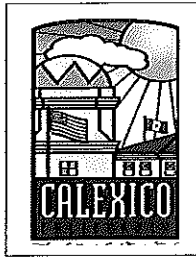


**AGENDA
ITEM
20**



AGENDA STAFF REPORT

DATE: June 23, 2021

TO: Mayor and City Council

APPROVED BY: Miguel Figueroa, City Manager *MK*

PREPARED BY: Liliana Falomir, Public Works Manager – Administrative *Liliana Falomir*

SUBJECT: Authorize the City Manager to Sign a Municipal Facilities License Agreement (“MLA”) between the City of Calexico and AT&T for the Installation of Small Cell Facilities on Municipal Facilities

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Recommendation:

Authorize the City Manager to Sign a Municipal Facilities License Agreement (“MLA”) between the City of Calexico and AT&T for the installation of small cell antennas to City-owned street light poles and other poles in the Public Right-of-Way.

Background:

In recent years, telecommunications companies increasingly seek to install small wireless facilities in the Public Rights-of-Way on utility poles, streetlights, traffic lights and new poles to accommodate the ever-growing demand for wireless services. To facilitate the deployment of small wireless facilities, in 2018, the Federal Communications Commission adopted an order¹ which, among other things, established short “shot clocks” for action on permits and authorizations for placement of small wireless facilities (60 days for small cell installations on existing structures and 90 days for new structures). In addition, although the FCC Small Cell Order did not directly mandate that local governments make their street lights and other poles available for use for small wireless facilities, it did provide that the failure to make this vertical infrastructure available may create an illegal effective prohibition of personal wireless service. The Small Cell Order also held that local governments may only charge cost-based rental rates for use of their poles, and established a “safe harbor” rental amount of \$270 per facility year.

This FCC Small Cell Order went into effect in part on January 14, 2019, and in part on April 15, 2019. On August 12, 2020, a three-judge panel of the Ninth Circuit Court of Appeals upheld significant portions of the Order, including the shot clocks and

¹ Declaratory Ruling and Third Report and Order, 33 FCC Rcd. 9088 (rel. Sep. 27, 2018) (FCC Small Cell Order).

presumptively reasonable fees. On October 22, 2020, the Ninth Circuit Court of Appeals denied a petition for en banc review of the above-referenced panel's decision. A petition seeking review by the U.S. Supreme Court is currently pending.

As the owner of street lights and other poles in the Public Right-Of-Way, and in light of the FCC Small Cell Order, the City is negotiating license agreements with wireless carriers to allow those carriers to attach small wireless facilities to its poles. A wireless carrier will likely apply for multiple locations in the City, and given the short deadlines or (shot clocks) by which federal law requires the City to act on each wireless application, it is not feasible to take a separate license agreement to the City Council for approval for each pole installation. Therefore, staff proposes the approval of the MLA with AT&T which provides the framework process for approving pole locations over time as coverage needs change under the same Agreement. The company will also have to comply with the City's applicable permitting processes and design regulations.

The MLA contains an initial term of 10 years, and then automatic renews for additional ten-year terms (renewal terms.) Under the MLA, AT&T may add, remove, or relocate facilities on City poles by applying to the City for a Supplement for each pole location. The MLA requires insurance, explains the parties' rights and obligations with respect to use and damage to any City infrastructure, and requires AT&T to provide a performance bond.

The MLA also includes an annual rent payment for use of the City poles consistent with the FCC Order, and indexed to inflation (the Municipal Cost Index). Given that the legal validity of this FCC Order is still subject to challenge, the MLA also provides for payment of an alternative rent of \$1,000.00 per year, if the FCC Order is not in effect. This rate reflects the market rate in similar agreements in some other cities in California.

It is also noteworthy that the California legislature is currently considering adoption of two bills that would further limit local authority over wireless siting and mandate that the City make its poles available for wireless facilities, if adopted and signed into law. These are:

- SB 556 which would mandate use of City streetlight and traffic poles for wireless facilities at cost or the FCC Order's \$270 per year rental rate and impose even short timelines for reviewing requests for use of the poles. SB 556 has passed the Senate and is currently in House committee process.
- AB 537 would expand Government Code section 65964.1 to provide a deemed granted remedy if the city fails to make a decision on the application within the FCC shot clock period for all types of wireless applications including small cells.

Discussion & Analysis:

The MLA does not grant present possessory property rights or unfettered access to any specific City-owned property. The MLA does not function as a substitute for any regulatory approvals that would otherwise be required, including, for example, encroachment permits, traffic control permits, and electrical permits. The MLA merely establishes the procedures, terms, and conditions under which AT&T may seek approval to install wireless facilities on individual City-owned streetlights and other poles.

The MLA contains terms and conditions applicable to all wireless facilities on City-owned structures in the Public Rights-of-Way and which:

- Establish an application and review process.
- City retains absolute authority to deny any Application for a facility that would create a hazardous or unsafe condition, or that fails to comply with the FCC's RF emissions standards.
- Set baseline standards for construction, operation and maintenance of AT&T's facilities on City-owned poles to ensure safe operation and consistency with community aesthetics.
- Protect the City's streetscapes by requiring compliance with the City's small cell design standards.
- Protect the City's interests through indemnification requirements and limitations on the City's liability.

Staff recommends that the City Council approves the MLA with AT&T.

Fiscal Impact:

Approval of the MLA will generate revenue for the City for each installation in accordance with federal and state laws. However, due to uncertainty of the timing and quantity of installations, an actual revenue amount cannot be estimated at this time. As part of the annual budget development process, the revenue amount will be estimated based on the terms of the agreements and number of installations completed and permitted.

California Environmental Quality Act:

The authorization of an MLA is not a project within the meaning of Section 15378 of the State of California Environmental Quality Act ("CEQA") Guidelines, because it has no potential for resulting in physical change in the environment, directly or indirectly. This agreement sets forth the legal terms and obligations for use of the City infrastructure in the public right-of-way. The authorization for AT&T to attach antennas to this infrastructure is guided by existing state and federal law and the Calexico Municipal Code. This action does not authorize any specific development or installation on any specific piece of property within the City's boundaries, most of which will be placed on existing infrastructure, and is mostly a means to streamline the contracting process in accordance with federal shot clocks.

Alternatively, even if the authorization to use this agreement is a "project" within the meaning of State CEQA Guidelines section 15378, the action is exempt from CEQA on multiple grounds. First, the action is exempt from CEQA because the City Council's action is covered by the general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment. (State CEQA Guidelines, § 15061(b)(3)). This template agreement creates terms for AT&T should they apply to place facilities in the public right-of-way, often on existing City infrastructure.

Moreover, in the event that the action is interpreted to permit installation of wireless facilities on a particular site, the installation would be exempt from CEQA review in accordance with either State CEQA Guidelines section 15302 (replacement or reconstruction), State CEQA Guidelines section 15303 (new construction or conversion of small structures), and/or State CEQA Guidelines section 15304 (minor alterations to land), as these facilities are allowed under federal and state law, are by their nature smaller when placed in the public right-of-way and subject to various siting and design preferences to prevent aesthetic impact to the extent feasible.

Attachments:

1. Municipal Facilities License Agreement between the City of Calexico and AT&T

MUNICIPAL FACILITY LICENSE AGREEMENT

THIS MUNICIPAL FACILITY LICENSE AGREEMENT (the "Agreement") is dated as of _____, 20__ (the date fully executed by all parties, referred to herein as "Effective Date"), and entered into by and between the City of Calexico, a California municipal corporation (the "Licensor" or the "City"), and New Cingular Wireless PCS, LLC, a Delaware limited liability company ("Licensee"). Licensor and Licensee are referred to herein collectively as the "Parties" or individually as a "Party."

Recitals

A. WHEREAS, the Licensor is the owner of certain Municipal Facilities (as defined below) located in the Rights-of-Way (as defined below) of the City of Calexico ("City");

B. WHEREAS, Licensee is authorized to conduct business as a telephone corporation in the State of California;

C. WHEREAS, Licensee desires to use space on certain of the Licensor's Municipal Facilities in the Rights-of-Way to construct, attach, install, operate, and maintain of its Equipment (as defined below);

D. WHEREAS, Licensor is willing to allow Licensee to use and physically occupy portions of the Municipal Facilities in the Rights-of-Way subject to the terms and conditions of this Agreement.

Agreement

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree to the following covenants, terms, and conditions:

1. DEFINITIONS. The following definitions shall apply generally to the provisions of this Agreement:

1.1 "Equipment" means the equipment cabinets, antennas, utilities, and fiber optic cables, wires, and related equipment, whether referred to individually or collectively, to be installed on a Municipal Facility and operated by Licensee under a particular Supplement.

1.2 "Hazardous Substance" means any substance, chemical or waste that is identified as hazardous or toxic in any applicable federal, state or local law or regulation, including, but not limited to, petroleum products and asbestos.

1.3 "Laws" means any and all applicable federal, state, or local statutes, codes, constitutions, ordinances, resolutions, regulations, judicial decisions, rules, tariffs, administrative orders, court orders, or other requirements of the Licensor or other governmental agency having joint or several jurisdiction over the parties to this Agreement as such laws may be amended from time to time.

1.4 “License Fee” means the compensation paid under any Supplement for use of the Municipal Facilities.

1.5 “Make-Ready Work” means the work required on or in a Municipal Facility to create space for the Equipment, and/or replacing and/or reinforcing the existing Municipal Facility to accommodate Equipment including, but not limited to, rearrangement or transfer of existing Equipment and the facilities of other entities, and Municipal Facility relocation and replacement if applicable.

1.6 “Municipal Facilities” means Licensor-owned structures, objects, and equipment in the ROW, including, but not limited to, street lights, traffic control structures, banners, street furniture, bus stops, billboards, or other poles, lighting fixtures, or electroliers located within the ROW, and may refer to such facilities in the singular or plural, as appropriate to the context in which used. The term includes Replacement Facilities referred to in Section 4.1.3.

1.7 “Person” means and includes any individual, partnership of any kind, corporation, limited liability company, association, joint venture, or other organization, however formed, as well as trustees, heirs, executors, administrators, or assigns, or any combination of such persons.

1.8 “PUC” means the California Public Utilities Commission.

1.9 “Right(s)-of-Way” or “ROW” means the improved or unimproved surface or subsurface of any public street, or similar public way of any nature, dedicated or improved for vehicular, bicycle, and/or pedestrian related use. Right-of-Way includes public streets, roads, lanes, alleys, sidewalks, medians, parkways, public utility easements, and landscaped lots or other way in which a public agency has a right. The Public Right-of-Way does not include private streets.

1.10 “Services” means the transmission and reception of communications signals for the provision of personal wireless services and mobile data services and the installation, construction, modification, maintenance, operation, repair, replacement and upgrade of the Equipment to provide such services.

1.11 “Supplement” shall mean each separate authorization, granted by Licensor to Licensee with regard to a specific Equipment installation, the form of which is attached hereto as Exhibit A, each and every of which shall be subject to the terms and conditions of this Agreement.

1.12 “Transfer” means any transaction in which the rights and/or obligations held by Licensee under this Agreement or a Supplement are transferred, directly or indirectly, in whole or in part to a party other than Licensee.

2. TERM; SUPPLEMENT TERM.

2.1 **Term.** The initial term of this Agreement shall be for a period of ten (10) years (the “Initial Term”), commencing on the Effective Date and ending on the tenth (10th) anniversary thereof, unless sooner terminated as stated herein. Provided that Licensee is not in default of the Agreement or any Supplement following written notice and the expiration of any applicable cure period, this Agreement shall be automatically renewed for successive ten (10) year renewal terms

(each, a “Renewal Term”), unless either party gives the other party written notice of the intent not to renew this Agreement at least six (6) months prior to the expiration of the Initial Term or any Renewal Term, as applicable. The Initial Term and all Renewal Terms shall be collectively referred to herein as the “Term.” Any holding over after the termination or expiration of the Term shall constitute a default by Licensee, notwithstanding that Licensor may elect to accept one or more payments of fees from Licensee after such default occurs.

2.2 Supplement Term. Unless otherwise specified in a Supplement, the initial term for each particular Supplement shall begin on its effective date (“Supplement Effective Date”) and shall end upon the expiration of the Term, unless such individual Supplement is earlier terminated or this Agreement is extended or terminated, as provided for herein (the “Supplement Term”). All of the provisions of this Agreement shall be in effect during the Supplement Term. The expiration or termination of the Agreement shall immediately terminate all Supplements. Any holding over after the expiration of the Supplement Term shall constitute a default by Licensee, notwithstanding that Licensor may elect to accept one or more payments of fees from Licensee after such default occurs.

3. REPRESENTATION CONCERNING SERVICES; NO AUTHORIZATION TO PROVIDE OTHER SERVICES. Licensee represents, warrants, and covenants that its Equipment installed pursuant to this Agreement and each Supplement will be utilized solely for providing the Services, and Licensee is not authorized to and shall not use its Equipment installed on Municipal Facilities to offer or provide any other services not specified herein without Licensor consent. At any time that Licensee ceases to operate as a provider of Services under federal or state law, it shall provide written notice of the same to Licensor within seven (7) days of such cessation, at which time the Licensor shall have the option, in its sole discretion and upon six (6) months’ written notice to Licensee, to terminate this Agreement and to require the removal of Licensee’s Equipment from the ROW and from Municipal Facilities, including the cost of any site remediation, at no cost to the Licensor, without any liability to Licensee related directly or indirectly to such termination.

4. SCOPE OF AGREEMENT. Licensee may only use Municipal Facilities pursuant to an approved Supplement. Any and all rights expressly granted to Licensee under this Agreement shall be exercised at Licensee’s sole cost and expense, and shall be subject to the restrictions set forth herein.

4.1 Attachment to Municipal Facilities. Subject to the conditions herein, Licensor hereby authorizes and permits Licensee to locate, place, attach, install, operate, maintain, control, remove, reattach, reinstall, relocate, and replace Equipment on identified Municipal Facilities located in the ROW for the purpose of providing Services.

4.1.1 Licensee will submit to the authorized representative of the Licensor an application substantially in the form of Exhibit B (“Application”) hereto including a proposed design for any proposed Equipment installations that identifies both the Equipment and the Municipal Facilities Licensee proposes to use. One Application is required per Municipal Facility.

4.1.2 Licensor may approve, approve with conditions, or disapprove an Application in its sole discretion; provided however, that Licensor shall not unreasonably delay its decision. Any approved Equipment shall be included as part of the applicable Supplement.

413 If Licensee submits an Application to use a Municipal Facility that is structurally inadequate to accommodate its proposed Equipment, Licensor may permit the replacement of the Municipal Facility (a "Replacement Facility") with one that is acceptable to and approved by the Licensor as part of the applicable Supplement. Any Replacement Facility shall be installed and maintained in accordance with Section 6 of this Agreement.

414 Unmetered electricity where possible. Licensee shall be solely responsible for obtaining and maintaining the provision of electricity to the Equipment, including, but not limited to, making payments to electric utilities. Where commercially feasible and available, Licensee shall secure unmetered electricity services.

42 Additional Authority. This Agreement is not an authorization to use the Right-of-Way. Nothing in this Agreement shall limit in any way, or is a substitute for, Licensee's obligation to obtain any additional required franchises, authorizations, approvals or permits from any City department, board, commission, or other governmental agency that has authority over the Licensee's activities involving use of the Municipal Facilities in the ROW or limit the Licensor's exercise of rights that it may have in connection with the grant or exercise of such franchises, authorizations, approvals or permits, whether or not such activities involve a Service. Without limiting the generality of the foregoing, Licensor believes it may have the right to require a franchise and franchise fees under Cal. Cal. Const. Art. XII, Section 8, or franchise fees under Section 5840(q) of the Digital Infrastructure and Video Competition Act (as codified in Public Utilities Code section 5800 et seq.) ("DIVCA") or federal law, 47 U.S.C. 542, and Licensor does not intend by entering into this Agreement to waive any of those rights or any legal arguments it might make to defend such rights. Licensee by entering into this Agreement does not waive any rights or arguments it might have under state or federal law. The Parties do not intend to resolve those disputes here nor do they intend to create uncertainty about what services can be offered under this Agreement. If Licensor demands a franchise or franchise fees pursuant to DIVCA or other state or federal law, or if there is a change of law or other legal development under which the services being provided by Licensee pursuant to this Agreement are subject to a franchise or franchise fees under DIVCA or other state or federal law, the Parties will meet and confer in good faith for a period not to exceed one hundred and twenty (120) days ("the Negotiation Period") to negotiate terms, including any compensation owed by Licensee to the City under DIVCA or other state or federal law. If the Parties are not able to reach agreement during the Negotiation Period, the parties may exercise any remedies that they may have. However, the Parties agree that in no instance shall Licensor seek to prevent Licensee from providing any such service under this Agreement.

43 No Interference. Licensee acknowledges and agrees that the primary purpose of the Municipal Facilities is to serve the Licensor and the public. In the performance and exercise of its rights and obligations under this Agreement, Licensee shall not interfere in any manner with Licensor's own services or the existence and operation of any and all public and private rights-of-way, sanitary sewers, water mains, storm drains, gas mains, poles, aerial and underground electrical and telephone wires, traffic signals, communication facilities owned by the Licensor, electroliers, cable television, location monitoring services, public safety and other then existing telecommunications equipment, utilities, or municipal property, without the express written approval of the owner or owners of the affected property or properties, except as permitted by applicable laws or this Agreement. If such interference should occur, Licensee shall discontinue using the Equipment, methodology, or technology that causes the interference until such time as Licensee takes corrective measures to eliminate such interference. In the event that such

interference does not cease promptly, Licensee acknowledges that continuing interference may cause irreparable injury and harm, and therefore, in addition to any other remedies, and without limitation of any other remedy, Licensor shall be entitled to seek temporary and permanent injunctions against the breach of this Subsection. Notwithstanding the foregoing, Licensor and Licensee agree to work in good faith with each other and any other affected party to resolve any interference to or by Licensee.

44 Permits; Default. In addition to any other remedies available hereunder, whenever Licensee is in default of this Agreement or an applicable Supplement, after notice and applicable cure periods, Licensor may deny further encroachment, excavation, or similar permits for work in connection with installations under this Agreement until such time as Licensee cures all of its defaults.

45 Compliance with Laws. Licensee shall comply with all Laws in the exercise and performance of its rights and obligations under this Agreement.

46 Non-Exclusive Use Rights. Notwithstanding any other provision of this Agreement, any and all rights expressly or impliedly granted to Licensee under this Agreement shall be non-exclusive, and shall be subject and subordinate to (1) the continuing right of the Licensor to use, and to allow any other person or persons to use, any and all parts of the ROW or Municipal Facilities, exclusively or concurrently with any other person or persons, and (2) the public easement for streets and any and all other deeds, easements, dedications, conditions, covenants, restrictions, encumbrances, and claims of title (collectively, "Encumbrances") which may affect the ROW or Municipal Facilities now or at any time during the term of this Agreement, including, without limitation any Encumbrances granted, created, or allowed by the Licensor at any time.

5. COMPENSATION. Licensee shall be solely responsible for the payment of all fees in connection with Licensee's performance under this Agreement, including, but not limited to, those set forth below.

5.1 One Time Fees. The Licensor activities described in Section 5.1 are "One-Time Fees" that reimburses the City for its costs associated with reviewing and approving applications to attach Equipment on identified Municipal Facilities located in the ROW, this Agreement and Supplements to this Agreement for additional locations. The Licensor shall track its time spent reviewing the Licensee submittals for Licenses, Supplements and associated permit activities described below, and charge its hourly rate for any time spent above the amount to be recovered by any established fee. The fee amounts shall be assessed and administered consistent with standard Licensor practice and fee schedule(s) as currently adopted and subsequently amended or replaced, in a manner consistent with applicable law.

5.1.1 Permit Fees. Licensee shall be responsible for paying all costs associated with City review, processing and inspection as part of all permit applications filed for the installation, modification, maintenance and removal of Equipment on identified Municipal Facilities located in the ROW.

5.1.2 License and Supplement Fee. Licensee shall be responsible for paying all costs associated with City review and processing of this License and any Supplements thereto (or any amendment thereto) and/or the other administrative review, consultation, and inspection described in this License, including review of Company submittals.

5.2 License Fees.

521 Rent. Licensee acknowledges that the FCC has adopted a Declaratory Ruling (FCC 18-133) that relates to the rent which went into effect on January 14, 2019 but that Declaratory Ruling is currently the subject of litigation. Paragraphs 5.2.2, 5.2.3 and 5.2.4 govern the payment of rent and how it may be impacted by the Declaratory Ruling and the resolution of related litigation during the Term and any renewal terms.

522 During any period in which the FCC Declaratory Ruling (FCC 18-133) is in effect and during any period in which the Alternate Rent provisions in paragraph 5.2.3 are not applicable, the Licensee shall pay Rent as described in this paragraph. Licensee shall pay to the Licensor the base amount of two hundred and seventy dollars (\$270.00) per year for each location covered by a Supplement. The base amount under all Supplements shall be subject to an annual adjustment based on the Municipal Cost Index, "MCI," applied on each anniversary of the Effective Date published by the *American City and County*. In the event that the *American City and County* publication ceases to publish the MCI, the City Manager shall designate an alternative publication. Any new Supplements entered into during a given year shall commence at the rent, as adjusted by this Section to reflect the then-current rate (the "Rent"). Rent for the first year of a Supplement for each location shall be pro-rated based on the number of days covered from the Supplement Effective Date to the next anniversary of the Effective Date of this Agreement. There shall be no refunds of Rent paid due to the termination or expiration of the Agreement or any Supplement for any reason.

523 Alternate Rent. In the event the relevant provisions of the FCC Declaratory Ruling cease to be effective, (for example, because they are stayed after having gone into effect, or they are vacated or invalidated and have not been replaced by the FCC with an alternative provision setting a specific amount as Rent), the Licensee shall automatically and immediately be obligated to pay Alternate Rent as described in this paragraph and paragraph 5.2.3, if applicable. For each location covered by a Supplement, Licensee shall pay to the Licensor an alternate rent in the base amount of one thousand dollars (\$1,000) per year. The base amount under all Supplements shall be subject to an annual adjustment based on the Municipal Cost Index, "MCI," applied on each anniversary of the Effective Date published by the *American City and County*. In the event that the *American City and County* publication ceases to publish the MCI, the City Manager shall designate an alternative publication applied on each anniversary of the Effective Date. ("Alternate Rent"). The Alternate Rent for the first year of a Supplement for each individual location shall be pro-rated based on the number of days covered from the Supplement Effective Date to the next anniversary of the Effective Date of this Agreement. There shall be no refunds of the Alternate Rent paid due to the termination or expiration of the Agreement or any Supplement for any reason.

524 The Licensor agrees that irrespective of whether the relevant provisions of the FCC Declaratory Ruling (FCC 18-133) cease to be effective, no Alternate Rent shall be due for any periods during which the relevant provisions of the FCC Declaratory Ruling were in effect. However, if Licensee has paid Rent pursuant to the provisions of Section 5.2.2 above for a year, and the relevant provisions of the FCC Declaratory Ruling subsequently cease to be effective during the same year, the Licensee shall pay the difference between the Rent and the Alternate Rent for the period from the date the relevant provisions of the FCC Declaratory Ruling ceased to be effective, until the next anniversary of the Effective Date of the Agreement ("Rent Adjustment"). Such Rent Adjustment shall be paid to Licensor along with the next License Fee payment.

525 Receipt of any Rent or Alternate Rent by the Licensor, with knowledge of any breach of this License by Licensee, or of any default on the part of Licensee in the observance

or performance of any of the conditions or covenants of this License, shall not be deemed a waiver of any provision of this License.

5.3 Payment.

5.3.1 Licensee shall make the first payment of the License Fee under any Supplement within forty-five (45) days of the Supplement Effective Date (as defined therein). The amount of the first payment of the License Fee for any Supplement shall be prorated to cover the period from the Supplement Effective Date of the applicable Supplement to the next anniversary of the Effective Date of this Agreement. Thereafter, the License Fee shall be paid in advance for each Municipal Facility used on or before each anniversary of the Effective Date. Acceptance by Licensor of any payment of the License Fee shall not be deemed a waiver by Licensor of any breach of this Agreement occurring prior thereto, nor will the acceptance by Licensor of any such payment preclude Licensor from later establishing that a greater amount was actually due or from collecting any balance that is due. As a prerequisite to the payment of License Fee, Licensor hereby agrees to provide to Licensee certain documentation (the "License Documentation") evidencing Licensor's interest in, and right to receive payments under, this Agreement, including without limitation: (i) a complete and fully executed Internal Revenue Service Form W-9, or equivalent, in a form acceptable to Licensee, for any party to whom License Fee payments are to be made pursuant to this Agreement; and (ii) other documentation requested by Licensee in Licensee's reasonable discretion. From time to time during the Term of this Agreement and within thirty (30) days of a written request from Licensee, Licensor agrees to provide updated License Documentation in a form reasonably acceptable to Licensee.

5.3.2 The License Fee shall be paid by check made payable to the City and mailed or delivered to the Finance Department, at the address provided for in Section 10 below. The place and time of payment may be changed at any time by Licensor upon thirty (30) days' written notice to Licensee. Mailed payments shall be deemed paid upon the date such payment is officially postmarked by the United States Postal Service. If postmarks are illegible to read, the payment shall be deemed paid upon actual receipt. Licensee assumes all risk of loss and responsibility for late payment charges if payments are made by mail. Notwithstanding the foregoing, upon agreement of the parties, Licensee may pay the License Fee by electronic funds transfer, and if agreed, the Licensor will provide to Licensee bank routing information for such purpose upon request of Licensee.

5.4 Delinquent Payment. A ten percent (10%) late fee shall be added to the License Fee if not received by Licensor within ten (10) calendar days after the due date. In addition, all unpaid fees shall accrue interest on the amount due at the rate of ten percent (10%) until paid in full. All late fees and interest payments shall be treated as part of, and subject to the same terms as, the License Fee under this Agreement.

5.5 Additional Remedies. The late fee set forth in Section 5.4 above is not exclusive, and does not preclude the Licensor from pursuing any other or additional remedies in the event that payments become overdue by more than thirty 30 days.

6. CONSTRUCTION. Licensee shall comply with all applicable federal, state, and local codes related to the construction, installation, operation, maintenance, and control of Licensee's Equipment installed on Municipal Facilities. Licensee shall not attach, install, maintain, or operate any Equipment on Municipal Facilities without the prior written approval of an authorized representative of the Licensor for each location as evidenced in a signed Supplement. Licensee

shall keep the Municipal Facilities free and clear from any liens arising out of any work performed, material furnished, or obligations incurred by or for Licensee.

6.1 Installation and Operation. On an annual basis, Licensee shall promptly furnish to Licensor a current list and map that identifies the exact location of the Equipment in or on the Municipal Facility. That information must be provided in a format that is compatible with Licensor's information technology, including but not limited to ESRI compatible GIS shapefiles, which Licensor shall provide to Licensee upon request.

6.2 Design Standards. Licensee shall design, construct, and install the Equipment and any Replacement Facility in compliance with the design standards set forth at http://www.calexico.ca.gov/vertical/sites/%7B342ED706-1EBB-4FDE-BD1E-9543BAD44C09%7D/uploads/Information_Bulletin_2019-003.pdf or in any applicable successor provision(s) or standards, and the City permit and conditions of approval. Licensor, in its sole discretion, may from time to time update the design standards. All future Supplements and modifications to existing Equipment shall be subject to then-current design standards. By entering into this Agreement, Licensee agrees that the design standards required by this Section are technically feasible and reasonably directed at accomplishing the aesthetic goals of Licensor.

6.3 Obtaining Required Permits. Licensee acknowledges that in addition to a signed Supplement, each installation of Equipment and maintenance thereof shall also be subject to then-current City permitting requirements as set out in the City's Municipal Code. Licensee agrees to comply with the current applicable ordinances regarding such installations and maintenance as well as any future regulations that may be adopted by the City related to such installations and maintenance. Licensee shall apply for the appropriate permits and pay any standard and customary permit fees.

6.4 Relocation and Displacement of Equipment.

6.41 This Agreement creates no right for Licensee to receive any relocation assistance or payment for any reason under the Relocation Assistance Act, the Uniform Relocation Assistance Act, or under any existing or future law upon any termination of tenancy.

6.42 Licensee understands and acknowledges that Licensor may require Licensee to relocate one or more of its Equipment installations. Licensee shall at Licensor's direction and upon ninety (90) days' prior written notice to Licensee, relocate such Equipment at Licensee's sole cost and expense whenever Licensor reasonably determines that the relocation is needed for any of the following purposes: (a) if required for the construction, modification, completion, repair, relocation, or maintenance of a Licensor or other public agency project; (b) because the Equipment is interfering with or adversely affecting proper operation of Licensor-owned Municipal Facilities; or (c) to protect or preserve the public health or safety, including, but not limited to, the safe or efficient use of rights-of-way. In any such case, Licensor shall use reasonable efforts to afford Licensee a reasonably equivalent alternate location. If Licensee shall fail to relocate any Equipment as requested by the Licensor within the prescribed time, Licensor shall be entitled to remove or relocate the Equipment at Licensee's sole cost and expense, without further notice to Licensee. Licensee shall pay to the Licensor actual costs and expenses incurred by the Licensor in performing any removal work and any storage of Licensee's property after removal within thirty (30) days of the date of a written demand for this payment from the Licensor.

643 To the extent the Licensor has actual knowledge thereof, the Licensor will attempt promptly to inform Licensee of the displacement or removal of any Municipal Facility on which any Equipment is located.

65 **Relocations at Licensee's Request.** In the event Licensee desires to relocate any Equipment from one Municipal Facility to another, Licensee shall so advise Licensor. Licensor will use reasonable efforts to accommodate Licensee by making another reasonably equivalent Municipal Facility available for use in accordance with and subject to the terms and conditions of this Agreement. Licensor may require Licensee to submit an application and/or enter into a new Supplement for the prospective relocation site. Licensee shall be liable for all costs of relocation, including any costs which Licensor may incur.

66 **Make Ready**

661 Make Ready Work and Costs.

(a) Licensee shall bear responsibility for all Make-Ready Work. If a Person other than Licensee or Licensor would have to rearrange or adjust any of its facilities in order to accommodate new Equipment, Licensee shall be responsible, at Licensee's sole expense, to coordinate such activity. Licensee shall be responsible for directly paying such other Person for its charges for the same. If Licensee is requested by another Person, in comparable circumstances, to relocate or adjust any Equipment to accommodate that Person's facilities, subject to Licensor's written approval of such relocation, Licensee shall reasonably cooperate with such request.

(b) Construction, installation, and operation of the Equipment shall be conditioned on the completion of all Make-Ready Work needed to establish full compliance with NESC, and with Licensor's regulatory rules and engineering standards; provided, however, that Licensee shall not be responsible for any third-party or Licensor costs necessary to correct third party or Licensor attachments that are non-compliant at the time of Licensee's Application.

662 Notification of Completion of Installation. Within twenty (20) business days of completing the installation of Equipment on each Municipal Facility, Licensee shall notify Licensor of such completion.

67 **Replacement Facilities**

671 Ownership of Replacement Facilities Licensor shall own any approved Replacement Facility. Where needed, Licensee shall cooperate with Licensor to transfer ownership and any associated warranties of any Replacement Facility from Licensee to Licensor without charge to Licensor.

672 Replacement Facility Installation Licensee shall be responsible for providing and installing any approved Replacement Facility.

68 **Damage, Maintenance & Repair.**

681 Licensee shall, at its sole cost and expense and to the satisfaction of the Licensor: (a) remove, repair, or replace any of its Equipment that is damaged or becomes detached; and/or (b) repair any damage to ROW, Municipal Facilities, or other property, whether public or private, caused by Licensee, its agents, employees, or contractors in their actions relating to attachment, operation,

repair, or maintenance of Equipment. Licensee shall complete such removal, repair, or replacement within thirty (30) days' of written notice.

682 In the event a Replacement Facility needs to be replaced, repaired, or cleared from the ROW, Licensee shall conduct this work at Licensee's own expense. In this case Licensee will notify Licensor in person at the Development Services Department window at 608 Heber Avenue, Calexico, CA 92231 by phone at 760.768.2105 or by emailing planning@calexico.ca.gov before beginning the work.

683 If Licensee does not remove, repair, replace, or otherwise remediate such damage to its Equipment, a Replacement Facility, or to the ROW, Municipal Facilities or other property as required in this Section 6.8, the Licensor shall have the option to perform or cause to be performed such removal, repair, or replacement on behalf of Licensee and shall charge Licensee for the actual costs incurred by the Licensor. If such damage causes a public health or safety emergency, as reasonably determined by Licensor, Licensor may immediately perform reasonable and necessary repair or removal work on behalf of Licensee and will notify Licensee as soon as practicable; provided, however, that such repair work shall not include any technical work on Licensee's Equipment. Licensor shall have no obligation to maintain or safeguard the Equipment.

684 Upon the receipt of a demand for payment by the Licensor pursuant to this Section 6.8, Licensee shall within thirty (30) days of such receipt reimburse the Licensor for such costs, provided any such demand shall be accompanied by supporting documentation.

685 The terms of this Section 6.8 shall survive the expiration or termination of this Agreement.

6.9 Change in Equipment. If Licensee desires to install Equipment which is different in any material way from the then-existing and approved Equipment, then Licensee shall first obtain the written approval for the use and installation of such Equipment from an authorized representative of the Licensor. Any such approval shall take the form of an amendment to the applicable Supplement. In addition to any other submittal requirements, and if requested by Licensor, Licensee shall provide "load" (structural) calculations for all Equipment changes. In addition to the foregoing, Licensee shall comply with any other applicable City permitting or approval process for the Equipment change. Notwithstanding the foregoing, Licensor's approval for modifications or an amendment to the applicable Supplement shall not be required in connection with routine maintenance or modifications that consist of upgrades or replacement of "like-kind" Equipment which is substantially similar (or smaller in size) in appearance, dimensions, weight, and RF emissions to the then-existing and approved Equipment

6.10 Unauthorized Equipment. If Licensor discovers any Equipment has been installed on Municipal Facilities without authorization pursuant to a Supplement, Licensor may send an invoice to Licensee for a sum equal to four (4) times the then-current License Fee as compensation for the unauthorized attachments, and, within sixty (60) days from the date of such invoice, Licensee shall (i) pay the invoiced amount to Licensor and submit an Application for the unauthorized Equipment, or (ii) produce documentation showing Licensor's prior approval of the Equipment identified in the invoice. If, in accordance with this Section, Licensee fails to pay all fees and submit the Application or submit documentation satisfactorily showing Licensor's prior approval within sixty (60) days of Licensor's invoice, Licensor may remove the unauthorized Equipment at Licensee's expense. If Licensor removes such unauthorized Equipment, such

Equipment shall become the property of Licensor, who shall have sole rights over such Equipment's disposition. Licensor's removal of unauthorized Equipment shall not release Licensee from its obligation to pay those invoiced fees accruing pursuant to this Section.

6.11 Termination of a Supplement.

6.11.1 Licensee shall have the right to terminate any Supplement on thirty (30) days' notice to Licensor. In the event of such termination, removal of Equipment associated with the terminated Supplement shall be governed by Section 6.12 below and Licensor shall retain any License Fee paid, without refund or setoff.

6.11.2 Licensor shall have the right to terminate any Supplement in any of the following circumstances: if Licensor determines the covered Equipment has been inoperative or abandoned for sixty (60) consecutive days; if Licensee's operation under a particular Supplement is deemed by Licensor to endanger or pose a threat to the public health, safety, or welfare or interfere with the normal day-to-day operation of any Licensor department or service; or Licensor is mandated by law, a court order or decision, or the federal, state, or local government to take certain actions that will cause or require the removal of an Equipment. Licensor shall provide written notice to Licensee regarding its intent to terminate the applicable Supplement pursuant to this Section, after which Licensee shall have thirty (30) days to cure. If Licensee does not cure within thirty (30) days following notice, Licensor may then terminate the applicable Supplement upon written notice to Licensee.

6.12 Removal of Equipment. Within thirty (30) days after the expiration or earlier termination of a Supplement, Licensee shall promptly, safely, and carefully remove the Equipment covered by the terminated or expired Supplement from the applicable Municipal Facility and ROW. Within thirty (30) days after the expiration or earlier termination of this Agreement, Licensee shall promptly, safely, and carefully remove all Equipment from all applicable Municipal Facilities and ROW. If Licensee fails to complete removal work pursuant to this Section, then the Licensor, upon written notice to Licensee, shall have the right at the Licensor's sole election, but not the obligation, to perform this removal work and charge Licensee for the actual costs and expenses, including, without limitation, reasonable administrative costs. Licensee shall pay to the Licensor actual costs and expenses incurred by the Licensor in performing any removal work and any storage of Licensee's property after removal within thirty (30) days of the date of a written demand for this payment from the Licensor. After the Licensor receives the reimbursement payment from Licensee for the removal work performed by the Licensor, the Licensor shall promptly make available to Licensee the property belonging to Licensee and removed by the Licensor pursuant to this Section at no additional liability to the Licensor. If the Licensor does not receive reimbursement payment from Licensee within such thirty (30) days, or if Licensor does not elect to remove such items at the Licensor's cost after Licensee's failure to so remove pursuant to this Section, or if Licensee does not remove Licensee's property within thirty (30) days of such property having been made available by the Licensor after Licensee's payment of removal reimbursement as described above, any items of Licensee's property remaining on or about the ROW, Municipal Facilities, or stored by the Licensor after the Licensor's removal thereof may, at the Licensor's option, be deemed abandoned and the Licensor may dispose of such property in any manner by allowed for by Law. Alternatively, the Licensor may elect to take title to the abandoned property, and Licensee shall submit to the Licensor an instrument satisfactory to the Licensor transferring to the Licensor the ownership of such property. The provisions of this Section shall survive the expiration or earlier termination of this Agreement.

6.13 Risk of Loss. Licensee acknowledges and agrees that Licensee, subject to the terms of this Agreement, bears all risks of loss, damage, relocation, or replacement of its Equipment and materials installed in the ROW or on Municipal Facilities pursuant to this Agreement from any cause, and Licensor shall not be liable for any cost of replacement or of repair to damaged Equipment, including, without limitation, damage caused by the Licensor's removal of the Equipment, except to the extent that such loss or damage was caused by the willful misconduct or gross negligence of the Licensor, including, without limitation, each of its elected officials, department directors, managers, officers, agents, employees, and contractors, subject to the limitation of liability provided in Section 7.3 below.

6.14 Hazardous Substances. Licensee agrees that Licensee, its contractors, subcontractors, and agents, will not use, generate, store, produce, transport, or dispose any Hazardous Substance on, under, about or within the area of a ROW or Municipal Facility in violation of any Law. Except to the extent of the gross negligence or intentional misconduct of Licensor, Licensee will pay, indemnify, defend, and hold Licensor harmless against and to the extent of any loss or liability incurred by reason of any Hazardous Substance produced, disposed of, or used by Licensee pursuant to this Agreement. Licensee will ensure that any on-site or off-site storage, treatment, transportation, disposal or other handling of any Hazardous Substance will be performed by persons who are properly trained, authorized, licensed and otherwise permitted to perform those services.

6.15 Inspection. Licensor may conduct inspections of Equipment on Municipal Facilities. Except in circumstances where Licensor has special reason to be concerned about potential violations or in case of an emergency, Licensor will give Licensee thirty (30) days' prior written notice of such inspections, and Licensee shall have the right to be present at and observe any such inspections. Licensee shall pay Licensor for its reasonable costs for safety inspections performed for the purpose of determining if a safety violation of which Licensor has provided notice to Licensee has been corrected by Licensee.

6.16 Access.

Licensee shall have access to the Equipment for non-emergency purposes, between the hours of 8am and 8pm, consistent with the Municipal Code's limitation on construction noise and/or activity. If Licensee requires non-emergency access outside of these hours, Licensee shall provide email notice, at least 24 hours in advance of accessing its Equipment, to the Licensor at the following email address: planning@calexico.ca.gov. In the event of an emergency at any time, Licensee will, if time permits, attempt to provide prior telephonic notice to the Licensor at the following telephone number: 760.768.2105.

7. INDEMNIFICATION AND WAIVER. Licensee agrees to indemnify, defend, protect, and hold harmless the Licensor, its council members, officers, employees, agents and contractors from and against any and all claims, demands, losses, including pole warranty invalidation, damages, liabilities, fines, charges, penalties, administrative and judicial proceedings and orders, judgments, and all costs and expenses incurred in connection therewith, including reasonable attorney's fees and costs of defense (collectively, the "Losses") to the extent arising from, resulting from, or caused by Licensee's activities undertaken pursuant to this Agreement, including, without limitation, the construction, design, use, or operation of the Equipment or provision of the Services, except to the extent arising from or caused by the gross negligence or willful misconduct of the

Licensor, its council members, officers, employees, agents, or contractors.

7.1 Waiver of Claims. Licensee waives any and all claims, demands, causes of action, and rights it may assert against the Licensor on account of any loss, damage, or injury to any Equipment or any loss or degradation of the Services as a result of any event or occurrence which is beyond the control of the Licensor.

7.2 Waiver of Subrogation. Licensee hereby waives and releases any and all rights of action for negligence against Licensor which may hereafter arise on account of damage to Equipment, Municipal Facilities, or to the ROW, regardless of whether or not, or in what amounts, such insurance is now or hereafter carried by the Licensee. This waiver and release shall apply between the parties and shall also apply to any claims under or through either party as a result of any asserted right of subrogation. All such policies of insurance obtained by Licensee concerning the Municipal Facilities, Equipment, or the ROW shall waive the insurer's right of subrogation against the Licensor. Licensee self-insures its property insurance and in satisfaction of the requirement for a waiver of subrogation endorsement will include Licensor as joint loss payee to the extent of Licensor's insurable interest which would have been covered had Licensee purchased property insurance.

7.3 Limitation on Consequential Damages. Neither party shall be liable to the other, or any of their respective agents, representatives, employees for any lost revenue, lost profits, loss of technology, rights or services, incidental, punitive, indirect, special or consequential damages, loss of data, or interruption or loss of use of service, even if advised of the possibility of such damages, whether under theory of contract, tort (including negligence), strict liability or otherwise.

8. PERFORMANCE BOND. In order to secure the performance of its obligations under this Agreement, Licensee will provide the following security instrument to the Licensor:

8.1 Performance Bond.

Prior to the commencement of any work under this Agreement, Licensee must provide a performance bond running to the Licensor in the sum of eighty-thousand dollars (\$80,000) which shall cover all Supplements.

The performance bond is conditioned upon the faithful performance by Licensee of all the terms and conditions of this Agreement and upon the further condition that, if Licensee fails to comply with any terms or conditions governing this Agreement, there shall be recoverable jointly and severally from the principal and surety of the bond any damage or loss suffered by the Licensor as a result, including, without limitation, the full amount of any compensation, indemnification, or costs of removal or abandonment of Licensee's property, plus costs and reasonable attorneys' fees up to the full amount of the performance bond. Licensee shall keep the performance bond in place during the term of this Agreement.

8.2 Assessment of the Bond. The performance bond may be assessed by the Licensor for any failure by Licensee to pay Licensor an amount owed under this Agreement, including, but not limited to:

(a) Reimbursement of costs borne by the Licensor to correct violations of the Agreement not corrected by Licensee, after Licensor provides notice and a reasonable

opportunity to cure such violations. This shall include, without limitation, removal of Equipment.

(b) Providing monetary remedies or satisfying damages assessed against Licensee due to a material breach of this Agreement.

83 Restoration of the Bond. Licensee must deposit a sum of money or a replacement instrument sufficient to restore the performance bond to its original amount within thirty (30) days after written notice from the Licensor that any amount has been recovered from the performance bond. Failure to restore the bond to its full amount within thirty (30) days will constitute a material breach of this Agreement. Licensee will be relieved of the foregoing requirement to replenish the bond during the pendency of an appeal from the Licensor's decision to draw on the performance bond.

84 Required Endorsement. The performance bond is subject to the approval of the Licensor and must contain the following endorsement:

"This bond may not be canceled until sixty (60) days after receipt by the Licensor, by registered mail, return receipt requested, of a written notice of intent to cancel or not to renew."

85 Reservation of Licensor Rights. The rights reserved by Licensor with respect to the performance bond are in addition to all other rights and remedies Licensor may have under this Agreement or any other Law.

86 Admitted Surety Insurer. The surety supplying the bond shall be an "admitted surety insurer", as defined in California Code of Civil Procedure Section 995.120 and authorized to do business in the State of California.

87 Cash Deposit. In lieu of obtaining a performance bond, Licensee shall have the right to instead deposit a cash deposit with Licensor securing Licensee's obligations under this Agreement.

9. **INSURANCE.** Licensee shall obtain and maintain at all times during the Term (a) Commercial General Liability insurance on ISO Form CG 00 01 or its equivalent with a limit of two million dollars (\$2,000,000) per occurrence for bodily injury and property damage and two million dollars (\$2,000,000) general aggregate including premises-operations, contractual liability, personal injury, and products completed operations; and (b) Commercial Automobile Liability insurance covering all owned, non- owned, and hired vehicles with a limit of one million dollars (\$1,000,000) each accident for bodily injury and property damage. In the required insurance policies, the Licensor, its officers, officials, employees, and volunteers are to be included as additional insureds on the CGL policy by endorsement with respect to liability caused, in whole or in part, by work or operations performed by or on behalf of the Licensee including materials, parts, or equipment furnished in connection with such work or operations with respect to this Agreement. General liability coverage can be provided in the form of an endorsement to the Licensee's insurance (at least as broad as the current version of ISO Form CG 20 10. Licensor's additional insured status shall (i) be limited to bodily injury, property damage or personal and advertising injury caused, in whole or in part, by Licensee, its employees, agents or independent contractors; (ii) not extend to claims for punitive or exemplary damages arising out of the acts or omissions of Licensor, its employees, agents or independent contractors or where such coverage is prohibited by law or to claims arising out of the gross negligence of Licensor, its employees, agents or independent

contractors; and (iii) not exceed Licensee's indemnification obligation under this Agreement, if any. Coverage shall be in an occurrence form and in accordance with the limits and provisions specified herein. Upon receipt of notice from its insurer, Licensee shall use its best efforts to provide the Licensor with thirty (30) days prior written notice of cancellation of any required coverage that is not replaced. Licensee shall be responsible for notifying the Licensor of such cancellation. Licensee's indemnity and other obligations shall not be limited by the foregoing insurance requirements. If Licensee fails, for any reason, to obtain or maintain insurance coverage required by this Agreement or fails to furnish certificates of insurance as detailed in Section 9.1, such failure shall be deemed a material breach of this Agreement, giving Licensor, in its discretion, the option to terminate this Agreement and obtain damages therefor.

9.1 Verification of Coverage; Filing of Certificates and Endorsements. Prior to the commencement of any work pursuant to this Agreement, Licensee shall furnish the Licensor with original Certificates of Insurance including all required amendatory endorsements to Licensor before work begins. However, failure to obtain the required documents prior to the work beginning shall not waive the Licensee's obligation to provide them. In the event that the Licensor has tendered a claim to Licensee, or its insurer, or its insurer has denied coverage to the Licensor, Licensee (in a local southern California office) will make available to the Licensor within fifteen (15) days of the Licensor's written request to Licensee, a copy of actual, authentic and applicable insurance policies for review (but not for copying, faxing or otherwise reproducing any part of any policy or other insurance correspondence), subject to the Licensor first executing Licensee's standard non-disclosure agreement. The policy review is limited to no more than three days during a consecutive six-month period and must be conducted during Licensee's normal business hours while the Licensor's representative is accompanied by a Licensee Risk Management professional. Upon completion of review no copies will be made and all policies will be returned to Licensee's Corporate Risk Management Department.

(a) Accordingly, the required certificate(s) of insurance with required blanket additional insured endorsements include the following:

- i. the policy number; name of insurance company; name and address of the agent or authorized representative; name and address of insured; project name; policy expiration date; and specific coverage amounts;
- ii. that Licensee's Commercial General Liability insurance policy is primary as respects any other valid or collectible insurance that the Licensor may possess, including any self-insured retentions the Licensor may have; and any other insurance the Licensor does possess shall be considered excess insurance only and shall not be required to contribute with this insurance; and
- iii. that Licensee's Commercial General Liability insurance policy waives any right of recovery the insurance company may have against the Licensor.

(b) The certificate(s) of insurance with required endorsements and notices shall be mailed to the Licensor at the address specified in Section 10 below.

92 Workers' Compensation Insurance. Licensee shall obtain and maintain at all times during the term of this Agreement statutory workers' compensation and employer's liability insurance in an amount of one million dollars (\$1,000,000) per accident, per disease per employee, per disease policy limit and shall furnish the Licensor with a certificate showing proof of such coverage.

93 Property Insurance. Licensee shall obtain and maintain at all times during the term of this Agreement property self-insurance against all risks of loss to any tenant improvements or betterments, at full replacement cost with no coinsurance penalty provision.

94 Notice of Cancellation. Licensee shall provide at least thirty (30) days prior written notice to Licensor of cancellation of any require coverage that is not replaced.

95 Insurer Criteria. Any insurance provider of Licensee shall be eligible to do business in the State of California and shall carry a minimum rating assigned by *A.M. Best & Company's Key Rating Guide* of "A-" Overall and a Financial Size Category of "VII."

96 Severability of Interest. "Severability of interest" or "separation of insureds" clauses shall be made a part of the Commercial General Liability and Commercial Automobile Liability policies.

97 Self-Insurance. Notwithstanding the foregoing, Licensee may, in its sole discretion, self-insure any of the required insurance under the same terms as required by this Agreement. In the event Licensee elects to self-insure its obligation under this Agreement to include Licensor as an additional insured, the following conditions apply: (i) Licensor shall promptly and no later than thirty (30) days after notice thereof provide Licensee with written notice of any claim, demand, lawsuit, or the like for which it seeks coverage pursuant to this Section and provide Licensee with copies of any demands, notices, summonses, or legal papers received in connection with such claim, demand, lawsuit, or the like; (ii) Licensor shall not settle any such claim, demand, lawsuit, or the like without the prior written consent of Licensee; and (iii) Licensor shall fully cooperate with Licensee in the defense of the claim, demand, lawsuit, or the like.

(a) **Self-Insured Retentions.** Self-insured retentions must be declared to the Licensor. The self-insured retention may be satisfied by either the named insured or Licensor.

98 Special Risks or Circumstances. Licensor reserves the right to modify these requirements at any time but not more than once in a three (3) year period and upon providing Licensee with at least forty (45) days prior written notice, including limits, based on the nature of the risk, prior experience, insurer, coverage, or other special circumstances

10. NOTICES.

10.1 Method and Delivery of Notices. All notices pursuant to this Agreement shall be in writing and delivered personally or transmitted (a) through the United States mail, by registered or certified mail, postage prepaid; or (b) by means of prepaid overnight delivery service, addressed as follows:

If to Licensor:

City of Calexico Development

Services Department Planning and
Engineering Divisions
608 Heber Avenue, Calexico, CA 92231

If to Licensee:

New Cingular Wireless PCS, LLC
Attn: Network Real Estate Administration
Site No. City of Calexico Wireless MLA (CA)
1025 Lenox Park Blvd NE, 3rd Floor
Atlanta, GA 30319

With a copy to:

New Cingular Wireless PCS, LLC
Attn: AT&T Legal Dept – Network Operations
Site No. City of Calexico Wireless MLA (CA)
208 S. Akard Street
Dallas, TX 75202-4206

10.2 Date of Notices; Changing Notice Address. Notices shall be deemed given upon receipt in the case of personal delivery, three days after deposit in the mail, or the next business day in the case of overnight delivery. Either party may from time to time designate any other address for this purpose by written notice to the other party delivered in the manner set forth in this Section.

11. DEFAULT; CURE; REMEDIES.

11.1 Licensee Default and Notification. This Agreement is granted upon each and every condition herein, and each of the conditions is a material and essential condition to the granting of this Agreement. Except for causes beyond the reasonable control of Licensee, if Licensee fails to comply with any of the conditions and obligations imposed hereunder, and if such failure continues for more than thirty (30) days after written demand from the Licensor to commence the correction of such noncompliance on the part of Licensee, the Licensor shall have the right to revoke and terminate this Agreement by written notice to Licensee, if such failure is in relation to the Agreement as whole, or any individual Supplement, if such failure is in connection solely with such Supplement, in addition to any other rights or remedies set forth in this Agreement or provided by law.

11.2 Cure Period. If the nature of the violation is such that it cannot be fully cured within thirty (30) days due to circumstances not under Licensee's control, the period of time in which Licensee must cure the violation shall be extended for such additional time reasonably necessary to complete the cure, provided that: (a) Licensee has promptly begun to cure; (b) Licensee is diligently pursuing its efforts to cure; and (c) Licensee provides a timeline to complete its cure efforts and responds within twenty-four (24) hours of any status request by Licensor. Licensor may not maintain any action or effect any remedies for default against Licensee, unless and until Licensee has failed to cure the breach within the time periods provided in these Sections 11.1 and 11.2.

11.3 Licensor Default. If Licensor breaches any covenant or obligation of Licensor under this Agreement in any manner, and if Licensor fails to commence to cure such breach within thirty (30) days after receiving written notice from Licensee specifying the violation (or if Licensor fails thereafter to diligently prosecute the cure to completion), then Licensee may enforce any and all of its rights and/or remedies provided under this Agreement or by Law.

12. ASSIGNMENT AND CUSTOMER EQUIPMENT. This Agreement shall be binding upon, and inure to the benefit of, the successors and assigns of the parties.

12.1 Licensee shall not assign this Agreement or its rights or obligations to any firm, corporation, individual, or other entity, without the prior written consent of Licensor, which consent shall not be unreasonably withheld. Notwithstanding the foregoing, upon thirty (30) days' prior written notice, Licensee may assign or transfer the rights and privileges granted herein to any parent or subsidiary of Licensee, to an entity with or into which Licensee may merge or consolidate, to an entity which Licensee is controlled by, or is under common control of a party; or in connection with the sale or other transfer of such entity or to any purchaser of all or substantially all of Licensee's assets in the FCC market area where the Equipment is located with prior notice to Licensor but without the requirement for Licensor approval, provided that the successor is bound by all terms and conditions of this Agreement and provides written confirmation to Licensor that it is then fully liable to the Licensor for compliance with all terms and conditions of this Agreement. The Licensee shall reimburse the Licensor for all direct and indirect costs and expenses reasonably incurred by the Licensor in considering a request to transfer or assign this Agreement.

12.2 If Licensee is not itself a Commercial Mobile Radio Services (CMRS) provider, Licensee need not own all components of Equipment subject to this Agreement, and may permit its customers to maintain ownership of Equipment components. However, (1) all Equipment must be wholly under the control and management of Licensee; and Licensee shall be liable for all acts or omissions, and all harms associated with the Equipment whether the same are its acts or omissions, or the acts or omissions of the owner of the Equipment; and (2) Licensee acknowledges and agrees that no rights of ownership in Equipment by Licensee's customers shall permit any such customer to enter upon, or use the any portion of the Municipal Facilities or the Equipment, in any other manner or at any other place, including to add to, or modify or install Equipment, which shall be Licensee's sole responsibility. Further, Licensee may not install Equipment it does not own on Municipal Facilities, unless the entity for on whose behalf the Equipment has been installed acknowledges and agrees, in a form acceptable to the Licensor, that the Licensor has not granted it a consent to be in the ROW for any purpose; that it is bound by Licensee's representations, obligations and duties hereunder; that it shall have no rights or claims against the Licensor of any sort related to the Equipment or Municipal Facilities; that its Equipment may be subject to taxes, fees or assessments as provided in the Laws or the Agreement, and that Licensor may treat any Equipment owned by such entity as if it were owned by Licensee for all purposes (including, but not limited to, removal and relocation); and the Equipment may only be used for the purposes and uses permitted herein. Such acknowledgement may be provided for all Equipment on Municipal Facilities, and need not be provided separately, site by site.

13. RECORDS; AUDITS.

13.1 Records Required by Code. Licensee will maintain complete records pursuant to all applicable Laws.

132 Additional Records. The Licensor may require such additional reasonable non-confidential information, records, and documents from Licensee from time to time as are appropriate in order to reasonably monitor compliance with the terms of this Agreement.

133 Production of Records. Licensee shall provide such records within twenty (20) business days of a request by the Licensor for production of the same, unless additional time is reasonably needed by Licensee, in which case, Licensee shall have such reasonable time as needed for the production of the same. If any person other than Licensee maintains records on Licensee's behalf, Licensee shall be responsible for making such records available to the Licensor for auditing purposes pursuant to this Section.

134 Public Records. Licensee acknowledges that information submitted to Licensor may be open to public inspection and copying under the Law.

14. MISCELLANEOUS PROVISIONS. The provisions that follow shall apply generally to the obligations of the parties under this Agreement.

14.1 Waiver of Breach. The waiver by either party of any breach or violation of any provision of this Agreement shall not be deemed to be a waiver or a continuing waiver of any subsequent breach or violation of the same or any other provision of this Agreement.

14.2 Severability of Provisions. If any one or more of the provisions of this Agreement shall be held by a court of competent jurisdiction in a final judicial action to be void, voidable, or unenforceable, such provision(s) shall be deemed severable from the remaining provisions of this Agreement and shall not affect the legality, validity, or constitutionality of the remaining portions of this Agreement. Each party hereby declares that it would have entered into this Agreement and each provision hereof regardless of whether any one or more provisions may be declared illegal, invalid, or unconstitutional.

14.3 Contacting Licensee. Licensee shall be available to the staff employees of any Licensor department having jurisdiction over Licensee's activities twenty-four (24) hours a day, seven days a week, regarding problems or complaints resulting from the attachment, installation, operation, maintenance, or removal of the Equipment. The Licensor may contact by telephone the Licensee's network control center operator at telephone number (800) 832-6662.

14.4 Governing Law; Jurisdiction. This Agreement shall be governed and construed by and in accordance with the laws of the State of California, without reference to its conflicts of law principles. If suit is brought by a party to this Agreement, the parties agree that trial of such action shall be vested exclusively in the United States District Court for the Southern District of California or the state courts of Imperial County, California.

14.5 Change Of Law.

During the Initial Term, in the event that any legislative or regulatory action ("New Law") affects the rights or obligations of the Parties or any term of the Agreement, the Parties agree that the Agreement shall nonetheless remain in effect until the end of the Initial Term unless mutually agreed to in writing by the Parties.

14.6 Force Majeure. Except for payment of amounts due, neither Party shall have any

liability for its delays or its failure of performance due to: fire, explosion, pest damage, power failures, strikes or labor disputes, acts of God, the elements, war, civil disturbances, acts of civil or military authorities or the public enemy, inability to secure raw materials, transportation facilities, fuel or energy shortages, or other causes reasonably beyond its control, whether or not similar to the foregoing.

14.7 Attorneys' Fees. Should any dispute arising out of this Agreement lead to litigation, the prevailing party shall be entitled to recover its costs of suit, including (without limitation) reasonable attorneys' fees.

14.8 "AS IS" condition of Municipal Facilities. Municipal Facilities licensed to Licensee pursuant to this Agreement are licensed to and accepted by Licensee "as is" and with all faults. The Licensor makes no representation or warranty of any kind as to the present or future condition of or suitability of the Municipal Facilities for Licensee's use and disclaims any and all warranties express or implied with respect to the physical, structural, or environmental condition of the Municipal Facilities and their merchantability or fitness for a particular purpose. Licensee is solely responsible for investigation and determination of the condition and suitability of any Municipal Facility for Licensee's intended use.

14.9 Representations and Warranties. Each of the parties to this Agreement represents and warrants that it has the full right, power, legal capacity, and authority to enter into and perform the party's respective obligations hereunder and that such obligations shall be binding upon such party without the requirement of the approval or consent of any other person or entity in connection herewith, except as provided in Section 4.2 above. This Agreement shall not be revocable or terminable except as expressly permitted herein.

14.10 Amendment of Agreement. This Agreement may not be amended except pursuant to a written instrument signed by both parties.

14.11 Entire Agreement. This Agreement contains the entire understanding between the parties with respect to the subject matter herein. There are no representations, agreements, or understandings (whether oral or written) between or among the parties relating to the subject matter of this Agreement which are not fully expressed herein. In witness whereof, and in order to bind themselves legally to the terms and conditions of this Agreement, the duly authorized representatives of the parties have executed this Agreement as of the Effective Date.

14.12 Non-Exclusive Remedies. No provision in this Agreement made for the purpose of securing enforcement of the terms and conditions of this Agreement shall be deemed an exclusive remedy or to afford the exclusive procedure for the enforcement of said terms and conditions, but the remedies herein provided are deemed to be cumulative.

14.13 No Third-Party Beneficiaries. It is not intended by any of the provisions of this Agreement to create for the public, or any member thereof, a third-party beneficiary right or remedy, or to authorize anyone to maintain a suit for personal injuries or property damage pursuant to the provisions of this Agreement. The duties, obligations, and responsibilities of the Licensor with respect to third parties shall remain as imposed by state law.

14.14 Construction of Agreement. The terms and provisions of this Agreement shall not be construed strictly in favor of or against either party, regardless of which party drafted any of its provisions. This Agreement shall be construed in accordance with the fair meaning of its terms.

14.15 Effect of Acceptance. Licensee (a) accepts and agrees to comply with this Agreement and all Laws; (b) agrees that this Agreement was entered into pursuant to processes and procedures consistent with Law; and (c) agrees that it will not raise any claim to the contrary or allege in any claim or proceeding against the Licensor that at the time of acceptance of this Agreement any provision, condition or term of this Agreement was unreasonable or arbitrary, or that at the time of the acceptance of this Agreement any such provision, condition or term was void or unlawful or that the Licensor had no power or authority to make or enforce any such provision, condition, or term.

14.16 Time is of the Essence. Time is of the essence with regard to the performance of all of Licensee's obligations under this Agreement.

14.17 Taxes. Licensee shall be responsible for payment of all fees and taxes charged in connection with the right, title, and interest in and construction, installation, maintenance, and operation of Equipment for the purposes set forth herein.

14.18 Tax Notice. Licensor hereby provides notice pursuant to California Revenue and Taxation Code Section 107.6, and Licensee acknowledges, that this Agreement may create a possessory interest and Licensee may be subject to property taxes levied on such interest, as described in California Revenue and Taxation Code Section 107.6. Licensee shall pay directly to the appropriate authority, when due, all real and personal property taxes, fees, and assessments, assessed against the area licensed and the Equipment.

14.19 Counterparts. This Agreement (and any Supplement) may be executed in multiple counterparts, including by electronic means, each of which shall be deemed an original, and all such counterparts once assembled together shall constitute one integrated instrument.

[signature page to follow]

SIGNATURE PAGE TO MUNICIPAL FACILITY LICENSE AGREEMENT

IN WITNESS THEREOF, the parties hereto have caused this Agreement to be legally executed as of the Effective Date.

Licensor:

CITY OF CALEXICO

By: _____

Name: _____

Title: _____

ATTEST:

_____, Clerk

APPROVED AS TO FORM
CITY ATTORNEY'S OFFICE

BY: _____
City Attorney

Licensee:

NEW CINGULAR WIRELESS PCS, LLC

By: AT&T Mobility Corporation
Its: Manager

By: _____

Name: _____

Title: _____

Exhibits:

Exhibit A – Supplement
Exhibit B – Application

EXHIBIT A
FORM OF SUPPLEMENT
SUPPLEMENT

This Supplement ("Supplement"), is approved by Licensor this ____ day of _____, 20____ (the date executed by all parties, referred herein as "Supplement Effective Date").

1. Supplement. Licensee has submitted an application for approval to use a Municipal Facility pursuant to that certain Municipal Facility License Agreement between Licensor, _____, and Licensee, _____, dated _____, 20____ ("Agreement"). Licensor has reviewed the Application to Use Municipal Facility and grants approval subject to the terms of this Supplement. All of the terms and conditions of the Agreement are incorporated hereby by reference and made a part hereof without the necessity of repeating or attaching the Agreement. In the event of a contradiction, modification, or inconsistency between the terms of the Agreement and this Supplement, the terms of this Supplement shall govern. Capitalized terms used in this Supplement shall have the same meaning described for them in the Agreement unless otherwise indicated herein. IF THE SUPPLEMENT IS NOT COUNTER-SIGNED BY LICENSEE AND RETURNED TO LICENSOR WITHIN 30 DAYS AFTER LICENSOR HAS GRANTED APPROVAL, THE SUPPLEMENT SHALL BE VOID AND OF NO LEGAL EFFECT. IF LICENSEE STILL WANTS TO USE THE MUNICIPAL FACILITY, LICENSEE WILL BE REQUIRED TO SUBMIT A NEW APPLICATION AND ASSOCIATED FEES.
2. Licensed Area Description and Location. Licensee shall have the right to use the space on the specific Municipal Facility (the "Licensed Area") depicted in Attachment 1 attached hereto to install Equipment as further listed in Attachment 2 attached hereto.
3. Equipment. The Equipment to be installed at the Licensed Area is described in Attachment 2 and depicted in Attachment 1.
4. Term. The term of this Supplement shall commence on the Supplement Effective Date and continue for in the Term of the Agreement.
5. License Fee. The initial License Fee for this Supplement shall be as follows per year: _____ . License Fee is subject to annual increase and is payable in accordance with Section 5 of the Agreement.
6. Performance Bond. The amount of the Performance Bond shall be _____.
7. Miscellaneous. _____.

[signature page follows]

IN WITNESS THEREOF, the parties hereto have caused this Supplement to be legally executed in duplicate, effective upon execution by both parties.

Licensor:

CITY OF CALEXICO

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

Licensee:

Accepted:

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

Attachments:

Attachment 1 – Licensed Area

Attachment 2 – Equipment List and Description

Attachment 1

Licensed Area

[site plan showing licensed area of applicable Municipal Facility and showing proposed Equipment installation]

Attachment 2

Equipment List and Description

EXHIBIT B

APPLICATION TO USE MUNICIPAL FACILITY

Applicant: _____ Date: _____

Licensee: _____ Application/License#: _____

Type of Municipal Facility	Alteration Required	Small Cell Equipment Heights (provide both (1) the overall height of pole structure with added facilities, and (2) the height of individual facilities)	Small Cell and Base Equipment Weights	Small Cell And Base Equipment Dimensions	Location of Any Additional Equipment
<i>[street light] [traffic light] [other, specify]</i>	<i>[Pole Reinforcement]] [Pole Replacement] [None]</i>				<i>[Installed on Pole, specify attachment height, weight and dimensions] [Installed on/in Ground (Vault), specific dimensions] [Other Location] [Not Applicable/Needed]</i>

APPLICANT SHALL PROVIDE THE FOLLOWING AS APPLICABLE:

- Site plan and engineering design and specifications for installation of Equipment, including the location of radios, antenna facilities, transmitters, equipment shelters, cables, conduit, point of demarcation, backhaul solution, electrical distribution panel, electric meter, and electrical conduit and cabling. Where applicable, the design documents should include specifications on design, pole modification, and ADA compliance. Also indicate whether [unmetered electricity] is available at the site.
- Include a load bearing study that determines whether the pole requires reinforcement or replacement in order to accommodate attachment of proposed Equipment.
- If the proposed installation will require reinforcement or replacement of an existing pole, provide applicable design and specification drawings.
- The number, size, type, and proximity to the facilities of all communications conduit(s) and cables to be installed.
- Description of the utility services required to support the facilities to be installed.
- List of the contractors and subcontractors, and their contact information, authorized to work on the project.
- A check for the applicable Application Fee pursuant to Section 5.1 of the Agreement.

APPLICANT REPRESENTATIVE: _____

PRINT NAME: _____

TITLE: _____

TELEPHONE: _____ EMAIL: _____