

AN ORDINANCE 2018-06-07-0416

APPROVING A NON-EXCLUSIVE 10-YEAR LICENSE AGREEMENT GRANTING E-Z BEL CONSTRUCTION, LLC THE USE AND OCCUPANCY OF THE RIGHT-OF-WAY AT A LOCATION NORTHWEST OF THE INTERSECTION OF RECOLETA ROAD AND JACKSON KELLER ROAD FOR THE PURPOSE OF INSTALLING AND MAINTAINING FIBER OPTIC CABLE FACILITIES TO PROVIDE TELECOMMUNICATIONS SERVICE FOR ITS BUSINESS OFFICES.

* * * * *

WHEREAS, E-Z Bel Construction, LLC desires the use of certain right-of-way within the City of San Antonio for the purpose of installing and maintaining fiber optic cable facilities to provide telecommunications service to its business offices; and

WHEREAS, the proposed fiber optic cable facilities will cross under the City's right-of-way to provide telecommunications connectivity at the location as depicted within the License Agreement attached as **EXHIBIT A**;

WHEREAS, the installation, maintenance, and repair of fiber optic cable facilities over or under the public right-of-way will be done in a manner consistent with all City of San Antonio regulations, including the Right-of-Way Management Ordinance and Utility Excavation Criteria Manual; **NOW THEREFORE**:

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF SAN ANTONIO:

SECTION 1. The License Agreement between the City of San Antonio and E-Z Bel Construction, LLC is hereby approved in substantially the same form as it appears in **EXHIBIT A**.

SECTION 2. The City Manager or her designee is hereby authorized to execute the License Agreement and any and all documents necessary to fulfill the purpose and intent of this Ordinance.

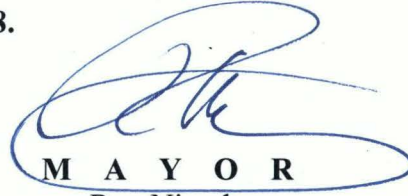
SECTION 3. Funds generated by this Ordinance will be deposited as per the table below:

Amount	General Ledger	Internal Order	Fund
\$3,500.00	4202440	209000000045	74001000
\$513.33	4202410	209000000045	74001000

SECTION 4. The financial allocations in this Ordinance are subject to approval by the Director of Finance, City of San Antonio. The Director of Finance may, subject to concurrence by the City Manager or the City Manager's designee, correct allocations to specific Cost Centers, WBS Elements, Internal Orders, General Ledger Accounts, and Fund Numbers as necessary to carry out the purpose of this Ordinance.

SECTION 5. This Ordinance becomes effective immediately upon the receipt of eight affirmative votes, or in the event eight affirmative votes are not received, on the tenth day after passage by majority vote.

PASSED AND APPROVED, this 7th day of June 2018.



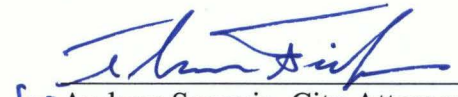
M A Y O R
Ron Nirenberg

ATTEST:



Leticia M. Vacek, City Clerk

APPROVED AS TO FORM:



for Andrew Segovia, City Attorney

Agenda Item:	16 (in consent vote: 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16)						
Date:	06/07/2018						
Time:	09:15:49 AM						
Vote Type:	Motion to Approve						
Description:	Ordinance approving a ten-year license agreement with E-Z Bel Construction LLC for fiber optic cable within the right-of-way near 203 Recoleta Road and 214 Jackson-Keller Road for total revenue of \$4,013.33. [Ben Gorzell, Chief Financial Officer; Craig Hopkins, Chief Information Officer, ITSD]						
Result:	Passed						
Voter	Group	Not Present	Yea	Nay	Abstain	Motion	Second
Ron Nirenberg	Mayor		x				
Roberto C. Treviño	District 1		x			x	
William Cruz Shaw	District 2	x					
Rebecca Viagran	District 3		x				x
Rey Saldaña	District 4		x				
Shirley Gonzales	District 5		x				
Greg Brockhouse	District 6		x				
Ana E. Sandoval	District 7		x				
Manny Pelaez	District 8		x				
John Courage	District 9		x				
Clayton H. Perry	District 10		x				

EXHIBIT “A”

Item No. 16

File No. 18-2676

NON-EXCLUSIVE LICENSE AGREEMENT BETWEEN THE CITY OF SAN ANTONIO AND E-Z BEL CONSTRUCTION, A TEXAS LIMITED LIABILITY COMPANY, FOR USE OF PUBLIC RIGHT-OF-WAY

This License Agreement ("License Agreement" or the "Agreement") is made by and between the **CITY OF SAN ANTONIO, TEXAS** (hereafter referred to as "CITY" or "Licensor"), a Texas Municipal Corporation and Home-Rule Municipality, acting by and through its City Manager, or designee, pursuant to Ordinance No. _____, passed and approved by the City Council on _____, 20__; and **E-Z BEL CONSTRUCTION, LLC**, a Texas limited liability company (hereafter referred to as "Licensee"). The CITY and the Licensee may hereinafter be referred to collectively as the "Parties."

WHEREAS, Licensee desires the use of certain public right-of-way within the CITY as described in **EXHIBIT A** for the purpose of installing and maintaining fiber optic cable Facilities as defined by this License Agreement; and

WHEREAS, the installation, maintenance, and repair of fiber optic cable facilities under the public right-of-way will be done in a manner consistent with all City of San Antonio regulations, including the City's Right-of-Way Management Ordinance and Utility Excavation Criteria Manual; and

WHEREAS, the fee schedule for use of the City's Right-of-Way is set forth in **EXHIBIT B**;

NOW THEREFORE THE ABOVE PARTIES AGREE TO THE FOLLOWING:

SECTION 1. DEFINITIONS

For purposes of this License Agreement the following terms shall have the same meanings herein. When not inconsistent with the context, words used in the present tense include the future; words in the plural number include the singular number, and words in the singular include the plural. The word "shall" is always mandatory and not merely permissive.

- (a) "CITY" means the City of San Antonio, Texas, a home-rule municipality.
- (b) "Chief Information/Technology Officer" means the director of the Information Technology Services Department.
- (c) "Director" means the Director of Transportation & Capital Improvements Department.

- (d) "Excavation Manual" means the Utility Excavation Criteria Manual approved by the Director of Public Works on April 2, 2001, and as amended from time to time, pursuant to the authority granted by the Right-of-Way Management Ordinance.
- (e) "Facilities" means any and all of Licensee's fiber optic cables, conduits, and related equipment necessary for the proper functioning of fiber optic cables over or under the Right-of-Way areas as described in this License Agreement.
- (f) "Right-of-Way" or "Public Right-of-Way" means the surface of, and the space above and below, any public street, road, highway, freeway, lane, path, public way or place, sidewalk, alley, boulevard, parkway, drive, or other easement now or hereafter-held by the CITY or over which the CITY exercises any rights of management control.
- (g) "Right-of-Way Management Ordinance" means the San Antonio Right-of-Way Management Ordinance passed by the San Antonio City Council on January 25, 2001 as Ordinance No. 93319, as codified in Chapter 29 of the CITY's Municipal Codes, and as amended.
- (h) "Right-of-Way Manager" means the Manager of the Right-of-Way Management Division of the Transportation & Capital Improvements Department.

SECTION 2. GRANTING CLAUSE

- (a) The CITY hereby grants Licensee, a non-exclusive license to use and occupy the space above or below the CITY's Right-of-Way as particularly described in **EXHIBIT A** to this License Agreement in order to install, construct, replace, and maintain all necessary Facilities as that term is defined herein. **EXHIBIT A** is attached to this License Agreement and made a part hereof for all purposes.
- (b) Licensee's use of the Right-of-Way shall be subject to the terms of the CITY's Right-of-Way Management Ordinance, the CITY's Utility Excavation Manual, the laws of the State of Texas, and the CITY's charter and ordinances, each as they exist now or as may be amended from time to time. Failure by Licensee to comply with the above mentioned laws and regulations shall constitute a material breach of this License Agreement.
- (c) **Work by Others.** The CITY reserves the right to lay, and permit to be laid, sewer, gas, water and other pipe lines or cables and conduits, as well as drainage pipes and channels and streets and to do and permit to be done any underground and overhead installation or improvement that may be deemed necessary or proper by the governing body of the CITY, in, across, along, over or under any Rights-of-Way occupied by Licensee, and to change any curb or sidewalk or the grade of any street and to maintain all of the CITY'S facilities. In permitting such

work to be done, the CITY shall not be liable to Licensee for any damage caused by those persons or entities. If the CITY requires Licensee to adapt or conform its Facilities, or in any way or manner to alter, relocate or change its property to enable any other corporation or person, except the CITY, to use, or to use with greater convenience, any Rights-of-Way, Licensee shall not be required to make any such changes until such other corporation or person shall have undertaken, with solvent bond, to reimburse Licensee for any loss and expense which will be caused by, or arise out of such removal, change, adaptation, alteration, conformance or relocation of Licensee's Facilities; provided, however, that the CITY shall never be liable for such reimbursement.

- (d) **Location of Poles, Conduits, and Fiber.** In the event Licensee finds it necessary to install poles on Public Rights-of-Way, such poles shall be of sound material and reasonably straight, and shall be set so that they will not interfere with the flow of water in any gutter or drain, and so that they will not unduly interfere with ordinary travel on the streets or sidewalk. The location and route of all poles, stubs, guys, anchors, conduits, fiber, and cables placed and constructed by Licensee in the installation, construction and maintenance of its Facilities shall be subject to the lawful, reasonable and proper control, direction and/or approval of the Rights-of-Way Manager.
- (e) **Pole Attachments.** Nothing contained in this License Agreement shall be construed to require or permit any pole attachments owned, leased, or controlled by Licensee to be attached to CITY-owned poles or other CITY-owned property. Nothing contained in this License Agreement shall obligate or restrict Licensee in exercising its rights voluntarily to enter into pole attachment agreements with electric power companies or with other wire-owning companies which are authorized to operate within the CITY.
- (f) **Relocation of Facilities.** When reasonably conducive to the efficient use of the property on which Facilities are located, the CITY may require Licensee to relocate the Facilities, including all related equipment, at Licensee's expense. If Licensee fails to remove or relocate its Facilities to the satisfaction of the Rights-of-Way Director after appropriate notice, the CITY may remove or relocate the Facilities at the expense of Licensee and without liability to the CITY. Any damage to the Public Rights-of-Way or adjacent property that occurs during the removal or relocation of Licensee's Facilities shall be promptly repaired or replaced at Licensee's sole expense. Should Licensee not make adequate repairs after receiving written notice, the CITY may make all reasonable and necessary repairs on behalf of Licensee, and reimburse itself from proceeds from the surety bond required under CITY ordinances. Any remaining amount will be charged to Licensee. Licensee shall promptly remit payment of such costs when invoiced.

SECTION 3. TERM

The License term and the rights, privilege and authority hereby granted shall be in full force and effect beginning upon final execution of this License Agreement, and shall continue in effect for an initial term of ten (10) years.

SECTION 4. LICENSE RENEWAL PROCEDURES

- (a) Upon application by Licensee, this License Agreement may be renewed by the CITY for subsequent five (5) year periods pursuant to the procedures established in this Section, and in accordance with all applicable law.
- (b) At least six (6) months prior to the expiration of the then-current term of the License Agreement, Licensee shall inform the Chief Information/Technology Officer in writing of its intent to seek renewal of the License Agreement. During this time period, the CITY may order a new appraisal of the Right-of-Way used by Licensee, and the Parties may re-negotiate other terms of the License Agreement. A processing fee will apply to a renewal of the License Agreement.
- (c) Upon determination by the City Council that Licensee's performance is satisfactory, a renewal, subject to the agreed re-negotiation of any other terms, may be granted for a period of five (5) years.

SECTION 5. INDEMNITY

- (a) **GENERAL INDEMNITY CLAUSE – LICENSEE COVENANTS AND AGREES TO FULLY INDEMNIFY, DEFEND and HOLD HARMLESS, the CITY and the elected officials, employees, officers, directors, volunteers and representatives of the CITY, individually and collectively, from and against any and all costs, claims, liens, damages, losses, expenses, fees, fines, penalties, proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including but not limited to, personal or bodily injury, death and property damage, made upon the CITY directly or indirectly arising out of resulting from or related to the Licensee's activities under this Agreement, including any acts or omissions of the Licensee, any agent, officer, director, representative, employee, vendor or subcontractor of the Licensee, and their respective officers, agents employees, directors and representatives while in the exercise of the rights or performance of the duties under this Agreement. IF THE LICENSEE AND CITY ARE FOUND JOINTLY LIABLE BY A COURT OF COMPETENT JURISDICTION, LIABILITY SHALL BE APPORTIONED COMPARATIVELY IN ACCORDANCE WITH THE LAWS FOR THE STATE OF TEXAS, WITHOUT, HOWEVER, WAIVING ANY GOVERNMENTAL IMMUNITY AVAILABLE TO THE CITY UNDER TEXAS LAW AND**

WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER TEXAS LAW.

The provisions of this INDEMNITY are solely for the benefit of the parties hereto and not intended to create or grant any rights, contractual or otherwise, to any other person or entity. The Licensee shall advise the CITY in writing within 24 hours of any claim or demand against the CITY or the Licensee known to the Licensee related to, or arising out of the Licensee's activities under this Agreement and shall see to the investigation and defense of such claim or demand at the Licensee's cost. The CITY shall have the right, at its option and at its own expense, to participate in such defense without relieving the Licensee of any of its obligations under this paragraph.

Defense Counsel - CITY shall have the right to select or to approve defense counsel to be retained by the Licensee in fulfilling its obligation hereunder to defend and indemnify CITY, unless such right is expressly waived by CITY in writing. The Licensee shall retain CITY approved defense counsel within ten (10) business days of CITY'S written notice that CITY is invoking its right to indemnification under this License Agreement. If the Licensee fails to retain Counsel within such time period, CITY shall have the right to retain defense counsel on its own behalf, and the Licensee shall be liable for all costs incurred by CITY. CITY shall also have the right, at its option, to be represented by advisory counsel of its own selection and at its own expense, without waiving the foregoing.

Employee Litigation - In any and all claims against any party indemnified hereunder by any employee of Licensee, any subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, the indemnification obligation herein provided shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for the Licensee or any subcontractor under worker's compensation or other employee benefit acts.

- (b) Licensee shall be liable for the acts and omissions of its own employees, officers, directors, and any contractors, subcontractors, representatives, agents, or any parties involved directly or indirectly in the construction, installation, maintenance of Licensee's Facilities and proprietary poles. Any act or omission of non-employees, officers, and directors shall be considered an act or omission of the Licensee.
- (c) **Duty to Indemnify Licensor Against Claims Arising from License Agreement.** Licensee shall defend, indemnify and hold the CITY and its officers, employees, and appointed and elected officials harmless against all damages, cost, loss or expense arising out of, incident to, directly or proximately resulting from

the negligence or willful misconduct of Licensee, its employees, officers, directors, contractors, subcontractors, agents, or representatives in the performance of activities under this License Agreement for:

- (1) the repair, replacement, or restoration of CITY property, equipment, materials, structures, and facilities which are damaged, destroyed, or found to be defective;
 - (2) damage to or loss of the property of any person including, but not limited to Licensee, its agents, officers, employees and subcontractors, the CITY's agents, officers and employees, and third-parties; and
 - (3) death, bodily injury, illness, disease, worker's compensation, loss of services, or loss of income or wages to any person no matter how, or to whom, the loss may occur.
- (d) **Licensor's Duty to Notify Licensee of Claims** – CITY shall give prompt written notice to Licensee of any claim for which the CITY seeks indemnification. Licensee shall have the right to investigate, defend, and compromise these claims subject to the City Attorney's prior approval. Said approval shall not be unreasonably withheld.
- (e) **Licensor's Consent to Settle Claims** – Licensee may not settle any claim subject to this Section without the consent of CITY, unless (i) the settlement will be fully funded by Licensee, and (ii) the proposed settlement does not contain an admission of liability or wrongdoing by any elected officials, employees, officers, directors, volunteers or representatives of CITY. The CITY's withholding its consent as allowed in the preceding sentence does not release or impair Licensee of any obligations under this Section. Licensee must give CITY at least twenty (20) days advance written notice of the details of a proposed settlement before it becomes binding. Any settlement purporting to bind CITY must first be approved by City Council.
- (f) **EXCLUSION OF DAMAGES – LICENSOR SHALL NOT BE LIABLE TO LICENSEE, OR ITS CUSTOMERS, AGENTS, REPRESENTATIVES, OR EMPLOYEES FOR ANY CLAIMS ARISING FROM THIS LICENSE AGREEMENT FOR LOST REVENUE, LOST PROFITS, LOSS OF EQUIPMENT, INTERRUPTION OR LOSS OF SERVICE, LOSS OF DATA; OR FOR INCIDENTAL, INDIRECT, SPECIAL, CONSEQUENTIAL, OR PUNITIVE DAMAGES, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, WHETHER UNDER THEORY OF CONTRACT, TORT, INCLUDING NEGLIGENCE, STRICT LIABILITY, OR OTHERWISE.**

SECTION 6. INSURANCE REQUIREMENTS

- (a) Prior to the commencement of any work under this License Agreement, the Licensee shall furnish copies of all required endorsements and an original completed Certificate(s) of Insurance to the City's Information Technology Services Department, which shall be clearly labeled with the Licensee's name and followed immediately by "License Agreement for Use of Public Right-of-Way" in the Description of Operations block of the Certificate. The original Certificate(s) shall be completed by an agent and signed by a person authorized by that insurer to bind coverage on its behalf. The CITY will not accept Memorandum of Insurance or Binders as proof of insurance. The original certificate(s) or form must have the agent's original signature, including the signer's company affiliation, title and phone number, and be mailed, with copies of all applicable endorsements, directly from the insurer's authorized representative to the CITY. The CITY shall have no duty to pay or perform under this License Agreement, nor may Licensee commence work in the CITY Right-of-Way, until such certificate and endorsements have been received and approved by the CITY's Information Technology Services Department. No officer or employee, other than the CITY's Risk Manager, shall have authority to waive this requirement.

- (b) CITY reserves the right to review the insurance requirements of this Section during the effective period of this License Agreement and any extension or renewal hereof and to modify insurance coverages and their limits when deemed necessary and prudent by the CITY's Risk Manager based upon changes in statutory law, court decisions, or circumstances surrounding this Agreement. In no instance will CITY allow modification whereupon the CITY may incur increased risk. Such review and modification shall not occur more frequently than every five (5) years.

- (c) The Licensee's financial integrity is of interest to the CITY; therefore, the Licensee shall obtain and maintain in full force and effect for the duration of this License Agreement, and any extension hereof, at the Licensee's sole expense, insurance coverage written on an occurrence basis, by companies authorized and admitted to do business in the State of Texas and with an A.M Best's rating of no less than A- (VII), in the following types and for an amount not less than the amount listed below:

TYPE	AMOUNTS
1. Workers' Compensation	Statutory
2. Employers' Liability	\$1,000,000/\$1,000,000/\$1,000,000
3. Commercial General Liability Insurance to include coverage for the following: a. Premises/Operations b. Products/Completed Operations	For Bodily Injury and Property Damage of \$3,000,000 per occurrence; \$5,000,000 General Aggregate, or its equivalent in Umbrella or Excess Liability

c. Personal/Advertising Injury	Coverage
4. Business Automobile Liability a. Owned/leased vehicles b. Non-owned vehicles c. Hired Vehicles	Combined Single Limit for Bodily Injury and Property Damage of \$1,000,000 per occurrence
5. Professional Liability (Claims-made basis) To be maintained and in effect for no less than two years subsequent to the completion of the professional service.	\$1,000,000 per claim, to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages by reason of any act, malpractice, error, or omission in professional services.
6. Fidelity or Commercial Crime Insurance Employee Dishonesty Policy – City will be named as Loss Payee	\$100,000

- (e) The Licensee agrees that with respect to the above required insurance, all insurance policies are to contain or be endorsed to contain the following provisions:
- Name the CITY, its officers, officials, employees, volunteers, and elected representatives as additional insured by endorsement, as respects operations and activities of, or on behalf of, the named insured performed under contract with the CITY, with the exception of the workers' compensation and professional liability policies;
 - Provide for an endorsement that the "other insurance" clause shall not apply to the City of San Antonio where the CITY is an additional insured shown on the policy;
 - Workers' compensation and employers' liability policies will provide a waiver of subrogation in favor of the CITY; and
 - Upon receipt of notice from its insurer, Licensee will provide Licensor with thirty (30) days prior written notice of cancellation.
- (f) Within thirty (30) calendar days of a suspension, cancellation or non-renewal of coverage, the Licensee shall provide a replacement Certificate of Insurance and applicable endorsements to the CITY. The CITY shall have the option to suspend the Licensee's performance should there be a lapse in coverage at any time during this License Agreement. Failure to provide and to maintain the required insurance shall constitute a material breach of this License Agreement.

- (g) In addition to any other remedies the CITY may have upon the Licensee's failure to provide and maintain any insurance or policy endorsements to the extent and within the time herein required, the CITY shall have the right to order the Licensee to immediately stop work hereunder.
- (h) Nothing herein contained shall be construed as limiting in any way the extent to which the Licensee may be held responsible for payments of damages to persons or property resulting from the Licensee's or its subcontractors' performance of the work covered under this Licensee Agreement.
- (i) It is agreed that the Licensee's insurance shall be deemed primary and non-contributory with respect to any insurance or self-insurance carried by the City of San Antonio for liability arising out of operations under this License Agreement.
- (j) It is understood and agreed that the insurance required is in addition to and separate from any other obligation contained in this License Agreement.
- (k) The Licensee, and Licensee's employees, agents, and subcontractors are responsible for all damage to their own equipment and/or property.

SECTION 7. ADMINISTRATION OF LICENSE

- (a) The City Manager or her designee is the principal CITY officer responsible for the administration of this Agreement. The Right-of-Way Manager shall review the operations of Licensee in the Right-of-Way under this License Agreement.
- (b) Licensee shall remit payment of all fees associated with this License Agreement to the address indicated below, and the fees shall be labeled with the Licensee's name and followed immediately by "*License Agreement for Use of Public Right-of-Way*" and Licensee's address and phone number.

Remit Payment to: City of San Antonio
Revenue Collections
PO BOX 839975
San Antonio, TX 78283

- (c) Licensee shall communicate with the Right-of-Way Manager regarding all matters in connection with or affecting the installation, construction, reconstruction, maintenance and repair of Licensee's Facilities in the Right-of-Way and report any material changes regarding Licensee's Facilities.
- (d) Notices required by this License Agreement may be given by registered or certified mail by depositing the same in the United States mail in the continental United States, postage prepaid. Notices given in this manner shall be effective as of the date of deposit thereof in the United States Mail. Either Party shall have the

right, by giving written notice to the other, to change the address at which its notices are to be received. Until any such change is made, notices to CITY shall be delivered as follows:

Director of Capital Improvements	City Clerk's Office
Management Services	City of San Antonio
Department	P.O. Box 839933
City of San Antonio	San Antonio, Texas 78283-3933
P.O. Box 839966	(210) 207-7253
San Antonio, Texas 78204	
(210) 207-8140	

Until any such change is made, notices to Licensee shall be delivered as follows:

E-Z Bel Const., LLC
203 Recoleta Rd.
San Antonio, Texas 78216

Copies of petitions, applications, communications, and reports submitted by Licensee to the Federal Communications Commission or the Public Utility Commission of Texas concerning or affecting this License Agreement shall be provided to the CITY concurrently with the filing of such documents.

SECTION 8. RECORDS

- (a) Licensee shall keep complete and accurate maps and records of its Facilities. The CITY may require the keeping of additional records or maps which are reasonably necessary for purposes of identifying, accounting for, and reporting changes in Facilities.
- (b) The CITY may, at reasonable times and for reasonable purposes, examine, verify, make copies of, and review the documents, maps, plans and other records of Licensee pertaining to the Facilities installed in the Right-of-Way. Licensee shall make the above records available to the CITY for review within ten (10) working days after requested by the Director, the Chief Information/Technology Officer, or Right-of-Way Manager.

SECTION 9. COMPENSATION FOR USE OF RIGHT-OF-WAY

In exchange for the use and occupancy of the Public Right-of-Way, Licensee shall be required to pay the fees as set forth in this License Agreement and shown in **EXHIBIT B**, which is attached to this License Agreement and made a part hereof for all purposes:

- (a) **Processing Fee.** Licensee shall remit to the CITY a one-time processing fee of three thousand five hundred dollars (\$3,500.00) after City Council approval of this Agreement.
- (b) **Right-of-Way Access Fees.**
(1) The annual consideration amount for use of public Right-of-Way for the purpose of installing aerial and/or subterranean fiber optic and related communications facilities is based on the fair market value of the Right-of-Way used by Licensee ("Right of Way Access Fee"). The licensed area must be as wide as the Licensee will reasonably need to maintain the licensed Facilities but not more than twenty (20) feet. The Chief Information/Technology Officer, in his or her sole discretion, may utilize internal staff or engage an independent professional consultant to conduct an appraisal of the Right-of-Way subject to this License Agreement, based on the appraised values of adjoining properties as assessed by the Bexar County Appraisal District. Licensee will be responsible for paying the Right-of-Way appraisal separate from the processing fee. The Chief Information/Technology Officer will determine the fair market value based on a per-linear-foot basis of the Right-of-Way area associated with the Licensee's network footprint. An annual escalation factor of four (4) percent will be applied to the consideration amount for year one in order to derive the consideration amount for years two (2) to ten (10) of the license term. At the sole discretion of the Chief Information/Technology Officer, the CITY may negotiate a discount off the total licensing fee in exchange for in-kind contributions of equivalent value. The Right of Way Access Fee is shown in **EXHIBIT B**.

(2) This Agreement shall authorize Licensee to install Facilities on CITY Right-of-Way, but does not grant authority to use poles or other infrastructure of the CITY or utility agencies, to install Licensee's own poles, or to install any other facilities that are outside of what is defined in this License Agreement. The Chief Information/Technology Officer may require Licensee to sign and deliver an agreement setting out the applicable license fee and conditions imposed by CITY departments and utility agencies.
- (c) **Right-of-Way Access Fees Due.** Licensee shall remit the total amount of Right-of-Way access fees for all ten (10) years of this Agreement after City Council approval of this Agreement. The payment shall be accompanied by a statement explaining that the payment is made pursuant to this License Agreement.

SECTION 10. ASSIGNMENT OF LICENSE AGREEMENT

The rights granted by this License Agreement inure to the benefit of Licensee and this License Agreement shall not be assigned, transferred, sold or disposed of, in whole or in part, by voluntary sale, merger, consolidation or otherwise by force or involuntary sale, without the expressed written consent of the CITY, approved by passage of an

ordinance. For the purposes of this Section, assignment, transfer, sale, disposal, merger or consolidation shall exclude an assignment or transfer to entities that control, are controlled by, or are under common control with Licensee.

SECTION 11. FUTURE CONTINGENCY

Notwithstanding anything contained in this License Agreement to the contrary, in the event that this License Agreement, in whole or in part, is declared or determined by a judicial, administrative or legislative authority exercising its jurisdiction to be excessive, unrecoverable, unenforceable, void, unlawful, or otherwise inapplicable, Licensee and the CITY shall meet and negotiate an amended License Agreement that is in compliance with the authority's decision or enactment and, unless explicitly prohibited, the amended License Agreement shall provide the CITY with a level of compensation comparable to that set forth in this License Agreement.

SECTION 12. VENUE AND GOVERNING LAW

- (a) **VENUE OF ANY COURT ACTION BROUGHT DIRECTLY OR INDIRECTLY BY REASON OF THIS LICENSE AGREEMENT SHALL BE IN BEXAR COUNTY, TEXAS. THE PROVISIONS OF THE LICENSE AGREEMENT SHALL BE CONSTRUED UNDER, AND IN ACCORDANCE WITH, THE LAWS OF THE STATE OF TEXAS, AND ALL OBLIGATIONS OF THE PARTIES CREATED HEREUNDER SHALL BE PERFORMED IN BEXAR COUNTY, TEXAS.**
- (b) This License Agreement shall be construed in accordance with the CITY Charter and Municipal Code(s) in effect on the date of passage of this License Agreement, and as may be subsequently amended, to the extent that such Charter and Code(s) are not in conflict with or in violation of the Constitution and laws of the United States or the State of Texas.

SECTION 13. LICENSE AGREEMENT VIOLATIONS AND TERMINATION

The CITY shall have the right to declare this License Agreement terminated for failure of Licensee to comply with any term, condition, or provision of the License Agreement, including a challenge of this License Agreement, as further provided below.

- (a) If Licensee initiates a challenge, legal or otherwise, to the validity of any part of this License Agreement, then CITY shall have the option to terminate all rights and licenses granted to Licensee to use the Public Right-of-Way as of the challenge date, and Licensee shall continue to be bound to the terms of this Agreement. Licensee shall inform the CITY no later than the second day after initiating such a challenge.

- (b) As to violations other than a challenge to the validity of any part of the License Agreement, Licensee will have an opportunity to cure the violation following notice from the CITY. If Licensee fails to cure a violation within thirty (30) calendar days after receiving written notice, then the CITY may terminate this License Agreement. Any termination, other than for a challenge to the License Agreement, shall be declared in writing by the Director following an opportunity to cure a violation of the License Agreement.
- (c) Following termination of this License Agreement for any reason, CITY may require Licensee, at Licensee's expense, to remove the Facilities from the Public Right-of-Way and repair any damage caused by removal within sixty (60) days. If Licensee does not remove the Facilities from the Public Right-of-Way within sixty (60) days, the Facilities shall be considered abandoned and the property of the CITY. The CITY may, at Licensee's expense, remove the Facilities that remain in the Public Right-of-Way on or after the 61st calendar day without incurring liability for the removal. Licensee shall promptly remit payment of all costs associated with removal when invoiced by the CITY.
- (d) Licensee shall not be excused from complying with any of the terms and conditions of this License Agreement by the previous failure of the CITY to insist upon or seek compliance with such terms and conditions.

SECTION 14. NON-BINDING MEDIATION

- (a) Prior to filing a lawsuit, the Parties to this License Agreement shall use non-binding mediation to resolve any legal dispute arising under the License Agreement, expressly excluding disputes involving the applicability or effect of superior laws, the constitutionality of any requirement in this License Agreement, or the preemptive effect of federal law. CITY shall not be required to use non-binding mediation prior to terminating this License Agreement or prior to taking any other action authorized by this License Agreement.
- (b) To initiate non-binding mediation, a Party shall give written notice to the other Party. In the mediation process, the Parties will try to resolve their differences voluntarily with the aid of an impartial mediator, who will attempt to facilitate negotiations. The mediator will be selected by agreement of the Parties. If the Parties cannot agree on a mediator, a mediator shall be designated by JAMS at the request of a Party. Any mediator so designated shall be acceptable to both Parties.
- (c) The mediation will be conducted as specified by the mediator and agreed upon by the Parties. The Parties agree to discuss their differences in good faith. Any finding by the mediator shall be a non-binding determination. The mediation will be treated as a settlement discussion and therefore will be confidential in accordance with Tex. Civ. Prac. & Rem. Code § 154.073. The mediator may not

testify for either party in any later proceeding relating to the dispute. No recording or transcript shall be made of the mediation proceedings.

- (d) Each Party will bear its own costs in the mediation. The fees and expenses of the mediator will be shared equally by the parties.

SECTION 15. WAIVER

None of the material provisions of this License Agreement may be waived or modified except expressly in writing signed by Licensee and CITY, as authorized by City Council by passage of an ordinance. Failure of either Party to require the performance of any term in this License Agreement or the waiver by either Party of any breach thereof shall not prevent subsequent enforcement of the term and shall not be deemed a waiver of any subsequent breach.

SECTION 16. SEVERABILITY

If any clause or provision of this License Agreement is illegal, invalid, or unenforceable under present or future laws effective during the term of this License Agreement, it is the intention of the Parties hereto that the remainder of this License Agreement shall not be affected thereby, and it is also the intention of the Parties that in lieu of each clause or provision of this License Agreement that is illegal, invalid, or unenforceable, there be added as part of this License Agreement a clause or provision as similar in terms to such illegal, invalid, or unenforceable clause or provision as may be possible and be legal, valid, and enforceable.

SECTION 17. CAPTIONS

The captions contained in this License Agreement are for convenience of reference only and in no way modify the terms and conditions of this License Agreement.

SECTION 18. EXTENT OF LICENSE AGREEMENT AND MERGER

This License Agreement, together with any attached exhibits and the authorizing ordinance, embodies the complete agreement of the Parties, superseding all oral or written previous and contemporary agreements between the Parties and relating to this License Agreement.

SECTION 19. AUTHORITY

The signer of this License Agreement for Licensee hereby represents and warrants that he or she has full authority to execute this License Agreement on behalf of Licensee.

[Signature Page Follows]

EXECUTED and **AGREED** to as of the dates indicated below.

CITY OF SAN ANTONIO

E-Z BEL CONSTRUCTION, LLC,
a Texas limited liability company,

(Signature)

(Signature)

Printed Name: _____

Printed Name: _____

Title: Chief Information/
Technology Officer

Title: _____

Date: _____

Date: _____

APPROVED AS TO FORM:

Assistant City Attorney

EXHIBIT A

Location of Fiber Optic Cable Crossing

72
ROW

JACKSON
KELLER

203
RECOLETS
TO
214 JACKSON
KELLER

PROPOSED 2" POLY CONDUIT

EXISTING 4' SIDEWALK

EXISTING CURB.

2
0'

2
4'

APPROX LOCATION
OF WATER MAINS

PROPOSE CONDUIT (BORE)

NOT TO SCALE

214 JACKSON KELLER

EXHIBIT B

Access Fee Schedule for the Fiber Optic Cable Crossing

Right-of-Way Access Fee for Jackson-Keller Fiber Optic Cable Crossing

Site Name	LF	ROW Width	Appraised Value (\$)	EFMV %	Assessment \$	EFMV ROW Width	Fiber Optic Access Fee
203 Recoleta & 214 Jackson Keller	105.57	1	\$4.95	10%	\$ 0.41	\$0.41	\$42.76

Annual Fee	
\$42.76	1st Year
\$44.47	2nd Year
\$46.24	3rd Year
\$48.09	4th Year
\$50.02	5th Year
\$52.02	6th Year
\$54.10	7th Year
\$56.26	8th Year
\$58.51	9th Year
\$60.85	10th Year

\$513.33	TOTAL DUE
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