

ORDINANCE 2020-04-16-0271

APPROVING A NON-EXCLUSIVE 10-YEAR LICENSE AGREEMENT GRANTING HEB THE USE AND OCCUPANCY OF THE RIGHT-OF-WAY AT TWO DOWNTOWN SITES IDENTIFIED AS E. POPLAR AND OGDEN, FOR THE PURPOSE OF INSTALLING AND MAINTAINING FIBER OPTIC CABLE FACILITIES TO ALLOW HEB TO EXTEND ITS PRIVATE FIBER OPTIC NETWORK AMONG ITS DOWNTOWN CAMPUS LOCATIONS.

* * * * *

WHEREAS, HEB Grocery Company, LP (“HEB”) 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 downtown campus locations; and

WHEREAS, the proposed fiber optic cable facilities will cross over or under the City’s right-of-way to provide telecommunications connectivity at two sites with the names and locations listed below, and as depicted in greater detail within the License Agreement attached as **EXHIBIT A**;

- 1) “E. Poplar” (near the intersection of N. Main Avenue and E. Poplar Street);
- 2) “Ogden” (near the intersection of E. Poplar Street and Ogden Street);

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 HEB 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
\$2,001.16	4202410	209000000045	74001000

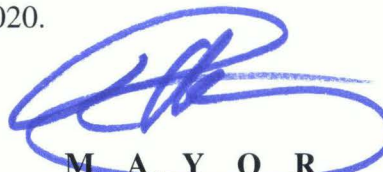
SECTION 4. Additional funds generated will be deposited into Fund 74001000 Internal Order 209000000045, and GLs 4202440 and 4202410.

SECTION 5. 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 6. 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 16th day of April, 2020.



M A Y O R
Ron Nirenberg

ATTEST:

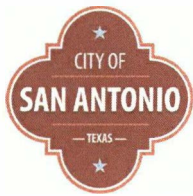


Tina J. Flores, City Clerk

APPROVED AS TO FORM:



for Andrew Segovia, City Attorney



City of San Antonio

City Council

April 16, 2020

Item: 17

Enactment Number:

File Number: 20-2275

2020-04-16-0271

Ordinance approving an agreement with HEB Grocery Company LP to install and maintain fiber optic cables near the intersection of East Poplar and North Main and the intersection of Ogden and East Poplar. [Ben Gorzell, Chief Financial Officer; Craig Hopkins, Chief Information Officer, Information Technology Services]

Councilmember John Courage made a motion to approve. Councilmember Manny Pelaez seconded the motion. The motion passed by the following vote:

Aye: 10 Nirenberg, Treviño, Andrews-Sullivan, Viagran, Rocha Garcia,
Gonzales, Cabello Havrda, Pelaez, Courage and Perry

Absent: 1 Sandoval

EXHIBIT A

NON-EXCLUSIVE LICENSE AGREEMENT BETWEEN THE CITY OF SAN ANTONIO AND H-E-B, LP, A TEXAS LIMITED PARTNERSHIP, FORMERLY KNOWN AS HEB GROCERY COMPANY LP, FOR USE OF PUBLIC RIGHT-OF-WAY

This License Agreement ("License 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 **H-E-B, LP**, a Texas limited partnership, formerly known as **HEB GROCERY COMPANY LP** (hereafter referred to as "HEB" or "Licensee"). The CITY and the HEB may hereinafter be referred to collectively as the "Parties".

WHEREAS, HEB 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 (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 HEB's fiber optic cables, conduits, and related equipment necessary for the installation of fiber optic cables and related equipment over or under the Right-of-Way as identified and described in the 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 HEB, a non-exclusive license to use and occupy the space above or below those portions of the CITY's Right-of-Way as particularly described in **EXHIBIT A (1-2)** to this License Agreement in order to install, construct, replace, and maintain all necessary Facilities as that term is defined herein. The shorthand name of the Facilities locations are known as The shorthand name of the Facilities locations are known as 1) "E. Poplar" (Being 0.0013 acres situated in E. Poplar Street); 2) "Ogden" (Being 0.0013 acres situated in Ogden Street). Each location is described with particularity in **EXHIBIT A**, which is attached to this License Agreement and made a part hereof for all purposes.
- (b) HEB'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, as they exist now or may be amended from time to time.

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 HEB, this License Agreement may be renewed by the CITY for up to two (2) separate five (5) year Renewal Terms pursuant to the procedures established in this Section, and in accordance with the applicable laws, regulations, and rules of the State of Texas and the City of San Antonio.
- (b) At least six (6) months prior to the expiration of the then-current term of the License Agreement, HEB shall inform the Chief Information/Technology Officer in writing of its intent to seek renewal of the License Agreement. During this time period, the Chief Information/Technology Officer may order a new appraisal of the Right-of-Way used by HEB, but no other terms of this License Agreement may be altered unless expressly authorized herein or unless mandated by ordinance or other law. A processing fee will apply to a renewal of the License Agreement.

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. The indemnity provided for in this paragraph shall not apply to any liability resulting from the negligence of the CITY, its officers or employees, in instances where such negligence causes personal injury, death, or property damage. 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(s) 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 Licensors 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 "*HEB 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 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, through self-insurance, or 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 c. Personal/Advertising Injury	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 Coverage
4. Business Automobile Liability a. Owned/leased vehicles b. Non-owned vehicles	Combined Single Limit for Bodily Injury and Property Damage of \$1,000,000 per occurrence

c. Hired Vehicles	
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 stop work hereunder, and/or withhold any payment(s) which become due to the Licensee hereunder until the Licensee demonstrates compliance with the requirements hereof.

- (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 License 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 any 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 License Agreement. The Right-of-Way Manager shall review the operations of HEB in the Right-of-Way under this License Agreement.
- (b) HEB shall remit payment of all fees associated with this License Agreement to the address indicated below:

 City of San Antonio
 Revenue Collections
 PO BOX 839975
 San Antonio, TX 78283
- (c) HEB shall communicate with the Right-of-Way Manager all matters in connection with or affecting the installation, construction, reconstruction, maintenance and repair of HEB's Facilities in the Right-of-Way and report any material changes regarding HEB'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 City Clerk's Office
 Improvements Management City of San Antonio

Services
Department
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78204
(210) 207-8140

P.O. Box 839933
San Antonio, Texas 78283-3933
(210) 207-7253

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

H-E-B, LP
646 South Flores Street
San Antonio, Texas 78204
210-938-0722
Attn: Kathy Strimple

Copy To:
Golden Steves & Gordon
200 E. Basse Road
San Antonio, Texas 78209
(210) 745-3700
Attn: Ami E. Gordon

Copies of petitions, applications, communications and reports submitted by HEB 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) HEB 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 and review the non-proprietary and non-confidential documents, maps, plans and other records of HEB pertaining to the Facilities installed in the Right-of-Way. HEB shall make the above records available to the CITY for review within ten (10) working days after requested by the Director 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, HEB shall be required to pay the fees as set forth in this Agreement and shown in **EXHIBIT B**, which is attached to this License Agreement and made a part hereof for all purposes:

- (a) **Processing Fee.** HEB shall remit to the CITY a one-time processing fee of three thousand five hundred dollars (\$3,500.00) prior to final approval by the director.
- (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 HEB ("Right of Way Access Fee"). The licensed area must be as wide as HEB will reasonably need to maintain the licensed Facilities but not more than twenty (20) feet. The Chief Information/Technology Officer in his 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. HEB will be responsible for paying the Right-of-Way appraisal separate from the processing fee. The Chief Information/Technology Officer has determined the fair market value based on a per-linear-foot basis of the Right-of-Way area associated with the HEB's network footprint. An annual escalation factor of four (4) percent has been 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 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 has been determined according to the process above and is shown in **EXHIBIT B**.

(2) The licensing fee will authorize HEB 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. The Chief Information/Technology Officer may require HEB to sign and deliver an agreement setting out the applicable license fee and conditions imposed by CITY departments and utility agencies. When reasonably conducive to the efficient use of the property on which Facilities are located, the Chief Information/Technology Officer may require HEB to relocate the Facilities, including all related equipment, at HEB'S expense.

(3) Following termination of this License Agreement for any reason, HEB must remove or otherwise dispose of all Facilities at its' own expense within sixty (60) days. Failure to take this action will result in the Facilities being considered abandoned and the property of the CITY.

- (c) **Right-of-Way Access Fees Due Annually.** HEB shall remit the Right-of-Way access fees on an annual basis. First payment of the Right-of-Way Access Fee shall be due on the first day of the month after the date of execution of this Agreement by both parties and shall be due on the same date annually thereafter. Each payment shall be accompanied by a statement explaining that the payment is made pursuant to this License Agreement.
- (d) Following termination of this License Agreement for any reason, HEB must remove or otherwise dispose of all Facilities at its own expense within sixty (60) days. Failure to take this action will result in the Facilities being considered

abandoned and the property of the CITY.

SECTION 10. ASSIGNMENT OF LICENSE AGREEMENT

The rights granted by this License Agreement inure to the benefit of HEB 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 HEB. Any such consent by the CITY shall not be unreasonably withheld.

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, HEB 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 Director shall have the right to declare this License Agreement terminated at

any time for failure of HEB 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 HEB initiates a challenge, legal or otherwise, to the validity of any part of this License Agreement, the entire agreement, all permits and permit applications to use Public Right-of-Way or a municipal facility is declared null and void as of the challenge date.
- (b) HEB shall inform the CITY no later than the second day after initiating such a challenge. Failure to provide the CITY with notice constitutes a material breach of the License Agreement.
- (c) HEB must remove all Facilities installed in Public Right-of-Way, or in, on, or around any CITY facility or property wherever located by no later than the 60th day after initiating the challenge.
- (c) The CITY may remove any of HEB's Facility that remain in or around Public Right-of-Way or CITY facility or property on or after the 61st day following HEB'S challenge without incurring liability for the removal.
- (d) As to violations, other than a challenge of the License Agreement, HEB will have an opportunity to cure following notice from the CITY. If HEB fails to cure a violation within thirty (30) days after receiving written notice, then the CITY may pursue termination of this License Agreement.
- (e) 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.
- (f) HEB 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 suit, the parties to this License Agreement shall use non-binding mediation to resolve any controversy, claim or 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.
- (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 and to attempt with the assistance of the mediator, to reach an amicable resolution of the dispute. Any finding by the mediator shall be a non-binding determination.
- (d) 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.
- (e) 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 HEB 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 this term and shall not be deemed a waiver of any subsequent breach.

SECTION 16. SEVERABILITY

If any clause or provision of the 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 limit or enlarge the terms and conditions of this License Agreement.

SECTION 18. EXTENT OF LICENSE AGREEMENT

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 Agreement.

SECTION 19. MODIFICATION

This License Agreement may not be changed orally and no modification, amendment, or waiver of any provision contained in this License Agreement, or any future representation, promise or condition in connection with the subject matter of this License Agreement shall be binding upon any party hereto unless made in writing, approved by the City Council, and signed by both Parties.

The City Manager, her designee, or the Chief Information/Technology Officer shall have the authority to enter into an amendment of this License Agreement without further action by the City Council in order to: 1) make adjustments to the location and length of the fiber cable installations identified herein and to recalculate the Right-of-Way Access Fee in accordance with such adjustments; and 2) renew this License Agreement in accordance with the license renewal procedures provided herein.

SECTION 20. AUTHORITY

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

[Signature Page Follows]

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

**CITY OF SAN
ANTONIO**

H-E-B, LP,
a Texas limited partnership

(Signature)

Printed Name: _____

Title: _____

Date: _____

(Signature)

Printed
Name: _____

Benjamin R. Scott

Title: _____

**Vice President of Real
Estate SAFD**

Date: _____

December 2019

APPROVED AS TO FORM:

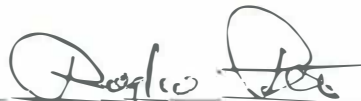

City Attorney

EXHIBIT A

Metes and Bounds Locations of Fiber Optic Cable Crossings

- **Exhibit A-1: “E. Poplar”**
- **Exhibit A-2: “Ogden”**

Exhibit A-1: “E. Poplar”



0.0013 Acres
(55 Sq. Ft.)
2220-11748_CC.dwg

FN NO. 2220-11748-1
October 10, 2019
JOB NO. 2220-11748.913

FIELD NOTE DESCRIPTION

Proposed Underground Fiber Optic Crossing

Being 0.0013 acres, out of E. Poplar Street, a variable width public right-of-way in the city of San Antonio, Bexar County, Texas; said 0.0013 acres being more particularly described by metes and bounds as follows with all bearings being referenced to the North American Datum of 1983, Texas State Plane Coordinate System, South Central Zone:

Commencing, at a found "P.K." nail set a concrete sidewalk at the south end of a cut-back at the intersection of N. Main Avenue and said E. Poplar Street, a public right-of-way, also being the southwest corner of the remaining portion of Block 8 of N.C.B. 384 of the city of San Antonio;

Thence, N 89° 40' 38" E, with the southerly line of said Block 8 of N.C.B. 384 and the northerly right-of-way line of said E. Poplar Street, 121.15 feet, to the **Point of Beginning** and the northwest corner of the herein described easement;

Thence, N 89° 40' 38" E, with said E. Poplar Street, 1.00 feet to a point for the northeast corner of the herein described easement;

Thence, S 00° 14' 40" E, crossing said E. Poplar Street, 55.20 feet to a point in the northerly line of Lot 1, Block 2 of N.C.B. 383 to a point for the southeast corner of the herein described easement;

Thence, S 89° 45' 20" W, with the southerly right-of-way line of said E. Poplar Street and the northerly line of said Lot 1, Block 2, N.C.B. 853, 1.00 feet for the southwest corner of the herein described easement;

Thence, N 00° 14' 40" W, crossing said E. Poplar Street, 55.19 feet, to the **Point of Beginning**, containing 0.0013 acres (55 square feet) of land, more or less.

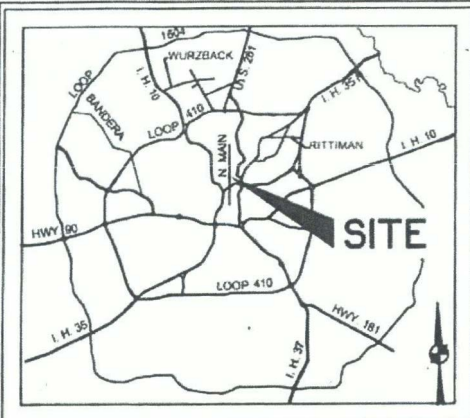
Note: Survey plat of even date to accompany this Field Note Description. (Exhibit "A")



Alberto Jonathan Perez
Registered Professional Land Surveyor
Texas Registration Number 6572
Stantec Consulting Services, Inc.
70 NE Loop 410, Suite 1100
San Antonio, Texas 78216
210/525-9090
TBPELS Firm No.: 10194228

10/30/2019
DATE





**VICINITY MAP
SAN ANTONIO, TEXAS**

NTS

LEGEND

- 1/2" IRON ROD FOUND
- 1/2" IRON ROD SET
- P.O.C. POINT OF COMMENCEMENT
- P.O.B. POINT OF BEGINNING



LOTS 1-12, BLOCK 8, N.C.B. 384
HEB GROCERY COMPANY, LP
VOL. 13411, PG. 2035 O.P.R.

N. MAIN AVENUE
(VARIABLE WIDTH R.O.W.)

63.05'

PK P.O.C.

N 89°40'38" E 121.15'

N 89°40'38" E
1.00'

P.O.B.

E POPLAR STREET
(VARIABLE WIDTH R.O.W.)

PROPOSED 1-FOOT WIDE
FIBER OPTIC CROSSING
(0.0013 ACRES)
(55 SQ. FT.)

55.03'

PK

55.19'

55.20'

N 00°14'40" W

S 00°14'40" E

S 89°45'20" W
1.00'

LOTS 1-6, BLOCK 2, N.C.B. 383
FLORESVILLE/181 LESSEE INC.
VOL. 13411, PG. 2042 O.P.R.

BEARING BASIS

BEARINGS ARE BASED ON NORTH AMERICAN
DATUM, 1983, TEXAS COORDINATE SYSTEM,
SOUTH CENTRAL ZONE, ESTABLISHED FROM
GPS OBSERVATIONS UTILIZING THE ALTERRA
COOPERATIVE NETWORK.



Stantec

70 NE Loop 410, Suite 1100
San Antonio, TX 78216
Tel (210) 525-9090 Fax (210) 525-0520
TBPCLS # F-10194228
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SKETCH TO ACCOMPANY DESCRIPTION OF

OF A 0.0013-ACRE PROPOSED UNDERGROUND FIBER
OPTIC CROSSING BEING A PORTION OF E. POPLAR
AVENUE, A VARIABLE WIDTH PUBLIC RIGHT-OF-WAY IN
THE CITY OF SAN ANTONIO, BEXAR COUNTY TEXAS

EXHIBIT "A"

SHEET 3 OF 3

DATE: 10/10/2019

SCALE: 1"=30'

DRAWN BY: STB

FILE: 2220-11748-CC.dwg

PROJECT No 2220-11748 913

Exhibit A-2: “Ogden”



0.0013 Acres
(55 Sq. Ft.)
2220-11748_CC.dwg

FN NO. 2220-11748-2
October 10, 2019
JOB NO. 2220-11748.913

FIELD NOTE DESCRIPTION

Proposed Underground Fiber Optic Crossing

Being 0.0013 acres, out of Ogden Street, a variable width public right-of-way in the city of San Antonio, Bexar County, Texas; said 0.0013 acres being more particularly described by metes and bounds as follows with all bearings being referenced to the North American Datum of 1983, Texas State Plane Coordinate System, South Central Zone:

Commencing, at a found "P.K." nail set a concrete sidewalk marking the southeast corner of Lot 12, Block 8 of N.C.B. 384 of the city of San Antonio at the intersection of E. Poplar Street and Ogden Street, a called 55.6-foot public right-of-way;

Thence, N 00° 38' 28" W, with the easterly line of said Block 8 of N.C.B. 384 and the westerly right-of-way line of said Ogden Street, 97.37 feet, to the **Point of Beginning** and the southwest corner of the herein described easement;


Thence, N 00° 38' 28" W, with said Ogden Street, 1.00 feet to a point for the northwest corner of the herein described easement;

Thence, N 89° 16' 49" E, crossing said Ogden Street, 55.28 feet to a point in the westerly line of Lot 7, Block 7 of N.C.B. 390 to a point for the northeast corner of the herein described easement;

Thence, S 00° 43' 11" E, with the easterly right-of-way line of said Ogden Street and the westerly line of said Lot 7, Block 7, N.C.B. 390, 1.00 feet for the southeast corner of the herein described easement;

Thence, S 89° 16' 49" W, crossing said Ogden Street, 55.29 feet, to the **Point of Beginning**, containing 0.0013 acres (55 square feet) of land, more or less.

Note: Survey plat of even date to accompany this Field Note Description. (Exhibit "B")

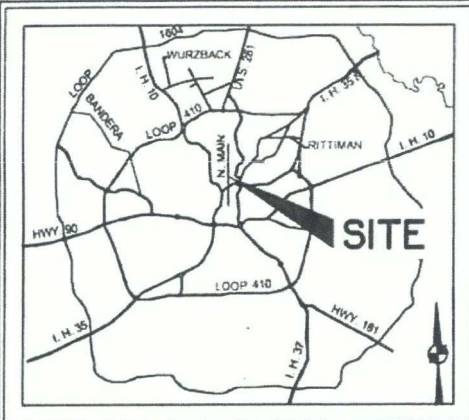


10/14/2019

DATE

Alberto Jonathan Perez
Registered Professional Land Surveyor
Texas Registration Number 6572
Stantec Consulting Services, Inc.
70 NE Loop 410, Suite 1100
San Antonio, Texas 78216
210/525-9090
TBPELS Firm No.: 10194228





**VICINITY MAP
SAN ANTONIO, TEXAS**

NTS

N 00°38'28" W
1.00'

P.O.B.

N 89°16'49" E
S 89°16'49" W

PROPOSED 1-FOOT WIDE
FIBER OPTIC CROSSING
(0.0013 ACRES/55 SQ. FT.)

S 00°43'11" E
1.00'

LOTS 1-12, BLOCK 8, N.C.B. 384
HEB GROCERY COMPANY, LP
VOL. 13411, PG. 2035 O.P.R.

LOTS 2-11, BLOCK 7, N.C.B. 390
FLORESVILLE/181 LESSEE INC.
VOL. 13411, PG. 2042 O.P.R.

OGDEN STREET
(VARIABLE WIDTH R.O.W.)

55.42'

P.O.C.
PK

"X" FOUND

E. POPLAR STREET
(VARIABLE WIDTH R.O.W.)

55.44'

CAP

LEGEND

- 1/2" IRON ROD FOUND
- 1/2" IRON ROD SET
- P.O.C. POINT OF COMMENCEMENT
- P.O.B. POINT OF BEGINNING



0 30" 60'

BEARING BASIS

BEARINGS ARE BASED ON NORTH AMERICAN
DATUM, 1983, TEXAS COORDINATE SYSTEM,
SOUTH CENTRAL ZONE, ESTABLISHED FROM
GPS OBSERVATIONS UTILIZING THE ALTERRA
COOPERATIVE NETWORK.



Stantec

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TBP/ELS # F-10194228
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SKETCH TO ACCOMPANY DESCRIPTION OF

OF A 0.0013-ACRE PROPOSED UNDERGROUND FIBER
OPTIC CROSSING BEING A PORTION OF OGDEN STREET,
A VARIABLE WIDTH PUBLIC RIGHT-OF-WAY IN THE CITY
OF SAN ANTONIO, BEXAR COUNTY TEXAS

EXHIBIT "B"

SHEET 3 OF 3

DATE: 10/10/2019

SCALE: 1"=30'

DRAWN BY STB

FILE: 2220-11748-CC.dwg

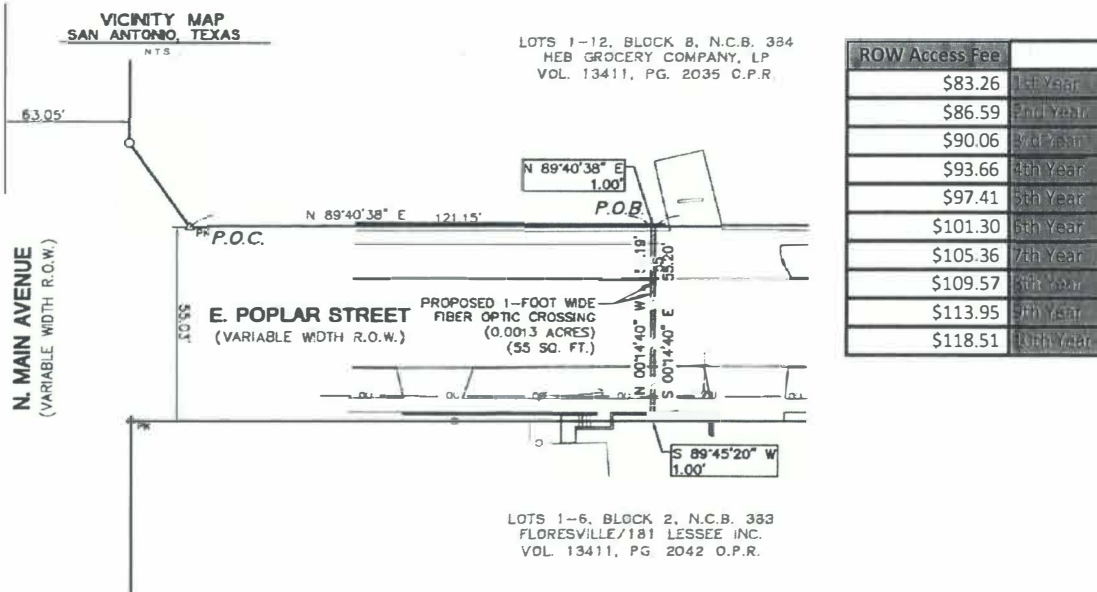
PROJECT No. 2220-11748.913

EXHIBIT B

**Access Fee Schedules for the Fiber Optic Cable
Crossings**

Right-of-Way Access Fee Schedule for C-1 E. Poplar

Site Name	LF	ROW Width	Total SF	Appraised Value (\$F)	EFMV %	Easement SV	FMV*ROW Width	ROW Access Fee
C-1 E. Poplar	55.2	1	55	\$16.76	9%	\$ 1.51	\$1.51	\$83.26
			0			\$ -	\$0.00	\$0.00
			0			\$ -	\$0.00	\$0.00
								\$83.26



Right-of-Way Access Fee Schedule for C-2 Ogden

Site Name	LF	ROW Width	Total SF	Appraised Value (\$F)	EFMV %	Easement SV	FMV*ROW Width	ROW Access Fee
C-2 Ogden	55.3	1	55	\$16.76	9%	\$ 1.51	\$1.51	\$83.41
								\$83.41

