, which has an above ground volume greater than 24 cubic feet, but excluding buildings, towers, utility poles, watertowers and standpipes.

ANSI means the American National Standards Institute. *Applicant* means a person or any other Entity applying for a permit pursuant to this Article.

ASTM means the American Society for Testing and Materials.

Backfill means the methods or materials for replacing excavated material in a trench or pit.

Bore or Boring means to excavate an underground cylindrical cavity for the insertion of a pipe or electrical conductor.

Cable and Video Competition Law of 2007 means 220 ILCS 5/21-100 et seq., as the same may be amended from time to time.

Carrier Pipe means the pipe enclosing the liquid, gas or slurry to be transported.

Casing means the structural protective enclosure for transmittal devices such as Carrier Pipes, electrical conductors, and fiber optic devices.

City Engineer means the City of Wheaton Director of Engineering or his designee.

City Standards are any codes, ordinances or regulations of the City which are applicable to Construction of Facilities in Public Ways.

Clear Zone means the total roadside border area, starting at the edge of the pavement, available for safe use by errant vehicles. This area shall consist of a Shoulder, a recoverable slope, a non-recoverable slope, and a clear run-out area. The required width shall be dependent upon traffic volumes and speeds, and on roadside geometry. Distances are specified in the AASHTO Roadside Design Guide.

Coating means a protective wrapping or mastic cover applied to buried pipe for protection against external corrosion.

Code means the Wheaton City Code, unless the context clearly requires otherwise.

Competitive Cable Service or Video Service Provider shall have the meaning ascribed thereto by Section 5/21-201(h) the Cable and Video Competition Law of 2007 and as may be amended from time to time.

Conductor means a wire carrying electrical current.

Conduit means a Casing or Encasement for wires or cables.

Construction or Construct means the installation, repair, maintenance, placement, alteration, enlargement, demolition, modification or abandonment of Facilities.

Cover means the depth of earth or backfill over a buried pipe or conductor.

Crossing Facility means a Facility that crosses one or more Public Ways.

Disrupt the Public Way means any work that obstructs the Public Way or causes a materially adverse effect on the use of the Public Way for its intended use. Such work may include, without limitation, the following: excavating or other cutting; placement (whether temporary or permanent) of materials, Equipment, devices, or structures; damage to vegetation; and compaction or loosening of the soil, but shall not include the parking of vehicles or Equipment in a manner that does not materially obstruct the flow of traffic on a Public Way.

Emergency means any immediate maintenance to a Facility required for the safety of the public using, or in the vicinity of a Public Way, or immediate maintenance required for the health and safety of the general public served by the Facility.

Encasement means the provision of a protective casing.

Entity means any natural individual, firm, trust, estate, partnership, association, joint stock company, joint venture, corporation, limited liability company, a unit of local government, or a receiver, trustee, guardian or other representative appointed by order of court, or any other legally recognized organization, whether for-profit or not-for-profit. The City shall not be considered a "Person" or "Entity."

Equipment means the materials, tools, implements, supplies, and/or other items used to facilitate Construction of Facilities.

Excavation means any digging or other penetration below existing grades, including, but not limited to, the removal of surface materials to allow the installation of concrete footing or pads.

Extra Heavy Pipe means a pipe meeting ASTM standards for said designation.

Facility means all structures, devices, objects, and materials, including but not limited to: antennae's, electrical wires and cables, ducts, fiber optic cables, communications and video cables and wires, poles, conduits, grates, covers, pipes, water, sewer and stormwater lines, cables, pavement, pads, personal wireless facilities, and appurtenances thereto, located in the

Public Ways. Freestanding Facility means a Facility such as an antenna, transformer, pump, equipment cabinet, meter station or similar ground-mounted appurtenance. Freestanding Facility shall not include a Crossing Facility or a Parallel Facility.

Field Change means a change approved by the City Engineer, in writing, to the: size of a Facility, so long as the size does not exceed those specified by this Article of a Facility; location used for a Facility (by no more than ten percent from a permitted location); type of materials, equipment used for a Facility for the same purpose that is different than those set forth in approved permit plans.

Hazardous Material means any substance or material defined as such under federal and/or state law which, due to its quantity, form, concentration, location, or other characteristic, is determined by the City Engineer to pose an unreasonable or imminent risk to the life, health or safety of Persons or property or to the environment, including, but not limited to, explosives, radioactive materials, petroleum or petroleum products or gases, poisons, etiology (biological) agents, flammables, corrosives or any substance determined to be hazardous or toxic under any Federal or State law, statute or regulation.

Highway Code means the Illinois Highway Code, 605 ILCS 5/1-101 et seq., and as may be amended from time to time.

Highway means a dedicated way used for vehicular traffic, including rural or urban roads or streets, whether classified as arterial, collector, minor or local. Highway includes all highway land and improvements, including roadways, ditches and embankments, bridges, drainage structures, pavement, signs, guardrails, protective structures and appurtenances necessary or convenient for vehicular traffic.

IDOT means the Illinois Department of Transportation and its successor agencies.

ICC means the Illinois Commerce Commission and its successor agencies.

Jacking means pushing a pipe horizontally under a roadway by mechanical means with or without Boring.

Jetting means pushing a pipe through the earth using water under Pressure to create a cavity ahead of the pipe.

Joint Use means the use of utility poles, trenches or other Facilities by two or more entities.

Major Intersection means the intersection of two or more arterial highways.

Occupancy means the presence of Facilities on, over or under a Public Way.

Parallel Facility means a Facility that is generally parallel or longitudinal to the centerline of a Right-of-Way.

Parkway means any portion of the Highway not improved by street or sidewalk.

Pavement Cut means the removal of an area of pavement for access to a Facility or for Construction of a Facility.

Permittee means the person or Entity to which a permit has been issued pursuant this Article.

Personal Wireless Services means any technologies defined in 47 U.S.C. 332(c)(7) including commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services, provided to personal mobile communication devices through wireless Facilities or any fixed mobile wireless services provided using personal wireless Facilities.

Personal Wireless Service Facilities means equipment at a fixed location that enables Personal Wireless Service between user equipment and a communications network, including but not limited to: (a) equipment associated with Personal Wireless Services such as private, broadcast and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul; and (b) Transmission Tower, radio transceivers, antennas, coaxial or fiber-optic cable, regular and backup power supplies and comparable equipment, regardless of technological configuration.

Practicable means that which is performable, feasible or possible, rather than that which is simply convenient.

Pressure means the internal force acting radially against the walls of a Carrier Pipe expressed in pounds per square inch gauge (psig).

Prompt means that which is done within a period of time specified by the City. If no time period is specified by the City, the period shall be thirty (30) days.

Public Entity means a unit government, whether at the local, state or federal level.

Public Way means the surface, the air space above the surface, and the area below the surface of any Right-of-Way, road, Highway, lane, path, alley, sidewalk, boulevard, drive, bridge, public driveway, Conduit, tunnel, park, parkway, square, waterway or easement containing, or which is planned to contain, a publicly owned sanitary sewer, stormwater sewer or water line or dedicated for other utilities. No reference herein to the Public Way shall be deemed to be a representation or a guarantee by the City that its title or interest in any property is sufficient to permit its use for such purpose, and the Permittee shall, by the use of such term, be deemed to gain only such rights to use property in the City as the City may have the undisputed right and power to give.

Restoration means the repair of a Public Way to its original condition, when it has been disrupted by the Construction of a Facility.

Right-of-Way means any road, highway, lane, path, alley, sidewalk, boulevard, drive, bridge, or public driveway.

Roadway means that part of the Highway that includes the pavement and Shoulders.

Sale of Telecommunications at Retail shall have the meaning set forth in (35 ILCS 635/10(f)) the Telecommunications Infrastructure Maintenance Fee Act, and as may be amended from time to time.

Security Fund means that amount of security required pursuant to section 58-233 of this Article.

Shoulder means the width of roadway, adjacent to the pavement, providing lateral support to the pavement edge and providing an area for emergency vehicular stops and storage of snow removed from the pavement.

Sound Engineering Judgment means a decision(s) consistent with generally accepted engineering principles, practices and experience.

State-Issued Authorization means the ICC authorization to allow an entity to offer or provide cable or video service from the pursuant to Section 21-401 of the Competitive Cable and Video Competition Law of 2007.

Telecommunications Retailer shall have the meaning prescribed thereto in the Telecommunications Infrastructure Maintenance Fee Act, as may be amended from time to time (35 ILCS 635/10(d)).

Trench means a relatively narrow open excavation for the installation of an underground Facility.

Utility Pole means a structure owned or operated by a public utility, as defined by 220 ILCS 5/3-105, or a municipality as defined by 65 ILCS 5/1-1-2, that is designed specifically for and used to carry lines, cables or wires for telecommunications, cable, electricity or to provide lighting.

Vent means a pipe that allows the dissipation of gases or vapors into the atmosphere from any underground casing.

Water Lines means pipelines carrying raw or potable water.

Wet Boring means Boring using water under pressure at the cutting auger to soften the earth and to provide a sluice for the excavated material.

Sec. 58-226. - Annual registration required.

Every Telecommunications Retailer, competitive cable service, video service provider, or Entity that occupies Public Ways within the City shall, on January 1 of each year, update the City Engineer, in writing, with name, address and regular business telephone and facsimile (fax) numbers, the name of one or more contact persons who can act on behalf of the Telecommunications Retailer, competitive cable service, video service provider, or Entity in connection with emergencies involving their Facilities in the Public Way, and a 24-hour telephone number for each such person, together with evidence of insurance as required in section 58-231 of this Article, in the form of a certificate of insurance.

Sec. 58-227. - Permit required; application and fees.

- (a) Permit required. No Entity, without first filing an application and obtaining a permit from the City Engineer, shall Construct any Facility on, over, above, along, upon, under, across, or within any Public Way which:
 - (1) Changes the size or location of the Facility,
 - (2) Adds a new Facility,
 - (3) Disrupts the Public Way, or
 - (4) Materially increases the amount of area or space occupied by the Facility, except as otherwise provided in this Article. No permit shall be required for installation and maintenance of service connections to customers' premises where there will be no disruption of the Public Way.
- (b) Permit application. All applications for permits pursuant to this Article shall be filed on a form approved by the City and shall be filed in such number of duplicate copies as the City may designate. The applicant may designate those portions of its application materials that it reasonably believes contain proprietary or confidential information as "proprietary" or "confidential" by clearly marking each page of such materials accordingly.
- (c) Minimum general application requirements. The application shall be made by the Entity or its duly authorized representative and shall contain, at a minimum, the following:
 - (1) The Entity's name and address and telephone and facsimile (fax) numbers,
 - (2) The applicant's name and address, if different than the Entity, its telephone, facsimile (fax) numbers, e-mail address, and its interest in the work,
 - (3) The Entity or applicant's project manager's name, telephone number and e-mail address,
 - (4) The names, addresses and telephone and facsimile (fax) numbers of all professional consultants, if any, advising the applicant with respect to the application,
 - (5) A description of the proposed work and the purposes and intent of the Facility and the uses to which the Facility will be put. The scope and detail of such description shall be appropriate to the nature and character of the work to be performed, as determined by the City Engineer, with special emphasis on those matters likely to be affected or impacted by the work proposed,
 - (6) A written traffic control plan demonstrating the protective measures and devices that will be employed consistent with the Illinois Manual on Uniform Traffic Control Devices, to prevent injury or damage to persons or property and to minimize disruptions to efficient pedestrian and vehicular traffic,

- (7) An emergency contingency plan which shall specify the nature of potential emergencies, including, without limitation, Construction and Hazardous Materials emergencies and the intended response by the applicant. The intended response shall include notification to the City and shall promote protection of the safety and convenience of the public. Compliance with ICC regulations for emergency contingency plans constitutes compliance with this Article unless the City finds that additional information or assurances are needed,
- (8) Drawings, plans and specifications showing the work proposed, including sufficient information regarding the types and quantities to be installed, the certification of an engineer that such drawings, plans, and specifications comply with applicable codes, rules, and regulations,
- (9) Evidence of insurance as required in section 58-231 of this Article,
- (10) Evidence of posting of the Security Fund as required in section 58-231 of this Article,
- (11) Any request for a variance from one or more provisions of this Article, and
- (12) Such additional information as may be reasonably required by the City Engineer.

(d) Supplemental application requirements for specific types of Facilities. In addition to the requirements of subsection (c) of this Section, the permit application shall include the following items as applicable to the specific Facility that is the subject of the permit application:

- (1) In the case of new electric power, communications or natural gas distribution system installation, evidence that a "certificate of public convenience and necessity" has been issued by the ICC, that the applicant is required by law, or has elected, to obtain,
- (2) In the case of natural gas systems, state the proposed pipe size, design, Construction class and operating pressures,
- (3) In the case of petroleum products pipelines, state the type or types of petroleum products, pipe size, maximum working pressure, and the design standard(s) to be followed, and
- (4) Identification of the zoning district or districts contiguous to the Public Way, in which the Above Ground Service Facility is proposed.

(e) Applicant's duty to update information. Throughout the entire permit application review period and the Construction period authorized by the permit, any change in the information set forth in a permit application shall be updated, in writing, to the City Engineer within thirty (30) days after said change occurs.

(f) Application fees. Unless otherwise provided by franchise, license, or similar agreement, all applications for permits pursuant to this Article shall be accompanied by a fee as set forth in Appendix B of this Code as compensation to the City for actual costs incurred in processing said application.

(g) Permit prohibitions.

- (1) No Above Ground Service Facility shall be permitted in any Public Way contiguous to and having a physical border with the front yard or the corner side yard of any private property unless the zoning district containing the private property permits the installation of above ground service Facilities in front yards or corner side yards.
- (2) No portion or part of any Above Ground Service Facility shall be installed over a potable water line, sanitary sewer line, storm water sewer line, underground natural gas line, or underground electrical conduit unless engineering means are approved by the City Engineer and installed to provide adequate access to the lines for inspection,

repairs or emergency access. Any applicant for a permit for an Above Ground Service Facility will use reasonable engineering methods to design the location of the Above Ground Service Facility not less than five (5) feet from any existing underground potable waterline, sanitary sewer line, storm water sewer line, underground gas line or underground electrical conduit and so as to minimize the probability that the Above Ground Service Facility will subside or cause soils in the area of the line to collapse if the ground is opened to access the line. Distances of less than five (5) feet may be authorized by the City Engineer where he determines that the Above Ground Service Facility has been engineered so as to not create an unreasonable risk of harm to the underground lines.

- (3) No Facility shall be installed underground where there is inadequate space to permit access maintenance and replacement of existing underground utilities or Facilities or where the placement of an above ground Facility threatens the pedestrian or vehicular safety.
- (4) Where Above Ground Service Facilities would require a variation for installation on private property within a zoning district contiguous to a Public Way, no large above ground mounted Facility shall be installed within a contiguous Public Way without a variation granted by the corporate authorities. This variation shall be considered a major variation to be determined by the corporate authorities and shall be subject to all procedural and variation standards set forth in the Wheaton Zoning Ordinance.
- (5) No Transmission Tower used to support Personal Wireless Service Facilities shall be permitted in any Public Way.
- (6) Personal Wireless Service Facilities may be located on an existing Utility Pole that is within the Public Way. Personal Wireless Service Facilities shall comply with Above Ground Service Facilities requirements as set forth herein and subject to the following conditions:
 - (i) The addition of said Personal Wireless Service Facilities does not exceed more than seven (7) feet above the height of the existing Utility Pole to which it is attached,
 - (ii) No guy or other support wires shall be used in connection with such Personal Wireless Service Facilities,
 - (iii) Personal Wireless Service Facilities antenna and related equipment shall not exceed four (4) square feet in antenna surface area or four (4) feet in any dimension,
 - (iv) Replacement Utility Poles can be placed at the same height as the existing Utility Pole to accommodate Personal Wireless Service Facilities,
 - (v) Personal Wireless Service Facilities, including antenna and related equipment shall be a color that blends with the surroundings of the existing Utility Pole on which it is mounted. Any wiring on the Utility Pole must be covered with an appropriate cover or cable shield,
 - (vi) Not more than one Personal Wireless Service Facility may be located on an existing single Utility Pole,
 - (vii) No Personal Wireless Facility shall be installed within three hundred feet (300') of an existing Personal Wireless Facility or within three hundred feet (300') of a site specific location already granted a permit for a Personal Wireless Facility, and
 - (viii) Facilities mounted on an existing Utility Pole of a current franchisee or licensee with the written permission of the franchisee or licensee, regardless of the

terms and conditions of any existing franchise or license agreement between the City and, a franchisee or a licensee, so long as the owner of the Facilities has entered into a Master License Agreement as required by this Article and secured a site specific permit as required by the Master License Agreement. An applicant for a site specific permit under the terms and conditions of the Master License Agreement, shall submit its written agreement with the franchisee or licensee, which owns the existing Utility Pole as part of its site specific permit application.

(7) No variations of the foregoing permit prohibitions may be granted by the City Engineer.

Sec. 58-228. - Action on permit applications.

(a) City review of permit applications. Fully completed permit applications shall be examined and rejected or approved by the City Engineer within a reasonable time after the filing thereof, but in no event later than any period specified for rejection or approval in an applicable Federal Regulation or State statute. If the application does not conform to the requirements of all applicable ordinances, Codes, laws, rules, and regulations, the City Engineer shall reject such application as incomplete in writing, stating the reasons therefore. If the City Engineer is satisfied that the application conforms to the requirements of this Article and all applicable ordinances, codes, laws, rules, and regulations, the City Engineer shall issue a permit therefor as soon as practicable.

Sec. 58-229. - Effect of permit.

(a) Authority granted; no property right or other interest created. A permit from the City authorizes a Permittee to undertake only certain activities in accordance with City ordinances to the extent of the City's property rights therein. The permit shall not create a property right or grant authority to the Permittee to impinge upon the rights of others who may have an interest in the Public Ways, including, but not limited to such rights as may exist by virtue of the Illinois Highway Code (605 ILCS 5/9-113).

(b) Compliance with all laws required. The issuance of a permit by the City does not excuse the Permittee from complying with other requirements of the City code, and all other applicable statutes, laws, ordinances, rules, and regulations.

Sec. 58-230. - Revised permit plans.

In the event the actual size, type, material, or location of any Facilities deviate in a minor way with respect to the size, type, material, or location identified in the plans, drawings and specifications submitted with the permit application, the Permittee shall request a Field Change from the City Engineer and shall thereafter submit a revised set of drawings or plans to the City within thirty (30) days after the completion of the permitted work. The revised drawings or plans shall specifically identify where the locations of the actual Facilities deviate from the locations approved in the permit. This Section shall not be used as a substitute for non-field variations. If the City Engineer deems a variation to be major or material, it shall be subject to approval or rejection by the Corporate Authorities of the City. If any such proposed deviation does not satisfy the requirements of the definition of a Field Change, it shall be treated as a request for a variance in accordance with 58-244 of this Article. If the City denies the request for a variance,

then the Permittee shall, within thirty (30) days of said denial, either remove the Facility from the Public Way or modify the Facility so that it conforms to the permit and submit revised drawings or plans therefore. Any reasonable out of pocket costs, including outside engineering fees, attorney's fees, documents preparation fees, court reporters fees, and notice or publication fees incurred by the City as a result of the installation of a Facility in violation of this Article, and for which no variation is granted, shall be paid to the City prior to the issuance of any other permits to the person or Entity violating the Article.

Sec. 58-231. - Insurance.

(a) Required coverage and limits. Unless otherwise provided by franchise, license, or similar agreement, each Entity occupying Public Way or Constructing any Facility in the Public Way shall secure and maintain the liability insurance policies specified by the City Engineer insuring the utility as named insured and naming the City and its elected and appointed officers, elected officials, agents, contractors, and employees as additional noncontributory insureds on the policies. The Entity shall provide the City with any and all information necessary to establish coverage including any definitions, limitations or endorsements related to additional insured's. The Entity's insurance shall be primary, and any City policies of insurance shall be deemed non-contributory.

(b) Copies required. The Entity shall provide certificates of insurance reflecting the requirements of this section to the City within ten (10) days following receipt of a written request from the City.

(c) Maintenance and renewal of required coverage. The insurance policies required by this section shall contain the following endorsement:

"It is hereby understood and agreed that this policy may not be canceled nor the intention not to renew be stated until thirty (30) days after receipt by the City, by registered mail or certified mail, return receipt requested, of a written notice addressed to the City Manager of such intent to cancel or not to renew."

Within ten days after receipt by the City of said notice, and in no event later than ten (10) days prior to said cancellation, the Entity shall obtain and furnish to the City evidence of replacement insurance policies meeting the requirements of this section. In the event that the Entity fails to obtain or produce evidence of said replacement insurance, any permits issued pursuant to this Article shall, without any further notice, be null and void.

(d) Self-insurance. An Entity may self-insure all or a portion of the insurance coverage and limit requirements required by subsection (a) of this section. An Entity that self-insures is not required, to the extent of such self-insurance, to comply with the requirement for the naming of additional insured under subsection (a) or the requirements of subsections (b), (c) and (d) of this section. An Entity that elects to self-insure shall provide to the City evidence sufficient to demonstrate its financial ability to self-insure the insurance coverage and limit required under subsection (a) of this section, such as evidence that the Entity is a "private self-insurer" under the workers compensation act. Self-insurance shall be primary, and any City policies of insurance shall be deemed non-contributory.

(e) Effect of insurance and self-insurance on utility's liability. The legal liability of the Entity to the City and any person for any of the matters that are the subject of the insurance policies or self-insurance required by this section shall not be limited by such insurance policies or self-insurance or by the recovery of any amounts thereunder.

Sec. 58-232. - Indemnification.

- (a) Prior to occupying or Constructing facilities in the Public Ways, and as a precondition to the issuance of a City right-of-way permit, permittee shall execute a City right-of-way agreement, agreeing, among other things, to defend, indemnify and hold harmless the City, its corporate authorities, officers, employees, successors, agents, contractors and representatives, harmless from and against any and all injuries, damages, claims, demands, judgments, losses or expenses, including reasonable attorney's fees and costs of suit or defense arising out of, resulting from, or alleged to arise out of or result from, negligent acts or omissions, careless or wrongful acts, or failures to act in conformance with plans and specifications by the Permittee, its affiliates, officers, employees, agents, contractors or sub-contractors in the Construction of the Facilities occupying the Public Ways, maintenance of those Facilities, and in providing or offering service over the Facilities, whether such acts or omissions are authorized, allowed or prohibited by this Article and/or franchise, license, or similar agreement; provided however that the Permittee's indemnity obligations hereunder shall not apply to any injuries, claims, demands, judgments, losses, damages, or expenses arising out of or resulting from the exclusive misconduct of the City, its officials, officers, employees, agents or representatives.
- (b) Where applicable, indemnification of the City shall be in strict accordance with Section 21-1001(f)(8) of the Cable and Video Competition Law of 2007 (220 ILCS 5/21-100 et seq.).

Sec. 58-233. - Security.

- (a) Purpose. The Permittee shall establish a Security Fund in a form and in an amount as set forth in this section. The Security Fund shall be continuously maintained in accordance with this section at the Permittee's sole cost and expense until the completion of the work authorized under the permit. The Security Fund shall serve as security for:
 - (1) The faithful performance by the Permittee of all the requirements of this Article,
 - (2) Any expenditure, damage, or loss incurred by the City occasioned by the Permittee's failure to comply with any codes, rules, regulations, orders, permits and other directives of the City issued pursuant to this Article, and
 - (3) The payment by Permittee of all liens and all damages, claims, costs, or expenses that the City may pay or incur by reason of any action or nonperformance by Permittee in violation of this Article including, without limitation, any damage to public property or restoration work the Permittee is required by this Article to perform that the City must perform itself or have completed as a sole consequence of the Permittee's failure to perform or complete, and all other payments due the City from the Permittee pursuant to this Article or any other applicable law.
- (b) Form. The Permittee shall provide the Security Fund to the City in the form of cash, unconditional letter of credit, or surety bond, in a form acceptable to the City.
- (c) Amount. The dollar amount of the Security Fund shall be sufficient to provide for the reasonably estimated cost to restore the Public Way to at least as good a condition as that existing prior to the Construction under the permit, as determined by the City Engineer, and may also include reasonable, directly related costs that the City estimates are likely to be incurred if the Permittee fails to perform such restoration. Where the Construction of Facilities proposed under the permit will be performed in phases in multiple locations in the City, with each phase consisting of Construction of Facilities in one location or a related

group of locations, and where Construction in another phase will not be undertaken prior to substantial completion of restoration in the previous phase or phases, the City Engineer may allow the Permittee to post a single amount of security which shall be applicable to each phase of the Construction under the permit. The amount of the Security Fund for phased Construction shall be equal to the greatest amount that would have been required under the provisions of this subsection (c) for any single phase.

- (d) Withdrawals from Security Fund. The City shall provide the Permittee with fourteen (14) days advance written notice stating the reason for, and its intention to, exercise withdrawal rights under this subsection. Upon such notice, the City may withdraw an amount from the Security Fund, provided that the Permittee has not reimbursed the City for such amount within said fourteen (14) day notice period. Withdrawals may be made if the Permittee:
 - (1) Fails to make any payment required to be made by the Permittee hereunder,
 - (2) Fails to pay any liens relating to the Facilities that are due and unpaid,
 - (3) Fails to reimburse the City for any damages, claims, costs or expenses which the City has been compelled to pay or incur by reason of any action or nonperformance by the Permittee, or
 - (4) Fails to comply with any provision of this Article that the City determines can be remedied by an expenditure of an amount in the Security Fund.
- (e) Replenishment of Security Fund. Within fourteen (14) days after receipt of written notice from the City that any amount has been withdrawn from the Security Fund, the Permittee shall restore the Security Fund to the amount specified in subsection (c) of this section.
- (f) Closing and return of Security Fund. Upon completion of the work authorized under the permit, the Permittee shall be entitled to the return of the Security Fund, or such portion thereof as remains on deposit, within a reasonable time after account is taken for all offsets necessary to compensate the City for failure by the Permittee to comply with any provisions of this Article or other applicable law. In the event of any revocation of the permit, the Security Fund, and any and all accrued interest therein, shall become the property of the City to the extent necessary to cover any reasonable costs, loss or damage incurred by the City as a result of said revocation, provided that any amounts in excess of said costs, loss or damage shall be refunded to the Permittee.
- (g) Rights not limited. The rights reserved to the City with respect to the Security Fund are in addition to all other rights of the City, whether reserved by this Article or otherwise authorized by law, and no action, proceeding or exercise of right with respect to said Security Fund shall affect any other right the City may have.

Sec. 58-234. - Permit suspension and revocation.

- (a) Right to revoke permit. The City Engineer may revoke or suspend a permit issued pursuant to this Article for one or more of the following reasons:
 - (1) Fraudulent, false, misrepresenting, or materially incomplete statements in the permit application,
 - (2) Non-compliance with one or more provisions this Article,
 - (3) Permittee's physical presence or presence of Permittee's Facilities on, over, above, along, upon, under, across, or within the Public Way presents a direct or imminent threat to the public health, safety, or welfare, or
 - (4) Permittee's failure to construct the Facilities substantially in accordance with the permit and approved plans.

- (b) Notice of revocation or suspension. The City Engineer shall send written notice of its intent to revoke or suspend a permit issued pursuant to this Article stating the reason or reasons for the revocation or suspension and the alternatives available to Permittee under this section.
- (c) Permittee alternatives upon receipt of notice of revocation or suspension. Upon receipt of a written notice of revocation or suspension from the City Engineer, the permittee shall have the following options:
 - (1) Immediately provide the City with evidence that no cause exists for the revocation or suspension,
 - (2) Immediately correct, to the satisfaction of the City, the deficiencies stated in the written notice, providing written proof of such correction to the City within five (5) working days after the receipt of the written notice of revocation, or
 - (3) Immediately remove the Facilities located on, over, above, along, upon, under, across, or within the Public Ways and restore the Public Ways to the satisfaction of the City providing written proof of such removal to the City within ten days after receipt of the written notice of revocation. The City Engineer may, in his discretion, extend the time periods provided in this subsection. To be effective extensions must be in writing.
- (d) Stop work order. In addition to the issuance of a notice of revocation or suspension, the City Engineer may issue a stop work order immediately upon the discovery of any of the reasons for revocation set forth within subsection (a) of this section.
- (e) Failure or refusal of the Permittee to comply. If the Permittee fails to comply with the provisions of subsection (c) of this section, the City or a contractor designated by the City may, at the option of the City:
 - (1) Correct the deficiencies,
 - (2) Upon not less than twenty (20) day's notice to the Permittee, remove the subject Facilities or equipment, or
 - (3) After not less than thirty (30) day's notice to the Permittee of failure to cure the non-compliance, deem them abandoned and therefore property of the City.
 - (4) The Permittee shall be liable in all events to the City for all costs of correction, removal or abandonment.

Sec. 58-235. - Change of ownership, owner's identity, or legal status.

- (a) Notification of change. An Entity shall notify the City no less than thirty (30) days prior to the transfer of ownership of any Facility in the Public Way or change in identity of the Entity. The new owner of the Entity or the Facility shall have all the obligations and privileges enjoyed by the former owner under the permit, if any, and all applicable laws, ordinances, rules and regulations, including this Article, with respect to the work and Facilities in the Public Way.
- (b) No transfer of ownership for Facilities requiring a Master License Agreement or Site Specific Permit shall become effective until the purchaser enters into a Master License Agreement with the City.
- (c) Amended permit. A new owner shall request that any current permit be amended to show current ownership. If the new owner fails to have a new or amended permit issued in its name, the new owner shall be presumed to have accepted, and agreed to be bound by, the terms and conditions of the permit if the new owner uses the Facility or allows it to remain on the City's Public Way.

(d) Insurance and Security Fund. Insurance and the Security Fund as required herein shall be changed to reflect the name of the new owner no less than thirty (30) days after a change of ownership, identity, or legal status.

Sec. 58-236. - General Construction standards.

(a) Standards and principles. All Construction in the Public Way shall be consistent with applicable ordinances and codes (including but not limited to the Wheaton City code), laws, rules, regulations, and commonly recognized and accepted traffic control and Construction principles, Sound Engineering Judgment and, where applicable, the principles and standards set forth in the following IDOT publications (excluding indemnification and insurance requirements which shall be governed by this Article,) and Illinois Statues:

- (1) IDOT Standard Specifications for Road and Bridge Construction,
- (2) IDOT Supplemental Specifications and Recurring Special Provisions,
- (3) Highway Design Manual,
- (4) IDOT Highway Standards Manual,
- (5) IDOT Standard Specifications for Traffic Control Items,
- (6) IDOT Illinois Manual on Uniform Traffic Control Devices (92 Ill. Adm. Code § 545),
- (7) IDOT Flagger's Handbook,
- (8) IDOT Work Site Protection Manual for Daylight Maintenance Operations, and
- (9) The Illinois Cable and Video Service Competition Law of 2007 and as may be amended (220 ILCS 5/21-101 et seq.).

(b) Interpretation of standards and principles. If a discrepancy exists between or among differing standards and principles required by this Article, the City Engineer shall determine, in the exercise of Sound Engineering Judgment, which standards or principles apply, and such decision shall be final. If requested, the City Engineer shall state which standard or principle will apply to the Construction, maintenance, or operation of a Facility in the future.

Sec. 58-237. - Traffic control.

(a) Minimum requirements. The City's minimum requirements for traffic protection are contained in IDOT'S Illinois Manual on Uniform Traffic Control Devices and this Code.

(b) Warning signs, protective devices, and flaggers. The utility is responsible for providing and installing warning signs, protective devices and flaggers, when necessary, meeting all applicable federal, state, and local requirements for protection of the public and the Entity's workers when performing any work on the Public Ways.

(c) Interference with traffic. All work shall be phased so that there is minimum interference with pedestrian and vehicular traffic.

(d) Notice when access is blocked. At least forty-eight (48) hours prior to beginning work that will partially or completely block access to any residence, business or institution, the Utility shall notify the resident, business or institution of the approximate beginning time and duration of such work; provided, however, that in cases involving emergency repairs pursuant to section 58-243, the Entity shall provide such notice as is practicable under the circumstances.

(e) Compliance. The Entity shall take immediate action to correct any deficiencies in traffic protection requirements that are brought to the Entity's attention by the City Engineer, Fire Department, or Police Department.

Sec. 58-238. - Location of Facilities.

- (a) Parallel Facilities located within Highways.
 - (1) Underground parallel Facilities required except as to "Above Ground Service Facilities," or as otherwise provided in state law, unless a variance is otherwise granted, as provided hereinafter, all Facilities or installations located in that portion of a Right-of-Way parallel to a highway after the adoption of this Article shall be located underground.
 - (2) Underground parallel Facilities. An Underground Parallel Facility may be located within the Right-of-Way lines of a Highway only if:
 - (a) The Facility is located as close to the Right-of-Way line as practicable and not more than eight (8) feet (2.4 m) from and parallel to the Right-of-Way line,
 - (b) A new Facility may be located under the paved portion of a Highway only if other locations are impracticable or inconsistent with Sound Engineering Judgment (e.g., a new cable may be installed in existing conduit without disrupting the pavement),
 - (c) In the case of an underground power or communications line, the Facility shall be located as near the Right-of-Way line as practicable and not more than five (5) feet (1.5 m) from the Right-of-Way line, and
 - (d) Maintain a 36-inch horizontal and/or 18-inch vertical separation from any City sanitary sewer, storm water sewer or water line.
- (b) Facilities crossing highways.
 - (1) Underground crossing Facilities required. Unless a variance is granted, all new installations of Facilities that cross a highway shall be located underground.
 - (2) No future disruption. The Construction and design of crossing Facilities installed between the ditch lines or curb lines of City highways may require the incorporation of materials and protections (such as encasement or additional cover) to avoid settlement or future repairs to the roadbed resulting from the installation of such crossing Facilities.
 - (3) Culverts or drainage Facilities. Crossing Facilities shall not be located in culverts or drainage Facilities.
 - (4) Ninety-degree crossing required. Crossing Facilities shall cross at or as near to a 90-degree angle to the centerline as practicable.
 - (5) Overhead power or communication Facility. If a variance has been granted, an overhead power or communication Facility may cross a Highway only if:
 - (a) It has a minimum vertical line clearance as required by the Illinois Commerce Commission's rules entitled, "Construction of Electric Power and Communication Lines" (83 Ill. Adm. Code 305) and the National Electrical Code adopted by the City,
 - (b) Poles are located within one foot (0.3 m) of the Right-of-Way line of the highway and outside of the Clear Zone, and
 - (c) Overhead crossings at Major Intersections are avoided.
 - (6) Underground power or communication Facility. An underground power or communication Facility may cross a highway only if:
 - (a) The design materials and Construction methods will provide maximum maintenance-free service life; and
 - (b) Capacity for the Entity's foreseeable future expansion needs is provided in the initial installation.

- (7) Markers. The City Engineer may require the person or Entity to provide a marker at each Right-of-Way line where an underground Facility other than a power or communication Facility crosses a highway. Each marker shall identify the type of Facility, and an emergency phone number. Markers may be eliminated as provided in applicable Federal regulations.
- (c) The City may require that Facilities be located within a particular Public Way.
- (d) Above Ground Service Facilities.
 - (1) All Above Ground Service Facilities shall require site specific permits.
 - (2) The City Engineer may require any Above Ground Service Facility located within a Public Way to be screened from view by landscaping or other means acceptable to the City.
 - (3) The City Engineer shall require such other conditions as are appropriate to mitigate the impact of Above Ground Service Facilities upon the Public Way and adjoining properties, including, but not limited to, landscape screening.
- (e) Appearance standards.
 - (1) The City may prohibit the installation of Facilities in particular locations in order to preserve the aesthetic character of the surrounding area.
 - (2) A Facility may be constructed only if its construction does not require extensive removal or alteration of trees or terrain features visible to the user of the Public Way or impair the aesthetic quality of the lands being traversed.
- (f) Facility attachments to bridges or roadway structures.
 - (1) Facilities may be installed as attachments to bridges or roadway structures only where the Entity has demonstrated that all other means of accommodating the Facility are not practicable. Other means shall include, but are not limited to, underground, underwater, independent poles, cable supports and tower supports, all of which are completely separated from the bridge or roadway structure. Facilities transmitting commodities that are volatile, flammable, corrosive, or energized, especially those under significant pressure, or have a potential or present high degrees of risk, are prohibited.
 - (2) A Permittee shall include in its request to accommodate a Facility installation on a bridge or roadway structure supporting data demonstrating the impracticability of alternate routing. Approval or disapproval of an application for Facility attachment to a bridge or roadway structure will be based upon the following considerations:
 - (a) The type, volume, pressure or voltage of the commodity to be transmitted and an evaluation of the resulting risk to persons and property in the event of damage to or failure of the Facility,
 - (b) The type, length value, and relative importance of the structure to the transportation system,
 - (c) The alternative routings available to the Entity and the relative practicability thereof,
 - (d) The proposed method of attachment,
 - (e) The ability of the structure to bear the increased load of the proposed Facility,
 - (f) The degree of interference with the maintenance, including but not limited to painting of the structure,
 - (g) The effect on the visual quality of the bridge or roadway structure, and
 - (h) The public benefit expected from the Facility service as compared to the risk involved.

Sec. 58-239. - Construction methods and materials.

- (a) Standards and requirements for particular types of Construction methods.
 - (1) Boring or jacking.
 - a. Pits and shoring. Boring or jacking under Public Way shall be accomplished from pits located at a minimum distance from the edge of the pavement as specified by the City Engineer. Pits for Boring or jacking shall be excavated no more than forty-eight (48) hours in advance of Boring or jacking operations, and backfilled within forty-eight (48) hours after Boring or jacking operations are completed. While pits are open, they shall be clearly marked and protected by barricades. Shoring shall be designed, erected, supported, braced, and maintained so that it will safely support all vertical and lateral loads that may be imposed upon it during the Boring or jacking operation.
 - b. Wet Boring or jetting. Wet Boring or jetting shall not be permitted under any Public Way.
 - c. Borings with diameters greater than six (6) inches. Borings over six (6) inches (0.15m) in diameter shall be accomplished with an auger and following pipe, and the diameter of the auger shall not exceed the outside diameter of the following pipe by more than one inch.
 - d. Borings with diameters six (6) inches or less. Borings of six (6) inches or less in diameter may be accomplished by either Jacking, guided with auger or auger or following pipe method.
 - e. Tree preservation. Any Facility located within the drip line of any tree shall be Bored under or around the root system.
 - (2) Trenching. Trenching for Facility installation, repair, or maintenance on Public Ways shall be done in accordance with all applicable provisions Section 603 of IDOT'S "Standard Specifications for Road and Bridge Construction" or with City Standards, whichever standards are more restrictive.
 - a. Length. The length of open trench shall be kept to the practicable minimum consistent with requirements for pipeline testing. Only one-half ($\frac{1}{2}$) of any intersection may have an open trench at any time unless special permission is obtained from the City Engineer.
 - b. Open trench and excavated material. Open trench and excavated material shall be protected as required by the Illinois Manual on Uniform Traffic Control Devices. Where practicable, the excavated material shall be deposited between the roadway and the trench as added protection. Excavated material shall not be allowed to remain on the paved portion of the right-of-way. Where it is impossible to keep excavated material off of the right-of-way, said material shall be hauled to an off-road location.
 - c. The Permittee shall not trench within the drip line of any tree designated by the City to be preserved.
 - (3) Backfilling.
 - a. Any pit, trench, or excavation created during the installation of Facilities shall be backfilled for its full width, depth, and length using methods and materials in accordance with IDOT'S "Standard Specifications for Road and Bridge Construction" or with City Standards, whichever standards are more restrictive.

When excavated material is hauled away or is unsuitable for backfill, suitable granular backfill as determined by the City Engineer shall be used.

b. For a period of four (4) years from the date that the permit is issued, the Permittee shall be responsible to remove and restore any backfilled area that has settled due to Construction of the Facility. If so ordered by the City Engineer, the Permittee, at its expense, shall remove any pavement and backfill material to the top of the installed Facility, place and properly compact new backfill material, and restore new pavement, sidewalk, curbs, and driveways to the proper grades, as determined by the City Engineer.

(4) Pavement Cuts. Pavement Cuts for Facility installation or repair shall be permitted on a highway only if:

- a. Required by Sound Engineering Judgment, as determined by the City Engineer, and
- b. Appropriate traffic control measures are approved by the City Engineer.

(5) If a variance to the limitations set forth in this section is permitted under 58-244, the following requirements shall apply:

- a. Any excavation under pavements shall be backfilled as soon as Practicable with granular material of CA-6 or CA-10 gradation, as designated by the director of public works,
- b. Restoration of pavement shall be accomplished as soon as Practicable and temporary repair with bituminous mixture shall be provided immediately. Any subsequent failure of either the temporary repair or the restoration shall be rebuilt upon notification by the City,
- c. All pavement saw cuts shall be full depth, and
- d. For all Public Ways which have been reconstructed in the last seven years, or resurfaced in the last five years, permits shall not be issued unless such work is determined to be an emergency repair or other work considered necessary and unforeseen before the time of the reconstruction.

(6) Encasement.

- a. Casing pipe shall be designed to withstand the load of the Highway and any other superimposed loads. The casing shall be continuous either by one (1) piece fabrication or by welding or jointed installation in a manner approved by the City Engineer.
- b. The venting, if any, of any Encasement shall extend within one (1) foot (0.3m) of the Right-of-Way line. No above-ground vent pipes shall be located in the area established as Clear Zone for that particular section of the highway.
- c. In the case of gas pipelines of 60 psig or less, encasement may be eliminated.
- d. In the case of gas pipelines or petroleum products pipelines with installations of more than 60 psig, Encasement may be eliminated only if: (1) Extra Heavy Pipe is used that precludes future maintenance or repair; and, (2) cathodic protection of the pipe is provided.
- e. If Encasement is eliminated for a gas or petroleum products pipeline, the Facility shall be located so as to provide that Construction does not disrupt the Public Way.

(7) Minimum cover of underground Facilities.

- a. Cover shall be provided and maintained at least in the amount specified in the following table for minimum Cover for the type of Facility:

Type of Facility	Minimum Cover
Power or communication line in general	30 inches (0.8 m)
Communication line installed by the plowed method	24 inches (0.6 m)
Gas or petroleum products	30 inches (0.8 m)

b. Standards and requirements for particular types of Facilities.

(1) Electric power or communication Facilities.

- a. Code compliance. Electric power or communications Facilities within Public Ways shall be Constructed, operated, and maintained in conformity with the provisions of 83 Ill.Adm.Code 305 (formerly General Order 160 of the ICC) entitled "Rules for Construction of Electric Power and Communications Lines," the National Electric code as adopted by the City of Wheaton.
- b. Utility Poles. If overhead Facilities have been permitted by the City pursuant to 58-238, Facilities shall use single pole Construction and, where practicable, joint use of poles for wires shall be used. Joint use of poles shall not be allowed for small cell sites.
- c. Underground Facilities.
 1. Cable may be installed by trenching or plowing, provided that special consideration is given to Boring in order to minimize damage when crossing improved entrances and side roads.
 2. If a crossing is installed by Boring or Jacking, Encasement shall be provided between pits. Encasement may be eliminated only if: (a) the crossing is installed by the use of "moles," "whip augers," or other approved method which compresses the earth to make the opening for cable installation; or (b) the installation is by the open Trench method which is only permitted prior to Roadway Construction.
 3. Cable shall be grounded in accordance with the National Electrical Code.

(2) Underground Facilities other than electric power or communication lines. Underground Facilities other than electric power or communication lines may be installed by:

- a. The use of "moles," "whip augers," or other approved methods which compress the earth to move the opening for the pipe,
- b. Jacking or Boring with vented Encasement provided between the ditch lines or toes of slopes of the Highway,
- c. Open trench with vented Encasement between ultimate ditch lines or toes of slopes, but only if prior to roadway Construction, or
- d. Tunneling with vented Encasement, but only if installation is not possible by other means.

(3) Gas transmission, distribution and service. Gas pipelines within Public Ways shall be Constructed, maintained, and operated in a City approved manner and in conformance with the Federal Code of the Office of Pipeline Safety Operations, Department of Transportation, Part 192—Transportation of Natural and Other Gas by Pipeline: Minimum Federal Safety Standards (49 C.F.R. 192), IDOT'S "Standard Specifications for Road and Bridge Construction," and all other applicable laws, rules, and regulations.

- (4) Petroleum products pipelines. Petroleum products pipelines within Public Ways shall conform to the applicable sections of ANSI Standard Code for Pressure Piping. (Liquid Petroleum Transportation Piping Systems ANSI-B 31.4).
- (5) Appurtenances. Above ground appurtenances to overhead or underground Facilities, shall be provided with a vegetation-free area extending one (1) foot (305 mm) in width beyond the appurtenance in all directions. The vegetation-free area may be provided by an extension of the mounting pad, approved by the City Engineer. With the approval of the City Engineer, shrubbery surrounding the appurtenance may be used in place of a vegetation-free area. The housing for ground mounted appurtenances shall be painted a natural color so as to blend with the surroundings.

(c) Materials.

- (1) General standards. The materials used in Constructing Facilities within Public Ways shall be those meeting the accepted standards of the appropriate industry, the applicable portions of IDOT'S "Standards Specifications for Road and Bridge Construction" and City Standards, the requirements of the ICC, or the standards established by other official regulatory agencies for the appropriate industry.
- (2) Material storage on Public Way. All pipe, Conduit, wire, poles, cross arms, or other materials shall be distributed along the Public Way prior to and during installation in a manner to minimize hazards to the public or an obstacle to Public Way maintenance or damage to the Public Way and other property. If material is to be stored on Public Way, prior approval must be obtained from the City. No materials may be stored for more than 15 days without approval of the City Engineer of his designee. No materials may be stored in a floodway or floodplain.
- (3) Hazardous Materials. The plans submitted by the Entity to the City shall identify any Hazardous Materials that may be involved in the Construction of the new Facilities or removal of any existing Facilities.

(d) Operational restrictions.

- (1) Construction operations on Public Ways may, at the discretion of the City, be required to be discontinued when such operations would create hazards to traffic or the public health safety, and welfare. Such operations may also be required to be discontinued or restricted when conditions are such that Construction would result in extensive damage to the Public Way or other property.
- (2) These restrictions may be waived by the City Engineer when emergency work is required to restore Facility services.
- (3) Unless otherwise permitted by the City, the hours of Construction shall be between 7:00 a.m. and 7:00 p.m.

(e) Location of existing Facilities. Any utility proposing to Construct Facilities in the City shall contact J.U.L.I.E. and ascertain the presence and location of existing aboveground and underground Facilities within the Public Ways to be occupied by its proposed Facilities. The City will make its permit records available to an Entity for the purpose of assisting in the identification of possible Facilities. The permit records information shall not be considered a warranty of the accuracy of the information provided. When notified of an excavation or when requested by the City or by J.U.L.I.E., an Entity shall locate and physically mark its underground Facilities within 48 hours, excluding weekends and holidays, in accordance with the Illinois Underground Facilities Damage Prevention Act (Section 220 ILCS 50/1 et seq.)

Sec. 58-240. - Vegetation control.

- (a) Tree trimming permit required. Notwithstanding any other provision to the contrary of this Municipal Code, tree trimming shall not be considered a normal maintenance operation, but shall require the application for, and the issuance of, a permit, in addition to any other permit required under this Article.
 - (1) Application for tree trimming permit. Applications for tree trimming permits shall include assurance that the work will be accomplished by competent workers with supervision who are experienced in accepted tree pruning practices. Tree trimming permits shall designate an expiration date in the interest of assuring that the work will be expeditiously accomplished.
 - (2) Damage to trees. Poor pruning practices resulting in damaged or misshapen trees will not be tolerated and shall be grounds for cancellation of the tree trimming permit and for assessment of damages. The City will require compensation for trees extensively damaged and for trees removed without authorization. The formula developed by the International Society of Arboriculture will be used as a basis for determining the compensation for damaged trees or unauthorized removal of trees. The City may require the removal and replacement of trees if trimming or radical pruning would leave them in an unacceptable condition.
- (b) Specimen trees or trees of special significance. The City may require that special measures be taken to preserve specimen trees or trees of special significance. The required measures may consist of higher poles, side arm extensions, covered wire or other means.
- (c) Chemical use. Spraying of any type of vegetation-killing chemicals will not be permitted on Public Ways unless approved by the City Engineer and in such case only in conformance with the manual specifications and EPA regulations.

Sec. 58-241. - Removal, relocation, or modification of Facilities.

- (a) Notice. Within 30 days following written notice from the City, any person or Entity installing, controlling or maintaining any Facility shall, at its own expense, temporarily or permanently remove, relocate, change or alter the position of any Facilities within the Public Ways whenever the City Engineer determines that such removal, relocation, change or alteration, is reasonably necessary for the Construction, repair, maintenance, or installation of any City improvement in or upon, or the operations of the City in or upon, the Public Ways.
- (b) Removal of unauthorized Facilities. Within thirty (30) days following written notice from the City Engineer, to any person or Entity that owns, controls, or maintains any unauthorized Facility or related appurtenances within the Public Way shall, at its own expense, remove all or any part of such Facilities or appurtenances from the Public Ways. A Facility is unauthorized and subject to removal in the following circumstances:
 - (1) Upon expiration or termination of the Permittee's license or franchise, unless otherwise permitted by applicable law,
 - (2) If the Facility was Constructed or installed without the prior grant of a license or franchise, if required,
 - (3) If the Facility was Constructed or installed without prior issuance of a required permit in violation of this Article,
 - (4) If the Facility was Constructed or installed at a location not permitted by the Permittee's license or franchise, or

(5) Upon abandonment of the Facility. Abandonment will be presumed where a Facility has not been used for the purpose for which it was installed for a period of sixty (60) consecutive days, or more, and where there have been no efforts to repair or renew the use during the sixty (60) day period. The Entity owning, controlling or maintaining the Facility shall have the burden of establishing to the City Engineer that the Facility is still being used within thirty (30) days of the notice. All notices described herein shall be regular U.S. Mail. Failure to respond to the City Engineer's request for information regarding the abandonment of the Facility shall constitute irrefutable evidence of abandonment. Upon the City Engineer's determination and final written notification to the entity of such abandonment the entity shall have sixty (60) days within which to:

- a.) Reactivate the use of the Facility or transfer the Facility to another entity which makes actual use of the Facility promptly, or
- b.) Dismantle and remove the Facility and notify the City Engineer in writing of the completion of such removal.

If the Entity believes that the final determination of abandonment by the City Engineer is incorrect it may file a written appeal with the City Manager within five (5) days of the City Engineer's final determination. The City Engineer shall review the matter, take evidence if deemed necessary, and make a determination as to whether the Facility has or has not been abandoned. The City Manager's determination shall be final. If the Entity fails to prevail on appeal, or fails to reactivate, or transfer to another active user or remove the service facility the City shall have the right to have the service facility removed at the Entities expense. The City shall be entitled to reimbursement for all costs and expenses associated with the removal and the storage of any facility thereafter. If a stored facility is not picked up from the City within twenty-eight (28) days of removal, the City may dispose of the Facility in its discretion. The City at that point will also be entitled to the cost of the disposal less any value the City secures for the Facility for scrap or resale. In addition, an administrative fee shall be assessed against the Entity for disposal of the service Facility in an amount equal to the staff time related to all proceedings associated with the removal and disposal of the Facility. Failure to remove an abandoned Facility in conformance with this Ordinance shall be considered a violation of the Code and subject to its general penalty provisions. No permit for any work in the City shall be granted to an Entity including its successors, which owes any sum of money to the City for the removal and disposal of an abandoned Facility.

(c) Emergency removal or relocation of Facilities. The City retains the right and privilege to cut or move any Facilities located within the Public Ways of the City, as the City may determine to be necessary, appropriate or useful in response to any public health or safety emergency. If circumstances permit, the City shall attempt to notify the utility, if known, prior to cutting or removing a Facility and shall notify the utility, if known, after cutting or removing a Facility.

Sec. 58-242. - Cleanup and restoration.

Upon completion of all Construction or maintenance of Facilities, the Entity shall remove all excess material and restore all turf and terrain in a timely manner and to the satisfaction of the City. This includes restoration of entrances and side roads. Restoration of roadway surfaces shall be made using materials and methods approved by the City Engineer. Such cleanup and repair

may be required to consist of backfilling, regrading, reseeding, re-sodding, or any other requirement to restore the Public Way to a condition substantially equivalent to that which existed prior to the commencement of the project and as per City Standards.

Sec. 58-243. - Maintenance and emergency maintenance.

- (a) General. Facilities on, over, above, along, upon, under, across, or within Public Ways are to be maintained by or for the utility at the utility's sole expense.
- (b) Emergency maintenance procedures. Emergencies may justify noncompliance with normal procedures for securing a permit:
 - (1) If an emergency creates a hazard on the traveled portion of the Public Way, the Entity shall take immediate steps to provide all necessary protection for traffic on the highway or the public on the Public Way including the use of signs, lights, barricades or flaggers. If a hazard does not exist on the traveled way but the nature of the emergency is such as to require the parking on the shoulder of equipment required in repair operations, adequate signs and lights shall be provided. Parking on the shoulder in such an emergency will only be permitted when no other means of access to the Facility is available.
 - (2) In an emergency, the Entity shall, as soon as possible, notify the City Engineer or his or her duly authorized agent of the emergency, informing him or her as to what steps have been taken for protection of the traveling public and what will be required to make the necessary repairs. On weekends the Entity shall notify the police of an emergency with the City Engineer is unavailable. If the nature of the emergency is such as to interfere with the free movement of traffic, the City police shall be notified immediately.
 - (3) In an emergency, the Entity shall use all means at hand to complete repairs as rapidly as practicable and with the least inconvenience to the traveling public immediately.
- (c) Emergency repairs. The Entity shall file in writing with the City of a description of the repairs undertaken in the Public Way within 48 hours after an emergency repair.
- (d) Landscape maintenance. All landscaping installed pursuant to this Article shall be maintained by the person or Entity owning, controlling or maintaining the adjacent Facility in good and reasonable condition. Any person or Entity failing to maintain any such landscaping after receiving written notice from the City Engineer that the landscaping is in need of maintenance shall not be issued any permits for the installation of new Facilities until the deficient landscaping has been restored to good and reasonable condition.

Sec. 58-244. - Variances.

- (a) Request for variance. An Entity requesting a variance from one or more of the provisions of this Article must do so in writing to the City Engineer a part of the permit application. The request shall identify each provision of this Article from which a variance is requested and the reasons why a variance should be granted.
- (b) Authority to grant variances. The City Engineer shall decide whether a variance is authorized for each provision of this Article identified in the variance request on an individual basis.
- (c) Conditions for granting of variance. The City Engineer may authorize a minor variance only if the Entity requesting the variance has demonstrated that:

- (1) One or more conditions not under the control of the Entity(such as terrain features or an irregular Public Way line) create a special hardship that would make enforcement of the provision unreasonable, given the public purposes to be achieved by the provision; and
- (2) All other designs, methods, materials, locations or Facilities that would conform to the provision from which a variance is requested are impracticable in relation to the requested approach.

(d) Additional conditions for granting of a variance. As a condition for authorizing a variance, the City Engineer may require the Entity requesting the variance to meet reasonable standards and conditions that may or may not be expressly contained within this Article but which carry out the purposes of this Article.

(e) If the City Engineer determines that the variance request is a major variance the variation request shall be determined by the corporate authorities of the City in conformance with the subsections (c)(1) and (2) of this section and the variation standards set forth in the Wheaton Zoning Code.

Sec. 58-245. - Penalties.

Any person or Entity who violates, disobeys, omits, neglects or refuses to comply with any of the provisions of this Article shall be subject to a fine of not less than \$500.00 nor more than \$1,000.00 for each offense, and a separate offense shall be deemed committed for each and every day during which a violation continues or exists. There may be times when the City will incur delay or other costs, including third party claims, because the utility will not or cannot perform its duties under its permit and this Article. Unless the utility shows that another allocation of the cost of undertaking the requested action is appropriate, the Entity shall bear the City's costs of damages and its costs of installing, maintaining, modifying, relocating, or removing the Facility that is the subject of the permit. No other administrative agency or commission may review or overrule a permit related cost apportionment of the City. Sanctions may be imposed upon an Entity who does not pay the costs apportioned to it.

Sec. 58-246. - Enforcement.

Nothing in this Article shall be construed as limiting any additional or further remedies that the City may have for enforcement of this Article.

SECTION 2: If a court of competent jurisdiction sets aside any portion of this Ordinance as unconstitutional or unlawful, it shall not affect the validity of the remainder of the Ordinance.

SECTION 3: Any ordinance which is inconsistent with this Ordinance is repealed to the extent of such inconsistency.

SECTION 4: This Ordinance shall become effective upon passage, execution by the Mayor and publication as required by law.



Michael Gresk
Mayor

ATTEST:



Sharon Bennett Hagan

City Clerk

Roll Call Vote

Ayes:

Councilman Scalzo
Councilman Suess
Councilwoman Fitch
Councilman Rutledge
Mayor Gresk
Councilman Saline

Nays:

None

Absent:

Councilman Prendiville

Motion Carried Unanimously

Passed: August 1, 2016

Published: August 2, 2016

**MASTER LICENSE AGREEMENT FOR WIRELESS AND POLE MOUNTED
TELECOMMUNICATIONS FACILITIES LOCATED WITHIN CITY WAYS OF THE
CITY OF WHEATON**

WHEREAS, the use of franchising is no longer a universal method of controlling public ways and utility easements, particularly in the fast-evolving fields of telecommunications and related information technologies; and

WHEREAS, the City intends to promote the expansion of telecommunications services in a manner consistent with the Illinois Cable and Video Competition Act, the Illinois Telephone Company Act, the Telecommunications Act of 1996, the Middle Class Tax Relief and Job Creation Act of 2012, the Simplified Municipal Telecommunications Tax Act, 35 ILCS 636/5-1, et. seq. and Federal Communication Commission Regulations; and

WHEREAS, the City has jurisdiction over and controls the City Ways in furtherance of the public health, safety and welfare; and

WHEREAS, the Corporate Authorities of the City of Wheaton have determined that the establishment of a Master License Agreement for telecommunications use of public ways and utility easements, will properly facilitate and manage the deployment of telecommunications facilities without requiring a telecommunications company to come before the City Council each time it seeks approval of a permit for each telecommunications facility within the City Ways; and

WHEREAS, regulation of the deployment of telecommunications facilities within the City Ways can be accomplished through the use of site-specific permitting, managed and controlled by City of Wheaton staff, but only after a telecommunications company agrees to the terms of this Master License Agreement; and

WHEREAS, Licensee, a Wireless Services provider or Neutral Host Provider, is requesting to attach, install, operate, maintain, repair, replace, reattach, reinstall, relocate, and remove its Telecommunications Facilities, fiber optic cable, small cell networks or outdoor distributed antenna systems (“DAS”) in the City Ways to provide improved telecommunications coverage and meet increasing demand for its services; and

WHEREAS, Section 253 of the Federal Communications Act of 1934, as amended, including 47 U.S.C § 253, and Illinois 220 ILCS 5/21-1001, provides that the City has the authority, subject to certain limitations, to control access to and use of the Right-of-Way within the City limits.

NOW THEREFORE, based upon the considerations recited herein and the granting of this Master License, the Telecommunications Licensee (insert name) and the City of Wheaton agree to abide by the terms and conditions of this Agreement as follows:

1.0 Recitals. The recitals set forth above are incorporated herein and made part of this Agreement as representing the intent of the parties, and as substantive covenants and conditions.

2.0 **Definitions.** Except where the context requires otherwise, the capitalized terms used in this Agreement shall have the following meanings.

“Agreement or License Agreement” shall mean this Master License Agreement.

“Application” means the application for a permit for the installation of Telecommunications Facilities at a Site-Specific Location in a City Way.

“Available” means any useable space within “City Ways” that is not otherwise occupied by or otherwise committed for City Facilities or to a franchise holder or existing Licensee, at the time an Application is submitted for the use of a Site-Specific Location by a Telecommunications Licensee.

“Cash” means United States currency.

“CFR” means Code of Federal Regulations.

“City Engineer” means the City of Wheaton’s Director of Engineering or his designee.

“City Facilities” means roads, alleys, paved surfaces, traffic control devices, water services, sanitary sewer services, stormwater services, and their appurtenances in City Ways.

“City Ways” means rights-of-way, dedicated utility easements owned or controlled by the City, and any other structures or facilities under the control or ownership of the City of Wheaton within rights-of-way, dedicated utility easements or on other City property.

“Entity” Entity: means any natural individual, firm, trust, estate, partnership, association, joint stock company, joint venture, corporation, limited liability company, unit of local government, a receiver, trustee, guardian or other representative appointed by order of court, or any other legally recognized organization, whether for-profit or not-for-profit. The City shall not be considered a “Person” or “Entity” for purposes of this Agreement.

“Force Majeure” means an incident, event, or cause that is beyond the reasonable control of a party, including without limitation: an act of God; act of superior governmental authority; earthquake; fire; flood; terrorism; tornado; labor strike; or sabotage which interferes with the ability of a Telecommunications Licensee or the City to fulfill the terms and conditions of this Agreement.

“Law(s)” means any applicable statute, administrative or judicial act, decision, certificate, charter, code, constitution, law, opinion, Court order, ordinance, policy, procedure, rate, regulation, resolution, rule, schedule, specification, tariff, or other requirement of the City or any other unit of government or agency of a unit of government, having joint or separate jurisdiction over the Telecommunications Licensee, now or hereafter in effect, during the term of this Agreement.

“Letter of Credit” means an irrevocable standby letter of credit issued by the United States Bank or other financial institution reasonably acceptable to the City of Wheaton and having a credit worthiness rating of at least “A” by Standard and Poor’s or “A2” by Moody Investment Services.

“Neutral Host Provider” means an independent third party host which owns and assumes financial, regulatory, legal and technical responsibility for deploying, installing and maintaining Telecommunications Facilities for a fee to Entities providing telecommunications services directly to the public.

“Permit Drawing and Specifications” means documents submitted by a Telecommunications Licensee for a Site-Specific Permit which depict the design, construction, installation, and maintenance of any Telecommunications Facility to be located within a City Way and meeting the requirements of the City.

“Pole” means: (a) any utility pole, used mainly to support overhead distribution wires and cables; or (b) any streetlight pole, but excluding light poles, towers, or water towers wholly owned by the City, and also excluding towers, as defined in the City Zoning Ordinance.

“Pole Attachment” means any Telecommunications Facility attached above grade to a Pole by the Telecommunications Licensee.

“Pole Mount Certification” means certification by a structural engineer that a pole has sufficient structural integrity to carry the weight of the Telecommunications Facility with or without hardening, in conformance with applicable ordinances and industry standards.

“RFEF” means radio frequency electromagnetic fields.

“Site-Specific Location” means a location in a City Way which qualifies, under this Agreement, for the placement of, or which contains, Site-Specific Permitted Telecommunications Facilities.

“Site-Specific Permit or Permit” means a non-exclusive permit granted by the City allowing the installation of Telecommunications Facilities at a Site-Specific Location.

“Telecommunications Facility or Facilities” means without limitation, aerial, surface, or underground wires, amplifiers, antennas, boxes, cabinets, cables (including fiber optic and coaxial cables), circuits, conduits, conductors, converters, copper wires, outdoor distributed antenna systems, decoders, demodulators, drop wires, ducts, electronics, encoders, equipment, generators, hubs, interducts, lasers, manholes, microwaves, modulators, multi-plexers, networks, nodes, optical fibers, optical repeaters, patch panels, processors, receivers, splice boxes, switches, tap-offs, terminals, traps, vaults, wires, wire, and wireless transmitters and receivers, or other similar equipment owned, leased, or controlled by the Telecommunications Licensee, including Neutral Host Providers, that is used for, or is useful in, the provision of communication services including

wireless facilities for small cell networks and personal wireless services as that term is defined in 47 U.S.C. § 322(c) (7) (c), now and hereafter in effect, including commercial vehicle services (defined in 47 U.S.C. § 332(d), now or hereafter in effect in existence, either as of the effective date or at any time during the term of this Agreement.

“Telecommunications Licensee” means an Entity which has entered into, and maintains, a valid telecommunications Master License Agreement with the City.

“Telecommunications Service” means any multi-channel video service, information service, or other service involving the transport or transmission of information electronically by wire, fiber optic cable or radio and holding a federal or state-issued authorization to provide telecommunications services within the State of Illinois.

“Work” means all design, construction, restoration, maintenance, removal, repair, relocation, or modification of any Telecommunications Facility.

2.1. **Term.**

2.2.0 Initial and Extension Terms. This Agreement shall apply to all Telecommunications Facilities proposed, permitted and installed at Site-Specific Locations in the City Ways. The initial term of this Agreement shall be ten years (“initial term”) commencing on the effective date, unless it is earlier terminated in accordance with this Agreement. The extension term of this Agreement shall be ten (10) years (“extension term”) commencing on the expiration of the initial term provided that:

- a. The Telecommunications Licensee gives the City Manager written notice of its intent to extend the Agreement no less than sixty (60) days prior to the expiration of the initial term; and
- b. The Telecommunications Licensee is in substantial compliance with the provisions of this Agreement and applicable Laws; and
- c. There has not been any change in the law that materially affects the provisions of this Agreement or its enforceability; and
- d. The City has not otherwise terminated this Agreement in accordance with its provisions.

2.2.1 New Agreement/Extension Term. A Telecommunications Licensee may enter into a new Master License Agreement with the City no later than six (6) months before the expiration of the extension term based upon the standard Master License Agreement then in effect or in accordance with such other contract rates, terms and conditions, or ordinances that may be adopted by the City from time to time. If upon expiration of the extension term the parties fail to negotiate the renewal of a new Master License Agreement, the Telecommunications Licensee shall be deemed to holdover and shall otherwise be liable to perform its obligations hereunder as well, in the case of Telecommunications Licenses which do

not pay the City the Simplified Municipal Telecommunications Tax (35 ILCS 636/5-1 et seq., payment of triple the amount of all costs and fees terms and conditions of the master license Agreement. No holdover shall exceed six (6) months.

2.2.2. Non-Renewal. If a new Master License Agreement has not been executed by the parties by the expiration of the extension term and the parties do not otherwise agree in writing to renew, then the Telecommunications Licensee, at its option, shall either:

- a. Remove the Telecommunications Licensee Facilities from the City Ways at its sole cost and expense; or
- b. Without cost or charge to the City abandon the Licensee's Telecommunications Facilities in place, but only if the City first approves the proposed abandonment, in writing; including conditions applicable to the abandonment; or
- c. Sell the Licensee's Telecommunications Facility to a qualified third party subject to the City's prior written approval; which will not be unreasonably withheld.
- d. Upon the occurrence of any circumstance set forth in this Section 2.2.2, this Agreement shall be deemed terminated except as to the indemnification and hold harmless provisions which shall survive until all statutes of limitations and repose applicable to a casualty occurring during the license term have expired.

2.3 Termination. Except as otherwise provided herein, the City may terminate this Agreement for cause, as defined herein, upon thirty (30) days' written notice sent by the City to the Telecommunications Licensee. In this event, the City may exercise its legal rights and/or equitable remedies either under this Agreement or by any other means that may be provided by law or equity, including the right, without limitation, to recover any uncollected fees that would be due and payable by the Telecommunications Licensee to the City if this Agreement had not been terminated during the initial or extension term as well as reasonable costs, including attorney's fees, incurred in the termination process.

2.3.1 A termination for cause means:

- a. The Telecommunications Licensee fails to cure a material default of this Agreement within thirty (30) days after it receives the City's notice of default, or, if the default can be cured and such cure reasonably requires more than thirty (30) days to achieve, fails to commence and thereafter diligently continue such cure to completion within the specified period; or
- b. Any agency exercising jurisdiction over the Telecommunications Licensee has by final order that is no longer subject to appeal, terminated or otherwise revoked the Telecommunications Licensee's approval,

authorization, certification or license to provide the Telecommunications services or Facilities.

2.3.2 Removal Upon Termination for Cause. Upon establishment of termination for cause, the right to make any pole attachment or occupy any City Way will immediately terminate. If the Telecommunications Licensee has failed within three (3) months of the effective date of termination for cause to remove or cause removal of the Telecommunications Licensee's Facilities, the City may remove the same for the account of and at the sole cost and expense of the Telecommunications Licensee. Notwithstanding the foregoing, the parties, by mutual agreement, may exercise any remedy which would be available under sub-section 2.2.2 of this Agreement.

2.4 Changes in the Law. The parties acknowledge that telecommunications services and the law associated with telecommunications services are evolving at the Federal and local level. If during the initial term or extension term the Laws are adopted, amended or repealed and are made binding on the City and would be applicable to this Agreement, the parties shall negotiate an amendment to this Agreement to the extent necessary to comply with such law. If the parties cannot mutually agree to an amendment to this Agreement within three (3) months after a party receives the other parties' request to negotiate an amendment, then the parties will agree to submit the dispute to mediation or binding arbitration under mutually acceptable terms and conditions. If the parties cannot reach agreeable, acceptable terms and conditions for mediation or arbitration within the three (3) months, they shall submit the matter by petition for declaratory relief in the Eighteenth Judicial Circuit Court to establish such terms and conditions. The parties hereby waive and appeal the ruling of the Court as to terms and conditions of mediation/arbitration.

3.0. Grant and Scope of License.

3.1 Grant of License. Subject to all the terms and conditions of this Agreement, the City grants to the Telecommunications Licensee and, the Telecommunications Licensee accepts from the City a non-exclusive license to submit Site-Specific Permit applications for access to and use of City Ways to install, and upon installation by a valid Site-Specific Permit to operate, maintain, repair, remove, reattach, relocate, and replace Licensee's Telecommunications Facilities. All rights and obligations of the Telecommunications Licensee under this Agreement shall be exercised by the Telecommunications Licensee at its sole cost and expense unless otherwise agreed to in writing by the parties.

3.1.2. Site-Specific Permit. The Telecommunications Licensee as condition precedent to its right to access, use or to attach any of the Telecommunications Licensee Facilities in a City Way, shall prior to occupying any area, submit a Site-Specific Permit application to the City Engineer, including all siting, design, and construction methodology manufacturer's specifications, as well as any structural engineering reports the City Engineer deems in his professional discretion, as necessary, and receive from the City Engineer a Site-Specific Permit to occupy the Site-Specific Location with the Telecommunications Licensee Facilities.

3.1.3. **Duration of Site-Specific Permit.** A Site-Specific Permit shall be effective for a period of six months from date of approval. If the Site-Specific permitted Telecommunications Facility is not operational by the expiration date the Permit shall become void and the Site-Specific Location shall be available to other Entities in compliance with City Code.

3.1.4. Except in non-residential and the R-6 and R-7 Zoning Districts, Small Cell Site Permit applications for specific sites shall not be submitted if they are within 500 feet of an existing small cell site or within 500 feet of a site for which a Site-Specific Permit has been issued for another Small Cell Site.

3.1.5. **Compliance with Laws.** The installation and maintenance of any Telecommunications Facilities in City Ways shall comply with all Laws.

3.2. **Scope of Site-Specific Permit.** The grant of a Site-Specific Permit to the Telecommunications Licensee is subject to prior use and existing and continuing rights, consents and approvals of the City for utilities and other Telecommunications Licensees, and to existing and future recorded and unrecorded deeds, easements, dedications, grievances, conditions, covenants, restrictions, encumbrances, and claims of title which may affect any right, title, and interest in and to the City Ways and any City owned or controlled facilities located within those City Ways.

3.2.1. **License Only.** Nothing in this Agreement or in a Site-Specific Permit shall be deemed to grant, convey, create, or vest in the Telecommunications Licensee a perpetual interest in land or in the City Ways or other property including, without limitation, any fee interest, leasehold interest, easement, or franchise right. Any interpretation of this license or a Site-Specific Permit or by a Court, which would purport to create any fee, leasehold, easement, or franchise interest in the Telecommunications Licensee shall, twenty-four (24) hours after such determination, result in the Telecommunications Licensee's forfeiture of any and all rights under this Agreement or any Site-Specific Permit.

3.2.2. **No Warranty.** Neither the City, nor any existing easement holder, franchisee, nor Telecommunications Licensee shall be liable to the Telecommunications Licensee for failure of the City or the others to secure legal authority from a grantor of an easement affecting the telecommunications installation. It shall be the obligation of the Telecommunications Licensee to ascertain any legal right held by any servient estate of an easement affecting the proposed or existing Telecommunications Facilities and resolving those issues with the owner of the servient estate.

3.2.3. **Modification of Site-Specific Application Permits.** The City may for consideration of the public health, safety, and welfare including, without limitation: safety, reliability, security, and engineering reasons, terminate or otherwise modify the scope of the Telecommunications Licensee's non-exclusive Site-Specific Permits Application request upon sixty (60) days written notice to the Telecommunications Licensee. If the City exercises its rights under this subsection it will use reasonable efforts to find one or more alternative locations for the Telecommunications Licensee to install its Telecommunications Facilities.

3.2.4. Non-Interference. Telecommunications Licensee in the performance and exercise of any of its authorizations and obligations under this Agreement or a Site-Specific Permit, shall not obstruct or interfere in any manner with the City Ways, public rights-of-way, existing utility easements, private rights-of-way, sanitary sewers, sewer laterals, water mains, storm drains, gas mains, poles, aerial and underground electric and telephone wires, electrical wires, multi-channel video surface facilities and other existing telecommunications facilities, and utility and municipal property facilities without the express written approval of the City or the other owners, including franchisees, of the affected property or properties. Written approvals of the owners or franchisees shall be provided to the City Engineer prior to the commencement of the installation of Telecommunications Facilities on an existing utility pole.

3.2.5. City Facilities. The City reserves to itself the right to attach, install, maintain, replace, and enlarge City Facilities and operate the same from time to time in such manner as will enable it to provide the public health, safety, and welfare. The Telecommunications Licensee acknowledges that certain utilities provided by the City, other units of government and franchisees, are essential public services, including but not limited to: water, sanitary and stormwater services, and utilities necessary to provide heat.

3.2.6. Interruptions. The City shall not be liable to the Telecommunications Licensee or its customers for any interruption of service to the Telecommunications Licensee or interference with the Telecommunications Licensee's facility arising in any manner relating to the City's operations within City Ways or the operations of utilities by the City's franchisees, or arising in any manner out of the condition or character of City Ways or City's.

3.2.7. Immunities. Nothing in this Agreement shall be interpreted to override, compromise or waive any of the City's statutory or common-law privileges or immunities which are all specifically reserved. There are no third-party beneficiaries of this Agreement.

3.3.0. Radio Propagation Studies of RFER. For Wireless Telecommunications Facilities and pole mount attachments the Licensee shall pre-installation file with the City Engineer radio frequency propagation specifications confirming that the Telecommunications Licensee Facilities will comply with applicable CFR radio frequency propagation standards at the time of installation. When the wireless Telecommunications Facilities and/or pole mounted attachments are activated the Licensee, at its expense, shall provide the City with a radio frequency propagation report establishing that the facility is operating within applicable CFR requirements. Any time after the installation, the City Engineer may have a Site-Specific radio frequency propagation study performed to determine if the Telecommunications Licensee's above-ground or pole-mounted facilities are in compliance with applicable CFR radio frequency propagation standards. The Telecommunications Licensee shall be obligated to reimburse the City the cost of the study.

3.4.0. Authorized Use. The Telecommunications Licensee shall use Telecommunications Licensee's Facilities for the sole purpose of providing telecommunications services and may only install, construct, and operate Telecommunications Licensee's Facilities as authorized by the Site-Specific Permit.

3.5.0. **Control of Facilities.** Telecommunications Licensee shall not allow any other Entity to control the Telecommunications Licensee facilities or any portion thereof for any purpose not directly related to the Telecommunications Licensee's provision of telecommunications services. Telecommunications Licensee shall have no authority to assign, sell or transfer a Site-Specific Permit or Location without the written consent of the City Engineer.

3.6.0. **Location of Telecommunications Licensee Facilities.** A granted Site-Specific Permit shall not extend to any pole or conduit to which the attachment and/or installation of the Telecommunications Licensee's Facilities would result in the forfeiture of the rights by the City or the imposition of additional obligations or liabilities upon the City or other joint owners or, other licensees, or franchisees. If the existence of the Telecommunications Licensee's Facilities in or on City Ways would result in a forfeiture, the Licensee at its sole cost and expense shall promptly remove the Telecommunications Licensee's Facilities within ninety (90) days after receipt of a written notice from the City. If the Telecommunications Licensee's Facilities are not timely removed, the City may, at the Telecommunications Licensee's sole cost and expense, remove them or cause their removal without liability on the part of the City and the Telecommunications Licensee shall pay the City, upon demand, the City's actual cost of removal and for any other losses or damages incurred by the City by such undertaking. This obligation shall survive termination or expiration of this Agreement.

3.7.0. **Removal Bond.** Telecommunications Licensee may in its discretion remove its Facilities at its own cost and expense provided that it has given the City Engineer notice of the removal, and posted a bond in an amount deemed reasonable by the City Engineer to guarantee restoration of the City's property upon completion of the removal.

4.0. **Other Rights and Obligations of Telecommunications Licensee.**

4.1. **General.** During any term of this Agreement the Telecommunications Licensee may request, in writing, the City's approval and authorization to add, attach, install, move, repair, replace, or otherwise alter or change the Telecommunications Licensee's Facilities in a manner consistent with this Agreement. All written requests for this purpose shall be filed with the City Engineer will grant a Permit for such work subject to appropriate reasonable conditions.

4.2. **Due Care.** Telecommunications Licensee shall at all times use due care to insure that no damage, beyond reasonable wear and tear, is caused to poles, conduits, or any other portion of the City's or others' property including but not limited to: ground surfaces, landscaping, paved surfaces, swales, sewer drainage features, fibers, wires, cables, poles and/or conduits lawfully located on or about Poles, or other physical structures which the Telecommunications Licensee intends to attach and/or install Telecommunications Licensee's Facilities. Any damage which is caused by the Telecommunications Licensee shall be reported to the affected party in writing within forty-eight (48) hours of the damage. Any Telecommunications Licensee causing the damage shall reimburse the other party upon demand for any damage caused by its employees, contractors, subcontractors, agents or representatives. The Telecommunications Licensee shall be fully liable for the acts or omissions of its subcontractors, agents and employees.

4.3. Identification of Facilities. Telecommunications Licensee shall identify its Telecommunications Facilities, including, without limitation, its fibers, wires, and cables and wireless facilities with appropriate durable visible identification tags that describe the Telecommunications Licensee's name, number, color, identification, code, size, and manufacture of Telecommunications Licensee's Facilities. Telecommunications Licensee shall consult with the City Engineer to make certain that such identification tags are specific to the Telecommunications Licensee so as not to be confused with other Entities lawfully within the area of Telecommunications Licensee's Facilities. Upon a change in ownership or control of Telecommunications Facilities, the new Entity shall provide updated identification as required by this section within fourteen (14) days.

4.4. Routine Work. Except in emergencies requiring restoration within twenty-four (24) hours of loss of function, the Telecommunications Licensee's Facilities, the Telecommunications Licensee shall give not less than ten (10) business days' written notice to the City Engineer whenever the Telecommunications Licensee intends to perform any work on or about the Telecommunications Licensee's Facilities. The City Engineer's permission to perform the work shall not be unreasonably withheld.

4.5. Graffiti Abatement. As soon as practical, but not later than fourteen (14) days from the date Licensee receives notice thereof, Licensee shall remove all graffiti on any of its Telecommunications Facilities or Licensee Poles located in the City Way. The foregoing shall not relieve the Licensee from complying with any City graffiti or visual blight ordinance or regulation.

5.0 Specific Location Permit Applications.

5.1 Application Requirements. The Telecommunications Licensee shall complete and file a Specific-Site Permit application to request access to any use of City Ways and any other necessary authorizations or approvals. The application shall be submitted with an application fee and sufficient information that in the City Engineer's opinion will allow him to determine whether the Permit should be granted or denied. The City Engineer may request additional detail if the information provided in the application estimate is inadequate. The City will use reasonable efforts to process and accept or reject the application within a reasonable period of time. Any rejection shall be accompanied by a written explanation detailing the reasons why the Permit has been denied. If the Permit is granted, the City Engineer shall require reimbursement to the City by the Telecommunications Licensee of any actual out-of-pocket costs and fees incurred by the City for independent and outside consultants used by the City to evaluate the application prior to the issuance of the Permit.

5.2. Fees. Any Entity occupying a City Way with Telecommunications Facilities shall not pay fees to the City for this Master License Agreement, or for Site-Specific Permits, so long as the Entity is a retailer of Telecommunications Services paying, for the benefit of the City, the tax imposed by the Simplified Municipal Communications Tax Act (35 ILCS 636/5-1 et seq. (hereinafter "SMCT").

Any Entity occupying a City Way with Telecommunications Facilities which does not pay the SMCT, shall pay those Fees charged by the City for the Application and occupancy of the Right-of-Way as determined by the City Engineer based on the Fee schedule set forth in Appendix B. The Fee schedule may be revised by the City Engineer without City Council approval on an annual basis to reflect existing market conditions and Permit-related increases in the City's overhead. The City Engineer shall base the Fees on the actual, reasonable out-of-pocket costs incurred by the City to process Site-Specific Permits and manage Telecommunications Facilities once installed. Telecommunications Licensees, not paying the SMCT for the benefit of the City, shall pay for the occupation of City Ways in the full amount for the initial term of the Agreement. If the Fee for management of the City Way after the installation is amended pursuant to this section by the City Engineer, the Telecommunications Licensee shall pay any additional sums to the City within thirty (30) days of invoice. If an extended term occurs, as allowed by Section 2.2.1 of this Agreement, the full amount for the extended term shall be paid no later than the date upon which the extended term commences.

Any reasonable out-of-pocket costs incurred by the City in consequence of its need to retain outside consultants (such as a structural engineer, etc.) to evaluate a Licensee's activities in the Right-of-Way shall be reimbursed to the City by the Licensee.

5.3 Simplified Municipal Telecommunications Tax. If the Licensee becomes a retailer of telecommunications services in the City by transmitting, supplying, or furnishing telecommunications, including without limitation internet services, data services, local telephone services, or long distance services, as contemplated under the Simplified Municipal Telecommunications Tax Act (35 ILCS 636/5-1 *et seq.*) as amended from time to time, the Licensee shall provide written proof thereof to the City and as soon as practicable thereafter commence collection of the taxes provided for under that Act and any other taxes that it may be required by law to collect.

5.4. First Come, First Served. Site-Specific Permit applications will be processed on a first come, first served basis. The City Engineer's office shall time notate Site-Specific Permit applications on the date of their arrival and, in the case of applications received on the same date, by post mark or earlier time stamp. First come, first served shall mean that the first filed application shall be processed first. If a first processed application is denied the City Engineer shall give the first processed application five (5) business days to correct any correctable issues in the application. If the issues are not corrected within the five (5) days the City Engineer shall move to the next filed application which will then be considered first processed application.

5.5. Pole Attachment License Applications. No more than five (5) pole attachment applications shall be on file by a single Telecommunications Licensee within any forty-five (45) day period unless the City Engineer has failed to grant or deny a Licensee's pole attachment applications in the prior sixty (60) days.

5.6. Failure to Pay. Telecommunications Licensee's failure to pay any costs or fees under this Agreement shall constitute a material default. Telecommunications Licensee's obligation to pay all costs, fees, and right-of-way fees shall survive the expiration or earlier

termination of this Agreement. If a failure to pay has not been cured within thirty (30) days of the due date, the Telecommunications Licensee shall remove Telecommunications Licensee's Facilities from the City Way within the following thirty (30) days. Telecommunications Licensee's failure to remove within the time required will authorize the City to remove the Telecommunications Licensee's Facilities at Telecommunications Licensee's cost and the City shall have no obligation to protect, store, recycle, or otherwise conserve the removed facilities. The City shall have no obligation to pay or reimburse the Telecommunications Licensee for any Telecommunications Licensee Facility removed by the City because of Telecommunications Licensee's default. Any monies secured by the City as a result of Telecommunications Licensee's default may be applied by the City to reimburse its removal costs.

6.0. Installation and Replacement of Telecommunications Licensee Facilities.

6.1. Co-Location. Licensee shall exercise all reasonable efforts to locate its Telecommunications Facilities on or within existing structures or Poles.

6.2. New Licensee Pole Requirements. Licensee shall not install new Licensee Poles in a City Way unless Licensee demonstrates that all of the following criteria are satisfied: (1) Licensee certifies that a new Licensee Pole and Telecommunications Facilities in the City Way are necessary to fill a coverage or capacity gap in Telecommunications Services, (2) there are no other existing structures in the City Way or buildings near the City Way that are available and capable of supporting the Licensee's Telecommunications Facilities.

- 6.2.1. If there is a City or private building in the area of the requested Licensed Location that is available (as solely determined by the City) and capable of supporting Licensee's Telecommunications Facilities, Licensee shall use the City building instead of installing a new Licensee Pole. The installation, if any, of Licensee Poles or Telecommunications Facilities on a City building, shall be subject to a duly authorized contract executed between Licensee and the City.
- 6.2.2. Licensee shall not install wooden poles, unless the poles are consistent with the design of other poles in the surrounding area.

6.3. Lack of Space. Unless otherwise provided by law the City reserves the right to refuse to approve or authorize the Site-Specific Permit application when it determines that space in an available City Way is inadequate to accommodate the Telecommunications Licensee's Facilities. The City, in its sole discretion, may rearrange or replace existing utilities or Facilities to accommodate the Telecommunications Licensee's Facilities at the Telecommunications Licensee's sole cost and expense if the Telecommunications Licensee is willing to do so.

6.4. Licensee Cooperation. The Telecommunications Licensee shall fully cooperate with the City, its franchisees, or any prior Telecommunications Licensees occupying the City Way during the installation and operation of its facilities so as to minimize conflicts, avoid damage, and threats to the public property, health, safety and welfare. The Telecommunications

Licensee shall not trim or cut trees, shrubbery or other vegetation without authorization from the City Engineer.

6.5. Relocation. Whenever the City deems it necessary to remove or relocate the Telecommunications Licensee's Facilities in the exercise of its governmental proprietary rights and powers, the City will issue timely notice to the Telecommunications Licensee to Permit the Telecommunications Licensee to secure the necessary approvals or authorizations before the removal or relocation must commence. Within reasonable periods of time established by the City the Telecommunications Licensee at its sole cost and expense, the Telecommunications Licensee shall construct, install, maintain, remove, and relocate the Telecommunications Licensee Facilities in a safe manner and so as to not physically or electronically interfere with the City's facilities or franchisee's facilities within the City Way.

6.6. Undergrounding. Where existing utilities within a City Way are undergrounded, the Telecommunications Licensee shall underground its facilities or shall have the option to move their facilities to another location pursuant to the same Permit requirements set forth in this Agreement.

6.7. No proration. No proration or refund of any Permit application fee, license fee, or independent contractor costs will be provided after a review of the Permit application or where the City has commenced a review. There shall also be no proration or refund of any use, costs, or fees based upon removal on a permanent basis unless that removal is based solely upon the City's direction to remove with no relocation site being available for the Telecommunications Licensee's Facilities within the City.

6.8. Inspection. The City shall have the right to inspect any work related to the Telecommunications Licensee's Facilities as it deems appropriate. The Telecommunications Licensee shall reimburse the City for the cost of such inspections at the rate per worker, per hour, then in effect: except nothing shall be construed to obligate the Telecommunications Licensee to pay for inspections by the City made in the ordinary course of the City's business.

6.9. Temporary Removal of Facilities. Telecommunications Licensee shall move or transfer or cause removal or transfer of Telecommunications Licensee's Facilities on a temporary, not permanent basis, whenever the City deems it necessary in conformance with the City's proprietary rights or the public health, safety, and welfare. Except as otherwise required by the City, in cases of emergency, the Telecommunications Licensee shall move or transfer or cause the temporary removal or transfer of the Telecommunications Licensee's Facilities in a workmanlike manner.

6.10. Unauthorized Placement of Telecommunications Licensee's Facilities. If the Telecommunications Licensee installs facilities within a City Way without a Site-Specific Permit the Telecommunications Licensee agrees to a penalty payable to the City in the sum of \$10,000.00 per month due on the first (1st) day of each month regardless of the amount of time the Telecommunications Licensee's Facilities remain in the City Way during that month until removed or permitted. Payment of the penalty shall not authorize the presence of the Telecommunications Licensee's Facilities in the specific site without a Site-Specific Permit. No

action or inaction by the City with respect to unauthorized use of any City Way shall be deemed to be a ratification of an unauthorized use or waiver of any provision of this Agreement

7.0 **Indemnity, Waiver, Risk of Loss.**

7.1. **Telecommunications Licensee Indemnification.** The Telecommunications Licensee on behalf of itself, its contractors, employees, successors, and representatives hereby agrees to defend, hold harmless, and indemnify the City in full conformance with subsections (a) and (b) of Section 58-232 "Indemnification" of Chapter 58 "Streets, Sidewalks and other Public Places" of the Wheaton City Code.

7.2. **Waiver.** The waiver by a party of any breach or default or violation of any provision, by any other party, shall not be deemed to be a waiver or continuing waiver by that party of any subsequent breach or default or violation of the same or any other provision.

7.3. **Risk of Loss.** The Telecommunications Licensee shall assume all responsibility for promptly reimbursing the City, or its franchisees, for any of their losses or expenses associated with damages caused directly or indirectly by the Telecommunications Licensee, its employees, agents and/or contractors or subcontractors in the City Way, including without limitation to any poles or conduits, sewers, gas or electric lines, or poles caused by the installation, presence, operation, maintenance or repair of the Telecommunications Licensee's Facilities. The Telecommunications Licensee shall provide immediate notification to the affected party upon the occurrence of any such damage.

8.0. **Insurance.**

8.1. Except as otherwise required by the City Engineer, the Telecommunications Licensee and the Telecommunications Licensee's contractor shall purchase and maintain, during the term of this Agreement, insurance coverage, which will satisfactorily insure the Telecommunications Licensee and, where appropriate, the City against claims and liabilities which may arise out of the use of the license area. Such insurance shall be issued by companies licensed to do business in the State of Illinois and approved by the City. The insurance coverage shall include the following:

- (A) Commercial general liability insurance with limits not less than:
 - (1) \$5,000,000.00 for bodily injury or death to each Entity;
 - (2) \$5,000,000.00 for property damage resulting from any one accident; and
 - (3) \$5,000,000.00 for all other types of liability.
- (B) Automobile liability for owned, non-owned and hired vehicles with a limit of \$3,000,000.00 for each Entity and \$3,000,000.00 for each accident.

- (C) Worker's compensation within statutory limits and employer's liability insurance with limits of not less than \$500,000.00.
- (D) Comprehensive form premises-operations, explosions and collapse hazard, underground hazard and products completed hazard with limits of not less than \$3,000,000.00.
- (E) The liability insurance policies required by this section shall be maintained by the Licensee throughout the terms of the license, and such other period of time during which the Licensee is operating without a license hereunder, or is engaged in the removal of its Telecommunications Facilities. Each such certificate of insurance and insurance policy shall contain the following endorsement:

"It is hereby understood and agreed that this policy may not be cancelled nor the intention not to renew be stated until thirty (30) days after receipt by the City of a written notice addressed to the City Engineer of such intent to cancel or not to renew."

- (F) In no event later than thirty (30) days prior to such cancellation, the Licensee shall obtain and furnish to the City replacement insurance policies meeting the requirements of this section.
- (G) After the first three years of the term of this license Agreement, the City Attorney, or City risk manager, may require an increase in the minimum insurance coverage required by this section based on prevailing market trends. Licensee agrees to provide the additional coverage within sixty (60) days of the City's written request.

8.2. Additional Insurance Requirements. Prior to commencing work, the Telecommunications Licensee shall furnish the City with certificates of insurance consistent with the foregoing. Claims-made policies are not acceptable. If a general contractor is posting the insurance, as co-insureds, excluding the workmen's compensation coverage, the policies of insurance shall name the City and the Telecommunications Licensee. Neither the Telecommunications Licensee, or its contractor or sub-contractor, shall enter any City Way until evidence of all required insurance has been received and approved by the City.

8.3. Primary Insurance. Telecommunications Licensee's required insurance shall be primary with respect to any other valid or collectible insurance that the City may possess, including any City self-insured retentions and any insurance that the City does possess shall not be required to contribute to the Licensee's insurance.

8.4. Occurrence-Based Insurance. All insurance policies shall be occurrence based. Any insurance provider of the Telecommunications Licensee shall be admitted and authorized to do business in the State of Illinois and shall be rated at least A-: VII in Best's Key Rating Guide. Insurance certificates issued by non-admitted insurance companies do not qualify. If occurrence

based coverage is not available from a carrier admitted to do business in Illinois a non-admitted carrier may be acceptable subject to the reasonable approval of the City Attorney or City risk manager.

8.5. Retention of Deductibles. Any and all self-insured retention or deductibles shall be stated on certificates of insurance provided to the City.

8.6. Breach. In the event that the Telecommunications Licensee, or its contractor, breaches any provision contained in this Section 8, the City may immediately terminate this Master License Agreement or a Site-Specific Permit, as the City determines in its discretion, by serving written notice as provided for in Section 12.19. In this circumstance, all work at all Site-Specific Locations, except protection for property and persons, shall stop until the Telecommunications Licensee's insurance obligations are in conformance with this Section 8. A waiver by the City of any breach of one or more of the terms of this Agreement shall not constitute a waiver of any subsequent or other breach of the same or other term, nor shall the failure on the part of the City to require exact, full, and complete compliance with the terms contained herein be construed as changing the terms of this Agreement or as stopping the City from enforcing full compliance with the provisions herein. No delay, failure, or omission of the City to exercise any right, power, privilege, or option arising from any breach shall impair any right, power, privilege, or option, or be construed as a waiver or acquiescence of such breach or as a relinquishment of any right. No right, power, privilege, or option of the City shall be construed as being exhausted by the exercise thereof in one or more of the instances. The rights, powers, privileges, and options given to the City under this Agreement and by law shall be cumulative.

9.0. Restoration Bonds.

9.1 Telecommunications Licensee or its contractor shall provide a restoration bond in the form of surety, or a certified or cashier's check made payable to the City of Wheaton, or Cash in an amount reasonably determined by the City's Director of Engineering as necessary to complete full and adequate restoration of any City Way. Such surety or fund shall be released or refunded without interest upon satisfactory restoration or repair of all affected areas as accepted by the City Engineer.

9.2. **Failure to Restore.** In the event that the Telecommunications Licensee fails to properly restore the license area or repair any damage caused to areas within or outside the boundaries of the City Way within twenty-one (21) days of the effective date of the written notice from the City demanding the repair, the City shall have the right to take such action as it deems necessary to perform the restoration work or repair the damage, including the authority to engage the services of an independent contractor and to utilize the restoration bond deposited with the City. If the costs and expenses incurred by the City in performing the restoration or repair work exceeds the amount of the restoration bond deposited with the City the Telecommunications Licensee shall be responsible for reimbursing the City for the additional costs and expenses in excess of the amount deposited within five (5) days of service of the City's written demand of service.

10.0. **Representations and Warranties.**

10.1. **Representations and Warranties of the Parties.** As of the Effective Date, each Party represents and warrants to the other Party that:

- a. It is duly organized, validly existing, and in good standing under the laws of the jurisdiction of its formation;
- b. The execution, delivery, and performance of this Agreement and its exhibits are within its powers, have been duly authorized by all legally necessary actions, and do not violate any of its governing documents, any contracts with any joint owners to which it is a party, or any law;
- c. This Agreement and its exhibits and any other document executed and/or delivered in accordance with this Agreement constitute a legally valid and binding obligation, enforceable against it in accordance with its covenants, terms, conditions, and provisions;
- d. It has not filed and it is not now contemplating the filing for bankruptcy protection and, to its knowledge, no action is threatened against it which would result in it being or becoming bankrupt;
- e. There is not, to its knowledge, pending or threatened against it or any of its affiliates, any legal or administrative proceedings that could materially and adversely affect its ability to perform its obligations under this Agreement; and
- f. No “event of default” or potential “event of default” with respect to it has occurred or is continuing and no such event or circumstance would occur as a result of its entering into or performing its obligations under this Agreement.

10.2 **Representations and Warranties of the Telecommunications Licensee.** The Telecommunications Licensee represents and warrants to the City that:

- a. The Telecommunications Licensee has all approvals, authorizations, certifications, licenses, and franchises required by the State of Illinois, the FCC and/or any other agency to provide the Communications Service; and
- b. The Telecommunications Licensee is not aware of any facts or circumstances that would call into doubt the continuing validity of any such approvals, authorizations, certifications, licenses, or franchises; and
- c. There is not pending or, to the Telecommunications Licensee’s knowledge, threatened against the Telecommunications Licensee or its parent corporation or any of its subsidiaries or affiliates, any legal or administrative proceedings that could materially and adversely affect the validity of such licenses, authorizations, or franchises; and

d. All Work to be performed by the Telecommunications Licensee pursuant to this Agreement will be (i) performed in a good and workmanlike manner, consistent with any Permit specifications, manufacturer's specifications, prevailing industry standards, applicable Laws, and the provisions of this Master License Agreement, and (ii) that it will be free from defects.

11.0. **Dispute Resolution.**

11.1. **No Bar to Other Relief.** Nothing contained in this Agreement will prevent or otherwise restrict either Party from pursuing its rights at law or in equity, including injunctive relief and specific performance, in the event of a default and a material breach by the other Party.

11.2. **Mediation.** In the event of a Dispute, either Party may, by notice to the other Party (the "Mediation Notice"), request that such Dispute be submitted to non-binding mediation in Wheaton, Illinois, with a mediator acceptable to all Parties.

11.3. **Immediate Relief.** Except for challenges to the validity of this Agreement or portions hereof which are specifically waived and released, nothing in this Agreement shall be deemed or construed to prohibit a Party from obtaining judicial, regulatory, or other relief necessary in order to preserve the status quo or prevent the loss or violation of that Party's rights.

12.0 **Miscellaneous Provisions.**

12.1. **Amendments.** This Agreement may not be amended except pursuant to a written instrument signed by the Parties.

12.2. **Assignment.** This Agreement is personal to only the Telecommunications Licensee and no other Entity. The Telecommunications Licensee may not directly or indirectly assign, transfer, or convey to another Entity this license, or any of the rights and obligations of the Telecommunications Licensee established by this Agreement without written approval of the City. Any assignment or transfer of this Agreement shall be void, and the City may terminate this Agreement if the Telecommunications Licensee attempts to assign or transfer this Agreement without compliance hereof. The preceding sentences of this Section 12.2 notwithstanding, the Telecommunications Licensee may assign or transfer this Agreement to its parent corporation or any subsidiary corporation or affiliate or successor in interest, provided that such parent corporation, subsidiary corporation, affiliate, or successor in interest first agrees, in writing, to be fully bound by this Agreement and the exhibits and to assume all of the Telecommunications Licensee's obligations and liabilities hereunder, whether arising before or after the date of such assignment or transfer. The City Engineer shall be notified of assignment or transfer.

12.3. **Attorneys' Fees.** If there is litigation under this Agreement and the City prevails the City will be entitled to reimbursement of its own costs and expenses including without limitation reasonable attorneys' and expert witness fees.

12.4. **Counterparts.** This Agreement may be executed in any number of counterparts, each of which shall be original, but all of which together shall constitute one and the same instrument.

12.5. **Exhibits.** As of the Effective Date, all exhibits referred to in this Agreement and any addenda, attachments, and schedules which may, from time to time, be referred to and duly executed amendments to this Agreement, are by such reference incorporated in this Agreement and shall be deemed a part hereof as if fully set forth.

12.6. **Governing Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of Illinois without regard to its conflict of laws rules or principles.

12.7. **Headings.** The headings hereof are inserted for convenience of reference only, are not a part hereof, and shall have no effect on the construction or interpretation hereof.

12.8. **Independent Contractor.** Each Party to this Agreement acts as an independent contractor and not as an employee of the other Party. Nothing in this Agreement shall be construed to establish a partnership, joint venture, group, pool, syndicate, or agency relationship between the City and the Telecommunications Licensee.

12.9. **Resolving Conflicting Provisions.** To the extent the provisions and any other authorizations and approvals required to be obtained by the Telecommunications Licensee from the City are in conflict, the provisions of the Agreement, authorizations and approvals which impose(s) the higher or greater legal duty or obligation upon the Telecommunications Licensee shall take precedence.

12.10 **Rules of Construction.** Each Party and its counsel have reviewed this Agreement. Accordingly, the rule of construction to the effect that any ambiguities are to be resolved against the drafting party shall not be employed in the construction and interpretation hereof.

12.11. **Severability.** Except as to 3.2.1, if a court of competent jurisdiction finds or rules that a provision of this Agreement or any amendment thereto is void or unenforceable, the unaffected provisions of this Agreement and any amendments thereto will remain in full force and effect. If, however, Section 3.2.1 is found void or unenforceable, this entire Agreement shall be rendered void except for its indemnification provisions set forth in Section 7.

12.12. **Successors and Assigns.** This Agreement shall be binding upon and inure to the benefit of the successors and permitted assignees of the Parties and approved successors.

12.13. **Time of Action.** For the purposes hereof, the time in which an act is to be performed shall be computed by excluding the first day and including the last. If the time in which an act is to be performed falls on a Saturday, Sunday, or any day observed as an official holiday by the City, the time for performance shall be extended to the following Business Day.

12.14. **Jurisdiction and Venue.** Exclusive jurisdiction and venue for any and all disputes related in any manner to this Agreement, regardless of their basis or nature, shall be in the Eighteenth Judicial Circuit Court, Wheaton, DuPage County, Illinois.

12.15. **Waiver of Lien Rights.** The City waives any lien rights that it may have in the Telecommunications Licensee Facilities, which shall be deemed personal property for purposes of this Agreement regardless of whether or not the same is deemed real property, fixtures, or attachments thereto by law. Subject to and as limited by the provisions, the City grants the Telecommunications Licensee and the Telecommunications Licensee's mortgagee the right to remove or cause the removal of the Licensee Facilities from time to time, whether before or after a default by the Telecommunications Licensee under this Agreement, in the discretion of the Telecommunications Licensee or the Telecommunications Licensee's mortgagee but only to the extent the Telecommunications Licensee posts the Insurance and Restoration Bonds required by Sections 8 and 9 of this Agreement.

12.16. **No Recording.** Telecommunications Licensee shall not record this Agreement or any other document referred to herein without the written consent of the City Manager.

12.18. **Entire Agreement.** This Agreement contains the entire understanding between the Parties with respect to the subject matter herein. There are no representations, warranties, agreements, or understandings (whether oral or written) between the Parties relating to the subject matter hereof which are not fully expressed herein.

12.19. **Notices.** All notices which shall or may be given pursuant to this Agreement shall be given, in writing, and shall be deemed validly given if delivered or sent by certified mail, return receipt requested, or by commercial courier, provided the commercial courier's regular business is delivery service, and addressed, as follows:

CITY: City Manager
 City of Wheaton
 303 W. Wesley Street
 Wheaton, Illinois 60187

Copy to: City of Wheaton Attorney

Walsh, Knippen, Pollock & Cetina, Chartered
2150 Manchester Road, Suite 200
Wheaton, Illinois 60187

Any notice to be sent to the City Manager or City Attorney shall be sent to the same address referred to above.

TELECOMMUNICATIONS LICENSEE: (insert)

14.0. Execution.

14.1. This Agreement may be executed in Counterpart.

Telecommunications Licensee

Date

City of Wheaton

Date

