

**ORDINANCE NO. 1721**

**AN ORDINANCE OF THE CITY OF DES MOINES, WASHINGTON** granting to Extenet Systems, Inc. and its affiliates, successors and assigns, the right, privilege, authority and nonexclusive Franchise for ten years, to construct, maintain, operate, replace, and repair a telecommunications network, in, across, over, along, under, through and below certain designated public rights-of-way of the City of Des Moines, Washington.

**WHEREAS**, ExteNet Systems, Inc. (the "Franchisee") has requested that the City Council grant a nonexclusive franchise (this "Franchise"), and

**WHEREAS**, the City Council has the authority to grant Franchises for the use of its streets and other public properties pursuant to RCW 35A.47.040, and

**WHEREAS**, the City Council seeks to facilitate the availability of reliable, personal wireless communication services for its citizens and the public by permitting the placement of small cell facilities where appropriate, and

**WHEREAS**, the installation, expansion, and maintenance of small cell technology facilities and associated structures on or along the Right of Way and on private properties may have an impact upon: (1) the aesthetic values and character of the City; (2) safe use and passage on or along the Rights of Way by the public; and (3) properties and property values in the City in areas where such structures are placed, and therefore local regulation is appropriate, and

**WHEREAS**, the federal Telecommunications Act of 1996 and regulations promulgated with respect to the Act by the Federal Communications Commission ("FCC") authorize local governments to enact reasonable regulations for the placement, expansion, height, and maintenance of small cell technologies facilities and associated structures, and

**WHEREAS**, the 1934 Communications Act, as amended relating to telecommunications providers recognizes and provides local government authority to manage the public rights-of-way and to require fair and reasonable compensation on a competitively neutral and nondiscriminatory basis, and

**WHEREAS**, a franchise does not include, and is not a substitute for any other permit, agreement, or other authorization required by the City, including without limitation, permits required in connection with construction activities in public ways which must be administratively approved by the City after review of specific plans, and

**WHEREAS**, Grantee shall be responsible for its actual costs in using, occupying and repairing public ways, and

**WHEREAS**, the City and Grantee desire to effectuate good coordination of the use of the rights-of-way, and

**WHEREAS**, the City Council finds that the franchise terms and conditions contained in this Ordinance are in the public interest; now therefore,

**THE CITY COUNCIL OF THE CITY OF DES MOINES ORDAINS AS FOLLOWS:**

**Sec. 1. Franchise granted.**

(1) Pursuant to RCW 35A.47.040, the City of Des Moines, a Washington municipal corporation (hereinafter the "City"), hereby grants to the Franchisee, its affiliates, heirs, successors, legal representatives and assigns, subject to the terms and conditions hereinafter set forth, a Franchise for a period of ten (10) years, beginning on the effective date of this ordinance, set forth in Section 40 herein.

(2) This Franchise ordinance grants Franchisee the right, privilege, and authority to construct, operate, maintain, replace, relocate, repair, upgrade, remove, excavate, acquire, restore, and use the Small Cell Facilities, as defined in Section 1.1, for its telecommunications network, in, under, on, across, over, through, along or below the public Rights-of-Way located in the City of Des Moines, as approved pursuant to City codes and permits issued pursuant to this Franchise. Public "Rights-of-Way" means land acquired or dedicated for public roads and streets, but does not include: state highways; land dedicated for roads, streets, and highways not opened and not improved for motor vehicle use by the public; structures, including poles and conduits, located within the right-of-way; federally granted trust lands or forest board trust lands; Lands owned or managed by the state parks and recreation commission; or federally granted railroad rights-of-way acquired under 43 U.S.C. Sec. 912 and related provisions of federal law that are not open for motor vehicle use. Rights-of-

Way for the purpose of this Franchise do not include: (i) buildings, other City-owned physical facilities, parks, conduits, fixtures, real property or property rights owned by the City, or similar facilities or property owned by or leased to the City.

**Sec. 2. Authority Limited to Occupation of Public Rights-of-Way for Services.**

(1) The authority granted herein is a limited authorization to occupy and use the Rights-of-Way throughout the City (the "Franchise Area"). The Franchisee is authorized to place its Facilities in the Rights-of-Way only consistent with this Franchise, the Des Moines Zoning Code, the Comprehensive Plan, the Design and Construction Standards and the Des Moines Municipal Code (collectively the "Codes"). Nothing contained herein shall be construed to grant or convey any right, title, or interest in the Rights-of-Way of the City to the Franchisee other than for the purpose of providing telecommunications services. Franchisee hereby warrants that it expects to provide the following services within the City: small cell network consisting of a collection of interrelated Small Cell Facilities designed to deliver personal wireless services (the "Services").

(2) As used herein, "Small Cell Facilities" or "Facilities" means a personal wireless services facility that meets both of the following qualifications: (i) each antenna is located inside an antenna enclosure of no more than three (3) cubic feet in volume or, in the case of an antenna that has exposed elements, the antenna and all of its exposed elements could fit within an imaginary enclosure of no more than three (3) cubic feet; and (ii) primary equipment enclosures are no larger than seventeen (17) cubic feet in volume. The following associated equipment may be located outside the primary equipment enclosure and if so located, are not included in the calculation of equipment volume (but remain included in the definition of Small Cell Facilities): Electric meter, concealment, telecomm demarcation box, ground-based enclosures, battery back-up power systems, grounding equipment, power transfer switch, and cut-off switch. Small Cell Facilities shall also include all necessary cables, transmitters, receivers, equipment boxes, backup power supplies, power transfer switches, electric meters, coaxial cables, wires, conduits, ducts, pedestals, antennas, electronics, and other necessary or convenient appurtenances used for the specific wireless communications facility. Equipment enclosures with equipment generating noise that exceeds the noise limits allowed in the Codes or associated permit are excluded from "Small Cell Facilities."

Services do not include those personal wireless services and associated facilities that fall outside of the definition of Small Cell Facilities (i.e. macro facilities).

(3) This Franchise does not grant Franchisee the right to install and operate wires and facilities to provide wireline broadband transmission services, whether provided by a third-party provider, Franchisee, or a corporate affiliate of Franchisee. Any entity that provides such wireline broadband transmission services must have an independent franchise to use the Rights-of-Way outside of this Franchise. Further, this Franchise does not grant the right to offer cable internet services or Cable Services as those terms are defined in 47 U.S.C. § 522(6) by wireline transmission.

(4) No right to install any facility, infrastructure, wires, lines, cables, or other equipment, on any City property other than a Right-of-Way, or upon private property without the owner's consent, or upon any City, public or privately-owned poles or conduits is granted herein. Nothing contained within this Franchise shall be construed to grant or convey any right, title, or interest in the Rights-of-Way of the City to Franchisee other than for the purpose of providing the Services, or to subordinate the primary use of the Right-of-Way as a public thoroughfare. If Franchisee desires to expand the Services provided within the City; it shall request a written amendment to this Franchise. If Franchisee desires to use City owned property, or to site new structures within the Rights-of-Way, it shall enter into a separate lease, site specific agreement or license agreement with the City.

(5) Franchisee shall have the right, without prior City approval, to offer or provide capacity or bandwidth to its customers consistent with this Franchise provided:

(a) Franchisee at all times retains exclusive control over its telecommunications system, Facilities and Services and remains responsible for constructing, installing, and maintaining its Facilities pursuant to the terms and conditions of this Franchise;

(b) Franchisee may not grant rights to any customer or lessee that are greater than any rights Franchisee has pursuant to this Franchise;

(c) Such customer or lessee shall not be construed to be a third-party beneficiary under this Franchise; and

(d) No such customer or lessee may use the telecommunications system or Services for any purpose not authorized by this Franchise, nor to sell or offer for sale any service to the citizens of the City without all required business licenses, franchise or other form of state wide approval.

**Sec. 3. Non-Exclusive Franchise Grant.** This Franchise is granted upon the express condition that it shall not in any manner prevent the City from granting other or further franchises in, along, over, through, under, below, or across any said Rights-of-Way. This Franchise shall in no way prevent or prohibit the City from using any of said roads, streets, or other public properties or affect its jurisdiction over them or any part of them, and the City shall retain power to make all necessary changes, relocations, repairs, maintenance, establishment, improvement, dedication of same as the City may deem fit, including the dedication, establishment, maintenance, and improvement of all new Rights-of-Way, thoroughfares and other public properties of every type and description.

**Sec. 4. Location of Telecommunications Network Facilities.**

(1) Franchisee may locate its Facilities anywhere within the Franchise Area consistent with the City's Design and Construction Standards and subject to the City's applicable Code requirements. Franchisee shall not be required to amend this Franchise to construct or acquire Facilities within the Franchise Area, provided that Franchisee does not expand its Services beyond those described in Section 2.

(2) To the extent that any Rights-of-Way within the Franchise Area are part of the state highway system ("State Highways"), are considered managed access by the City and are governed by the provisions of Chapter 47.24 RCW and applicable Washington State Department of Transportation (WSDOT) regulations, Franchisee shall comply fully with said requirements in addition to local ordinances and other applicable regulations. Without limitation of the foregoing, Franchisee specifically agrees that:

(a) Any pavement trenching and restoration performed by Franchisee within State Highways shall meet or exceed applicable WSDOT requirements;

(b) Any portion of a State Highway damaged or injured by Franchisee shall be restored, repaired and/or replaced by Franchisee to a condition that meets or exceeds applicable WSDOT requirements; and

(c) Without prejudice to any right or privilege of the City, WSDOT is authorized to enforce in an action brought in the name of the State of Washington any condition of this Franchise with respect to any portion of a State Highway.

**Sec. 5. Relocation of Telecommunications Network Facilities.**

(1) Relocation Requirement. The City may require Franchisee, and Franchisee covenants and agrees, to protect, support, temporarily disconnect, relocate, remove, its Facilities within the Right-of-Way when reasonably necessary for construction, alteration, repair, or improvement of the Right-of-Way for purposes of and for public welfare, health, or safety or traffic conditions, dedications of new Rights-of-Way and the establishment and improvement thereof, widening and improvement of existing Rights-of-Way, street vacations, freeway construction, change or establishment of street grade, or the construction of any public improvement or structure by any governmental agency acting in a governmental capacity or as otherwise necessary for the operations of the City or other governmental entity, provided that Franchisee shall in all such cases have the privilege to temporarily bypass in the authorized portion of the same Rights-of-Way upon approval by the City, which approval shall not unreasonably be withheld or delayed, any Facilities required to be temporarily disconnected or removed. For the avoidance of doubt, such projects shall include any Right-of-Way improvement project, even if the project entails, in part, related work funded and/or performed by or for a third party, provided that such work is performed for the public benefit, but shall not include, without limitation, any other improvements or repairs undertaken by or for the sole benefit of third party private entities. Collectively all such projects described in this Section 5.1 shall be considered a "Public Project". Except as otherwise provided by law, the costs and expenses associated with relocations or disconnections ordered pursuant to this Section 5.1 shall be borne by Franchisee.

(2) Relocation - Third Party Structures. If the request for relocation from the City originates due to a Public Project, in which structures or poles are either replaced or removed, then Franchisee shall relocate or remove its Facilities as required by the City, and at no cost to the City, subject to the procedure in

Section 5.5. Franchisee acknowledges and agrees that the placement of Small Cell Facilities on third party-owned structures does not convey an ownership interest in such structures. Franchisee acknowledges and agrees, that to the extent Franchisee's Small Cell Facilities are on poles owned by third parties, the City shall not be responsible for any costs associated with requests arising out of a Public Project.

(3) Relocation - Franchisee Owned Structures. The cost of relocation of any Franchisee owned poles or structures shall be determined in accordance with the requirements of RCW 35.99.060(3)(b), provided, however, that the Franchisee may opt to pay for the cost of relocating its Small Cell Facilities in order to provide consideration for the City's approval to site a Small Cell Facility on Franchisee owned structures or poles in a portion of the Right of Way designated or proposed for a Public Project. For this Section 5.3, designation of the Right of Way for a Public Project shall be undertaken in the City's Comprehensive Plan in accordance with the requirements of Ch. 36.70A RCW. The Comprehensive Plan includes, but is not limited to the Transportation element or Transportation Improvement Plan (TIP), Capital Facilities element, utilities element and any other element authorized by RCW 36.70A.070 and RCW 36.70A.080. The parties acknowledge that this provision is mutually beneficial to the parties, as the City may otherwise deny the placement of the Small Cell Facility at a particular site because of the cost impact of such relocation and the conflict with the City's Comprehensive Plan.

(4) Locate. Upon request of the City, or a third party performing work in the Right-of-Way, and in order to facilitate the design of City street and Right-of-Way improvements, Franchisee agrees, at its sole cost and expense, to locate, and if reasonably determined necessary by the City, to excavate and expose its Facilities for inspection so that the Facilities' location may be taken into account in the improvement design. The decision as to whether any Facilities need to be relocated in order to accommodate the Public Projects shall be made by the City upon review of the location and construction of Franchisee's Facilities. The City shall provide Franchisee at least fourteen (14) days' written notice prior to any excavation or exposure of Facilities.

(5) Notice and Relocation Process. If the City determines that the project necessitates the relocation of Franchisee's existing Facilities, the following process shall apply:

(a) The City shall consult with the Franchisee in the predesign phase of any Public Project in order to coordinate the project's design with Franchisee's Facilities within such project's area.

(b) Franchisee shall participate in predesign meetings until such time as (i) both parties mutually determine that Franchisee's Facilities will not be affected by the Public Project, or (ii) until the City provides Franchisee with written notice regarding the relocation as provided in subsection (d) below.

(c) Franchisee shall, during the predesign phase evaluate and provide comments to the City related to any alternatives to possible relocations. The City agrees to give any alternatives proposed by the Franchisee full and fair consideration, but the final decision accepting or rejecting any specific alternative shall be within the City's sole discretion.

(d) The City shall provide Franchisee with its decision regarding the relocation of Franchisee's Facilities as soon as reasonably possible, but in no event less than one hundred twenty (120) days prior to the commencement of the construction of such Public Project; provided, however that in the event that the provisions of a state or federal grant require a different notification period or process than that outlined in Section 5.5, the City shall notify the Franchisee during the predesign meetings and the process mandated by the grant funding shall control.

(e) After receipt of such written notice, Franchisee shall relocate such Facilities to accommodate the Public Project consistent with the timeline provided by the City. Such timeline may be extended by a mutual agreement.

(f) Franchisee shall complete relocation of its Facilities at no charge or expense to the City pursuant to the timeline provided by the City, or as otherwise modified by the City.

(g) In the event of an emergency posing a threat to public safety or welfare, or in the event of an emergency beyond the control of the City which will result in severe financial consequences to the City, which necessitates the

relocation of Franchisee's Facilities, Franchisee shall relocate its Facilities within the time period specified by the City.

(6) Alternative Arrangements. The provisions of this Section 5 shall in no manner preclude or restrict Franchisee from making any arrangements it may deem appropriate when responding to a request for relocation of its Facilities by any person or entity other than the City, where the facilities to be constructed by said person or entity are not or will not become City-owned, operated, or maintained facilities, provided that such arrangements do not unduly delay a City construction project.

(7) Contractor Delay Claims. Franchisee shall be solely responsible for the out-of-pocket costs incurred by the City for delays in a Public Project to the extent the delay is caused by or arises out of Franchisee's failure to comply with the final schedule for the relocation (other than as a result of a Force Majeure Event or causes or conditions caused by the acts or omissions of the City or any third party unrelated to Franchisee. Franchisee vendors and contractors shall not be considered unrelated third parties). Such out-of-pocket costs may include, but are not limited to, payment to the City's contractors and/or consultants for increased costs and associated court costs, interest, and attorneys' fees incurred by the City to the extent directly attributable to such Franchisee's caused delay in the Public Project.

(8) Indemnification. Franchisee will indemnify, hold harmless, and pay the costs of defending the City, in accordance with the provisions of Section 16, against any and all claims, suits, actions, damages, or liabilities for delays on City construction projects caused by or arising out of the failure of Franchisee to remove or relocate its Facilities as provided in this Section 5; provided, that Franchisee shall not be responsible for damages due to delays caused by circumstances beyond the control of Franchisee or the sole negligence, willful misconduct, or unreasonable delay of the City or any unrelated third party.

(9) City's Costs. If Franchisee fails, neglects, or refuses to remove or relocate its Facilities as directed by the City following the procedures outlined in Section 5.1 through Section 5.5 then upon at least ten (10) days written notice to Franchisee, the City may perform such work or cause it to be done, and the City's costs shall be paid by Franchisee pursuant to Section 14.3 and Section 14.4.

(10) Survival. The provisions of this Section 5 shall survive the expiration or termination of this Franchise during such time as Franchisee continues to have Facilities in the Rights-of-Way.

**Sec. 6. Undergrounding of Facilities.**

(1) Franchisee shall not be permitted to erect poles, unless permitted by the City pursuant to Section 15.3 and the Codes. Franchisee acknowledges and agrees that if the City allows the placement of Small Cell Facilities above ground the City may, at any time in the future, require the conversion of Franchisee's aerial facilities to an underground installation or relocated at Franchisee's expense if the existing poles on which Franchisee's Facilities are located are designated for removal due to a Public Project as described in Section 5. This Franchise does not place an affirmative obligation on the City to allow the relocation of such Facilities on public property or in the Rights-of-Way, nor does it relieve Franchisee from any Code provision related to the siting of wireless facilities.

(2) Franchisee shall not be required to underground any portion of the Facility that must technically remain above-ground to operate. If the City requires undergrounding of wirelines (either telecommunications or electrical) and allows Franchisee's Facilities to remain above ground, then Franchisee shall cooperate with the City and modify the affected Facilities to incorporate the placement of wireline services underground and internal to the pole if the replacement pole is hollow (for example electrical and fiber) or otherwise consistent with a design plan agreed to between the City and Franchisee, at no cost to the City. Franchisee shall be treated equally to other utilities in regards to undergrounding requirements.

(3) Franchisee shall not remove any underground Facilities that require trenching or other opening of the Rights-of-Way, except as provided in this Section 6.3. Franchisee may remove any underground Facilities from the Right-of-Way that have been installed in such a manner that it can be removed without trenching or other opening of the Right-of-Way, or if otherwise permitted by the City. When the City determines, in the City's reasonable discretion, that Franchisee's underground Facilities must be removed in order to eliminate or prevent a hazardous condition, Franchisee shall remove such Facilities at Franchisee's sole cost and expense. Franchisee must apply and receive a permit, pursuant to Section 8.2, prior to any such removal of underground Facilities

from the Right-of-Way and must provide as-built plans and maps pursuant to Section 7.1.

(4) The provisions of this Section 6 shall survive the expiration, revocation, or termination of this Franchise. Nothing in this Section 6 shall be construed as requiring the City to pay any costs of undergrounding any of the Franchisee's Facilities.

**Sec. 7. Maps and Records.**

(1) Following any construction, excluding modifications that meets the same or substantially similar dimensions of the Small Cell Facility, Franchisee shall provide the City with accurate copies of as-built plans and maps prepared by Franchisee's design and installation contractors for all existing Small Cell Facilities in the Franchise Area. These plans and maps shall be provided at no cost to the City and shall include hard copies and digital files in Autocad or other industry standard readable formats that are acceptable to the City and delivered electronically. Further, Franchisee shall provide such maps within thirty (30) days following a request from the City. Franchisee shall warrant the accuracy of all plans, maps and as-builts provided to the City.

(2) Within thirty (30) days of a written request from the City Engineer, the Franchisee shall furnish the City with information sufficient to reasonably demonstrate that the Franchisee has complied with all applicable requirements of this Franchise.

(3) All books, records, maps, and other documents maintained by Franchisee with respect to its Facilities within the Rights-of-Way shall be made available for inspection by the City at reasonable times and intervals; provided, however, that nothing in this Section 7.3 shall be construed to require Franchisee to violate state or federal law regarding customer privacy, nor shall this Section 7.3 be construed to require Franchisee to disclose proprietary or confidential information without adequate safeguards for its confidential or proprietary nature. Unless otherwise permitted or required by State or federal law, nothing in this Section 7.3 shall be construed as permission to withhold relevant customer data from the City that the City requests in conjunction with a tax audit or review; provided, however, Franchisee may redact identifying information such as names, street addresses (excluding City and zip code), Social Security

Numbers, or Employer Identification Numbers related to any confidentiality agreements Franchisee has with third parties.

(4) Franchisee shall not be required to disclose information that it reasonably deems to be proprietary or confidential in nature; provided, however, Franchisee shall disclose such information to comply with a utility tax audit. Franchisee shall be responsible for clearly and conspicuously identifying the work as confidential or proprietary and shall provide a brief written explanation as to why such information is confidential and how it may be treated as such under State or federal law. In the event that the City receives a public records request under Chapter 42.56 RCW or similar law for the disclosure of information Franchisee has designated as confidential, trade secret, or proprietary, the City shall promptly provide written notice of such disclosure so that Franchisee can take appropriate steps to protect its interests.

(5) Nothing in Section 7.3 or Section 7.4 prohibits the City from complying with Chapter 42.56 RCW or any other applicable law or court order requiring the release of public records, and the City shall not be liable to Franchisee for compliance with any law or court order requiring the release of public records. The City shall comply with any injunction or court order obtained by Franchisee that prohibits the disclosure of any such confidential records; however, in the event a higher court overturns such injunction or court order and such higher court action is or has become final and non-appealable, Franchisee shall reimburse the City for any fines or penalties imposed for failure to disclose such records as required hereunder within sixty (60) days of a request from the City.

(6) On an annual basis, upon thirty (30) days prior written notice, the City shall have the right to conduct an independent audit of Franchisee's records reasonably related to the administration or enforcement of this Franchise, in accordance with GAAP. If the audit shows that tax or fee payments have been underpaid by three percent (3%) or more, Franchisee shall pay the total cost of the audit.

#### **Sec. 8. Work in the Rights-of-Way.**

(1) During any period of relocation, construction or maintenance, all work performed by Franchisee or its contractors shall be accomplished in a safe and workmanlike manner, so to minimize interference with the free passage of traffic and the

free use of adjoining property, whether public or private. Franchisee shall at all times post and maintain proper barricades, flags, flaggers, lights, flares and other measures as required for the safety of all members of the general public and comply with all applicable safety regulations during such period of construction as required by the ordinances of the City or the laws of the State of Washington, including RCW 39.04.180 for the construction of trench safety systems. The provisions of this Section 8 shall survive the expiration or termination of this Franchise and during such time as Franchisee continues to have Facilities in the Rights of Way.

(2) Whenever Franchisee shall commence work in any Rights-of-Way for the purpose of excavation, installation, construction, repair, maintenance, or relocation of its Facilities, it shall apply to the City for a permit to do so and, in addition, shall give the City at least ten (10) working days prior notice (except in the case of an emergency) of its intent to commence work in the Rights-of-Way. During the progress of the work, the Franchisee shall not unnecessarily obstruct the passage or proper use of the Rights-of-Way, and all work by the Franchisee in the area shall be performed in accordance with applicable City standards and specifications and warranted for a period of two (2) years. In no case shall any work commence within any Rights-of-Way without a permit, except as otherwise provided in this Franchise.

(3) The City reserves the right to limit or exclude Franchisee's access to a specific route, public Right-of-Way or other location when, in the judgment of the Public Works Director there is inadequate space (including but not limited to compliance with ADA clearance requirements and maintaining a clear and safe passage through the Rights-of-Way), a pavement cutting moratorium, unnecessary damage to public property, public expense, inconvenience, interference with City utilities, or for any other reason determined by the Public Works Director.

(4) If the Franchisee shall at any time plan to make excavations in any area covered by this Franchise, the Franchisee shall afford the City, upon receipt of a written request to do so, an opportunity to share such excavation, PROVIDED THAT:

(a) Such joint use shall not unreasonably delay the work of the Franchisee causing the excavation to be made;

(b) Such joint use shall be arranged and accomplished on terms and conditions satisfactory to both parties; and

(c) To the extent reasonably possible, Franchisee, at the direction of the City, shall cooperate with the City and provide other private utility companies with the opportunity to utilize joint or shared excavations in order to minimize disruption and damage to the Right-of-Way, as well as to minimize traffic-related impacts.

(d) Franchisee may only charge the incremental costs to the City of installing facilities supplied by the City in such joint or shared excavations.

(5) At the discretion of the City Engineer and depending on the impact to the usage of the Rights-of-Way, Franchisee shall give reasonable advance notice of intended construction to entities or persons adjacent to the affected area. Such notice shall contain the dates, contact number, nature and location of the work to be performed. Following performance of the work, Franchisee shall restore the Right-of-Way to City standards in effect at the time of construction except for any change in condition not caused by Franchisee. Any disturbance of landscaping, fencing, or other improvements on private property caused by Franchisee's work shall, at the sole expense of Franchisee, be promptly repaired and restored to the reasonable satisfaction of the property owner/resident. Notwithstanding the above, nothing herein shall give Franchisee the right to enter onto private property without the permission of such private property owner, or as otherwise authorized by applicable law.

(6) Franchisee may trim trees upon and overhanging on public ways, streets, alleys, sidewalks, and other public places of the City so as to prevent the branches of such trees from coming in contact with Franchisee's Facilities. The right to trim trees in this Section 8.6 shall only apply to the extent necessary to protect above ground Facilities. Franchisee shall ensure that its tree trimming activities protect the appearance, integrity, and health of the trees to the extent reasonably possible. Franchisee shall be responsible for all debris removal from such activities. All trimming, except in emergency situations, is to be done after the explicit prior written notification and approval of the City and at the expense of Franchisee. Franchisee may contract for such services, however, any firm or individual so retained must

first receive City permit approval prior to commencing such trimming. Nothing herein grants Franchisee any authority to act on behalf of the City, to enter upon any private property, or to trim any tree or natural growth encroaching into the Public Rights-of-Way. Franchisee shall be solely responsible and liable for any damage to any third parties' trees or natural growth caused by Franchisee's actions. Franchisee shall indemnify, defend and hold harmless the City from third-party claims of any nature arising out of any act or negligence of Franchisee with regard to tree and/or natural growth trimming, damage, and/or removal. Franchisee shall reasonably compensate the City or the property owner for any damage caused by trimming, damage, or removal by Franchisee. Except in an emergency situation, all tree trimming must be performed under the direction of an arborist certified by the International Society of Arboriculture, and in a manner consistent with the most recent issue of "Standards of Pruning for Certified Arborists" as developed by the International Society of Arboriculture or its industry accepted equivalent (ANSI A300), unless otherwise approved by the City Engineer or his/her designee.

(7) Franchisee shall meet with the City and other franchise holders and users of the Rights-of-Way upon written notice to schedule and coordinate construction in the Rights-of-Way. All construction locations, activities, and schedules shall be coordinated, as ordered by the City to minimize public inconvenience, disruption or damages.

(8) Franchisee shall inform the City with at least thirty (30) days' advance written notice that it is constructing, relocating, or placing ducts or conduits in the Rights-of-Way and provide the City with an opportunity to request that Franchisee provide the City with additional duct or conduit and related structures necessary to access the conduit pursuant to RCW 35.99.070.

(9) Franchisee shall maintain all above ground improvements that it places on City Rights-of-Way pursuant to this Franchise. In order to avoid interference with the City's ability to maintain the Right-of-Way, Franchisee shall provide a clear zone to meet the Public Works Engineering and Construction Standards. If Franchisee fails to comply with this provision, and by its failure, property is damaged, then Franchisee shall be responsible for all damages caused thereby, including restoration.

**Sec. 9. One Call Locator Service.** Prior to doing any work in the Rights-of-Way, the Franchisee shall follow established

procedures, including contacting the Utility Notification Center in Washington and comply with all applicable State statutes regarding the One Call Locator Service pursuant to Chapter 19.122 RCW. Further, upon request, by the City or a third party, Franchisee shall locate its Facilities consistent with the requirements of Chapter 19.122 RCW. The City shall not be liable for any damages to Franchisee's Facilities or for interruptions in service to Franchisee's customers that are a direct result of Franchisee's failure to locate its Facilities within the prescribed time limits and guidelines established by the One Call Locator Service regardless of whether the City issued a permit.

**Sec. 10. Safety Requirements.**

(1) Franchisee shall, at all times, employ professional care and shall install and maintain and use industry-standard methods for preventing failures and accidents that are likely to cause damage, injuries, or nuisances to the public. All structures and all lines, equipment, and connections in, over, under, and upon the Rights-of-Way, wherever situated or located, shall at all times be kept and maintained in a safe condition. Franchisee shall comply with all federal, State, and City safety requirements, rules, regulations, laws, and practices, and employ all necessary devices as required by applicable law during the construction, operation, maintenance, upgrade, repair, or removal of its Facilities. Additionally, Franchisee shall keep its Facilities free of debris and anything of a dangerous, noxious or offensive nature or which would create a hazard or undue vibration, heat, noise or any interference with City services. By way of illustration and not limitation, Franchisee shall also comply with the applicable provisions of the National Electric Code, National Electrical Safety Code, FCC regulations, and Occupational Safety and Health Administration (OSHA) Standards. Upon reasonable notice to Franchisee, the City reserves the general right to inspect the Facilities to evaluate if they are constructed and maintained in a safe condition.

(2) If an unsafe condition or a violation of Section 10.1 is found to exist, and becomes known to the City, the City agrees to give Franchisee written notice of such condition and afford Franchisee a reasonable opportunity to repair the same. If Franchisee fails to start to make the necessary repairs and alterations within the time frame specified in such notice (and pursue such cure to completion), then the City may make such repairs or contract for them to be made. All costs, including administrative costs, incurred by the City in repairing any unsafe

conditions shall be borne by Franchisee and reimbursed to the City pursuant to Section 14.3 and Section 14.4.

(3) Additional safety standards include:

(a) Franchisee shall endeavor to maintain all equipment lines and facilities in an orderly manner, including, but not limited to, the removal of all bundles of unused cable on any aerial facilities.

(b) All installations of equipment, lines, and ancillary facilities shall be installed in accordance with industry-standard engineering practices and shall comply with all federal, State, and local regulations, ordinances, and laws.

(c) Any opening or obstruction in the Rights-of-Way or other public places made by Franchisee in the course of its operations shall be protected by Franchisee at all times by the placement of adequate barriers, fences, or boarding, the bounds of which, during periods of dusk and darkness, shall be clearly marked and visible.

(4) Stop Work Order. On notice from the City that any work is being performed contrary to the provisions of this Franchise, or in an unsafe or dangerous manner as determined by the City, or in violation of the terms of any applicable permit, laws, regulations, ordinances, or standards, the work may immediately be stopped by the City. The stop work order shall:

(a) Be in writing;

(b) Be given to the person doing the work or posted on the work site;

(c) Be sent to Franchisee by overnight delivery;

(d) Indicate the nature of the alleged violation or unsafe condition; and

(e) Establish conditions under which work may be resumed.

#### **Sec. 11. Work of Contractors and Subcontractors.**

Franchisee's contractors and subcontractors shall be licensed and bonded in accordance with State law and the City's ordinances,

regulations, and requirements. Work by contractors and subcontractors are subject to the same restrictions, limitations, and conditions as if the work were performed by Franchisee. Franchisee shall be responsible for all work performed by its contractors and subcontractors and others performing work on its behalf as if the work were performed by Franchisee and shall ensure that all such work is performed in compliance with this Franchise and applicable law.

**Sec. 12. Restoration after Construction.**

(1) Franchisee shall, promptly after installation, construction, relocation, maintenance, or repair of its Facilities, or within sixty (60) days after abandonment approved pursuant to Section 18, promptly remove any obstructions from the Rights-of-Way and restore the surface of the Rights-of-Way to at least the same condition the Rights-of-Way were in immediately prior to any such installation, construction, relocation, maintenance or repair, provided Franchisee shall not be responsible for any changes to the Rights-of-Way not caused by Franchisee or anyone doing work for Franchisee nor for reasonable wear and tear. The Public Works Director or his/her designee shall have final approval of the condition of such Rights-of-Way after restoration. All concrete encased survey monuments that have been disturbed or displaced by such work shall be restored pursuant to federal, state (such as Chapter 332-120 WAC), and local standards and specifications.

(2) Franchisee agrees to promptly complete all restoration work and to promptly repair any damage caused by work to the Franchise Area or other affected area at its sole cost and expense and according to the time and terms specified in the construction permit issued by the City. All work by Franchisee pursuant to this Franchise shall be performed in accordance with applicable City standards and warranted for a period of two (2) years and for undiscovered defects as is standard and customary for this type of work.

(3) If conditions (e.g. weather) make the complete restoration required under this Section 12 impracticable, Franchisee shall temporarily restore the affected Right-of-Way or property. Such temporary restoration shall be at Franchisee's sole cost and expense. Franchisee shall promptly undertake and complete the required permanent restoration when conditions no longer make such permanent restoration impracticable.

(4) In the event Franchisee does not repair or restore a Right-of-Way as required under this Section 12 or an improvement in or to a Right-of-Way, then upon fifteen (15) days' notice to Franchisee, the City may repair the damage and shall be reimbursed its actual cost within sixty (60) days of submitting an invoice to Franchisee in accordance with the provisions of Section 14.3 and Section 14.4. In addition, and pursuant to Section 14.3 and 14.4, the City may bill Franchisee for expenses associated with the inspection of such restoration work. The failure by Franchisee to complete such repairs shall be considered a breach of this Franchise and is subject to remedies by the City including the imposition of damages consistent with Section 20.

(5) The provisions of this Section 12 shall survive the expiration or termination of this Franchise so long as Franchisee continues to have Facilities in the Rights-of-Way and has not completed all restoration to the City's standards.

**Sec. 13. Emergency Work/Dangerous Conditions.**

(1) In the event of any emergency in which any of Franchisee's Facilities located in the Rights-of-Way breaks, falls, becomes damaged, or if Franchisee's Facilities is otherwise in such a condition as to immediately endanger the property, life, health or safety of any person, entity or the City, Franchisee shall immediately take the proper emergency measures to repair its Facilities, to cure or remedy the dangerous conditions for the protection of property, life, health or safety of any person, entity or the City without first applying for and obtaining a permit as required by this Franchise. However, this shall not relieve Franchisee from the requirement of obtaining any permits necessary for this purpose, and Franchisee shall apply for all such permits not later than the next succeeding day during which the Des Moines City Hall is open for business. The City retains the right and privilege to cut, move or remove any Facilities located within the Rights-of-Way of the City, as the City may determine to be necessary, appropriate or useful in response to any public health or safety emergency.

(2) The City shall not be liable for any damage to or loss of Facilities within the Rights-of-Way as a result of or in connection with any public works, public improvements, construction, grading, excavation, filling, or work of any kind in the Rights-of-Way by or on behalf of the City, except to the extent directly and proximately caused by the sole negligence, intentional misconduct, or criminal actions of the City, its

employees, contractors, or agents. The City shall further not be liable to Franchisee for any direct, indirect, or any other such damages suffered by any person or entity of any type as a direct or indirect result of the City's actions under this Section 13 except to the extent caused by the sole negligence, intentional misconduct, or criminal actions of the City, its employees, contractors, or agents.

(3) Whenever the construction, installation or excavation of Facilities authorized by this Franchise has caused or contributed to a condition that appears to substantially impair the lateral support of the adjoining street or public place, or endangers the public, an adjoining public place, street utilities or City property, the Public Works Director may direct Franchisee, at Franchisee's own expense, to take reasonable action to protect the public, adjacent public places, City property or street utilities, and such action may include compliance within a prescribed time. In the event that Franchisee fails or refuses to promptly take the actions directed by the City, or fails to fully comply with such directions, or if emergency conditions exist which require immediate action, before the City can timely contact Franchisee to request Franchisee effect the immediate repair, the City may access the Facilities and take such reasonable actions as are necessary to protect the public, the adjacent streets, or street utilities, or to maintain the lateral support thereof, or reasonable actions regarded as necessary safety precautions, and Franchisee shall be liable to the City for the costs thereof.

#### **Sec. 14. Recovery of Costs, Taxes and Fees.**

(1) Franchisee shall pay a fee for the actual administrative expenses incurred by the City that are directly related to the receiving and approving this Franchise pursuant to RCW 35.21.860, including the costs associated with the City's legal costs incurred in drafting and processing this Franchise. No permits shall be issued for the installation of authorized Facilities until such time as the City has received payment of this fee. Franchisee shall further be subject to all permit fees associated with activities undertaken through the authority granted in this Franchise or under the laws of the City. Where the City incurs costs and expenses for review, inspection, or supervision of activities, including but not limited to reasonable fees associated with attorneys, consultants, City Staff and City Attorney time, undertaken through the authority granted in this Franchise or any ordinances relating to the subject for which a permit fee is not established, Franchisee shall pay such costs and

expenses directly to the City in accordance with the provisions of Section 14.3.

(2) Franchisee shall promptly reimburse the City in accordance with the provisions of Section 14.3 and Section 14.4 for any and all costs the City reasonably incurs in response to any emergency situation involving Franchisee's Facilities, to the extent said emergency is not the fault of the City. The City agrees to simultaneously seek reimbursement from any franchisee or permit holder who caused or contributed to the emergency situation.

(3) Franchisee shall reimburse the City within sixty (60) days of submittal by the City of an itemized billing for reasonably incurred costs, itemized by project, for Franchisee's proportionate share of all actual, identified expenses incurred by the City in planning, constructing, installing, repairing, altering, or maintaining any City facility as the result of the presence of Franchisee's Facilities in the Rights of Way. Such costs and expenses shall include, but not be limited to, Franchisee's proportionate cost of City personnel assigned to oversee or engage in any work in the Rights of Way as the result of the presence of Franchisee's Facilities in the Rights of Way. Such costs and expenses shall also include Franchisee's proportionate share of any time spent reviewing construction plans in order to either accomplish the relocation of Franchisee's Facilities or the routing or rerouting of any utilities so as not to interfere with Franchisee's Facilities.

(4) The time of City employees shall be charged at their respective rate of salary, including overtime if applicable, plus benefits and reasonable overhead. Any other costs will be billed proportionately on an actual cost basis. All billings will be itemized so as to specifically identify the costs and expenses for each project for which the City claims reimbursement. A charge for the actual costs incurred in preparing the billing may also be included in said billing. At the City's option, the billing may be on an annual basis, but the City shall provide the Franchisee with the City's itemization of costs, in writing, at the conclusion of each project for information purposes.

(5) Franchisee hereby warrants that its operations as authorized under this Franchise are those of a telephone business as defined in RCW 82.16.010, or service provider as defined in RCW 35.21.860. As a result, the City will not impose a franchise fee under the terms of this Franchise, other than as described herein. The City hereby reserves its right to impose a franchise fee on

Franchisee if Franchisee's operations as authorized by this Franchise change such that the statutory prohibitions of RCW 35.21.860 no longer apply, or if statutory prohibitions on the imposition of such fees are removed. In either instance, the City also reserves its right to require that Franchisee obtain a separate Franchise for its change in use. Nothing contained herein shall preclude Franchisee from challenging any such new fee or separate agreement under applicable federal, State, or local laws.

(6) Franchisee acknowledges that certain of its business activities may be subject to taxation as a telephone business and that Franchisee shall pay to the City the rate applicable to such taxable services under Chapter 3.68 DMMC, and consistent with state and federal law. The parties agree that if there is a dispute regarding tax payments that the process in Des Moines Municipal Code Chapter 3.68 shall control. In that event, the City may not enforce remedies under Section 20 or commence a forfeiture or revocation process pursuant to Section 21 until the dispute is finally resolved either consistent with Chapter 3.68 DMMC or by judicial action and then only if the Franchisee does not comply with such resolution. The parties agree however, that nothing in this Franchise shall limit the City's power of taxation as may exist now or as later imposed by the City. This provision does not limit the City's power to amend Chapter 3.68 DMMC as may be permitted by law.

**Sec. 15. Small Cell Facilities.**

(1) City Retains Approval Authority. The City shall have the authority at all times to control by appropriately exercised police powers through ordinance or regulation, consistent with 47 U.S.C. § 253, 47 U.S.C. § 332(c)(7) and the laws of the State of Washington, the location, elevation, manner of construction, and maintenance of any Small Cell Facilities by Franchisee, and Franchisee shall promptly conform with all such requirements, unless compliance would cause Franchisee to violate other requirements of law. This Franchise does not prohibit the City from exercising its rights under federal, state or local law to deny or give conditional approval to an application for a permit to construct any individual Small Cell Facility.

(2) This Franchise is a City-wide franchise in that it encompasses all Rights of Way within the City, and an amendment to this Franchise shall not be required to authorize Small Cell Facilities at additional locations that have not been previously been identified.

(3) City Approvals and permits. Except as provided in the foregoing paragraph, the granting of this Franchise is not a substitute for any other City required approvals to construct Franchisee's Facilities in the rights-of-way ("City Approvals"). The parties agree that such City Approvals (except right-of-way use permits as described in section 8(2)) are not considered use permits, as that term is defined in RCW 35.99.010. These City Approvals do not grant general authorization to enter and utilize the rights-of-way but rather grant Franchisee permission to build its specific Small Cell Facilities. Therefore, City Approvals are not subject to the thirty (30) day issuance requirement described in RCW 35.99.030. The parties recognize that this provision is specifically negotiated as consideration for designating the entire City as the Franchise Area. Such City Approvals shall be issued consistent with the Codes, state and federal laws governing wireless communication facility siting and shall be in addition to any permits required under section 8(2). This section does not affect the thirty (30) day issuance requirement described in RCW 35.99.030 required for use permits such as right-of-way use permits and traffic control permits.

(4) Preference for Existing Infrastructure; Site Specific Agreements.

(a) Franchisee shall utilize existing infrastructure in the City whenever possible and consistent with the design, concealment and siting of the Codes. The erection of new poles or structures in the Right-of-Way may only be permitted if no other alternative space feasible for the installation of the Facility is available. In the event that existing infrastructure is not available or feasible for a Small Cell Facility, or if the City prefers new poles or infrastructure in a particular area of the City, then Franchisee may request the placement of new or replacement structures in the Rights-of-Way consistent with the requirements of the Codes.

(b) Franchisee acknowledges and agrees that if Franchisee requests to place new structures or replacement structures which are over sixty (60) feet in the Rights-of-Way then Franchisee may be required to enter into a site-specific agreement consistent with RCW 35.21.860 in order to construct such Facilities in the Right of Way. Such agreements may require a site-specific charge paid to the City. The approval of a site-

specific agreement is at the discretion of each of the parties thereto.

(c) Replacement poles or structures which remain substantially similar to existing structures or deviate in height or design as permitted within the Codes are permissible provided that Franchisee, or the pole owner at the Franchisee's request, removes the old pole or structure promptly, but no more than thirty (30) days after the installation of the replacement pole or structure.

(d) This Section 15 does not place an affirmative obligation on the City to allow the placement of new infrastructure on public property or in the Rights-of-Way, nor does it relieve Franchisee from any Code provision related to the siting of wireless facilities.

(5) Concealment. Franchisee shall construct its Facilities consistent with the concealment or stealth requirements as described in the Codes or in the applicable permit(s), in order to minimize the visual impact of such Facilities.

(6) Eligible Facilities Requests. The parties acknowledge that it is the intent of this Franchise to provide general authorization to use the Rights-of-Way for Small Cell Facilities. The designs approved by the City for the installation of Small Cell Facilities, including the dimensions and number of antennas and equipment boxes and the pole height are intended and stipulated to be concealment features when considering whether a proposed modification is a substantial change under Section 6409(a) of the Spectrum Act, 47 U.S.C. § 1455(a).

(7) Inventory. Franchisee shall maintain a current inventory of Small Cell Facilities throughout the Term of this Franchise. Franchisee shall provide to the City a copy of the inventory report no later than one hundred eighty (180) days after the Effective Date of this Franchise and shall be updated within thirty (30) days of a reasonable request by the City. The inventory report shall include GIS coordinates, date of installation, type of pole used for installation, description/type of installation for each Small Cell Facility installation and photographs taken before and after the installation of the Small Cell Facility and taken from the public street. Small Cell Facilities that are considered Deactivated Facilities, as described in Section 18.1, shall be included in the inventory report and Franchisee shall provide the same information as is

provided for active installations as well as the date the Facilities were deactivated and the date the Deactivated Facilities were removed from the Right-of-Way. The City shall compare the inventory report to its records to identify any discrepancies, and the parties will work together in good faith to resolve any discrepancies. Franchisee is not required to report on future inventory reports any Deactivated Facilities which were removed from the Right-of-Way since the last reported inventory and may thereafter omit reference to the Deactivated Facilities.

(8) Unauthorized Facilities. Any Small Cell Facilities installations in the City Right-of-Way that were not authorized under this Franchise or other required City Approval ("Unauthorized Facilities") will be subject to the payment of an Unauthorized Facilities charge by Franchisee. City shall provide written notice to Franchisee of any Unauthorized Facilities identified by City staff and Franchisee shall have sixty (60) days thereafter in which to either (i) establish that the site was authorized, or (ii) submit a complete application to the City for approval of the Unauthorized Facilities. Failure to do either of the foregoing within such 60-day period (or longer than sixty (60) days if necessary upon the City's consent so long as Franchisee can demonstrate that it has submitted a complete small cell permit application to the City) will result in the imposition of an Unauthorized Facilities charge in the amount of One Thousand and 00/100 Dollars (\$1000.00) per Unauthorized Facility, per day starting on the sixty-first (61<sup>st</sup>) day, or the first day after the expiration of any extended period granted by the City, until such time as Franchisee has obtained approval for the Unauthorized Facilities or has otherwise removed such Facilities. If the City does not approve the application for such Unauthorized Facilities and Franchisee is unsuccessful in an appeal (if an appeal is requested), then Franchisee shall remove the Unauthorized Facilities from the City's Right-of-Way within thirty (30) days after the expiration of all appeal periods for such denial. This Franchise remedy is in addition to any other remedy available to the City at law or equity.

(9) Graffiti Abatement. As soon as practical, but not later than fourteen (14) days from the date Franchisee receives notice or is otherwise aware, Franchisee shall remove all graffiti on any of its Small Cell Facilities of which it is the owner of the pole or structure or on the Small Cells Facilities themselves attached to a third-party pole (i.e. graffiti on the shrouding protecting the radios). The foregoing shall not relieve Franchisee from

complying with any City graffiti or visual blight ordinance or regulation.

(10) Emissions Reports.

(a) Franchisee is obligated to comply with all laws relating to allowable presence of or human exposure to Radiofrequency Radiation ("RFs") or Electromagnetic Fields ("EMFs") on or off any poles or structures in the Rights-of-Way, including all applicable FCC standards, whether such RF or EMF presence or exposure results from the Small Cell Facility alone or from the cumulative effect of the Small Cell Facility added to all other sources operated by Franchisee or on behalf of Franchisee on or near the specific pole or structure.

(b) Franchisee must provide to the City the results of an emissions report (the "Emissions Report") from a licensed professional engineer analyzing whether RF and EMF emissions at the proposed Small Cell Facility locations would comply with FCC standards. Franchisee may provide one Emissions Report within the same batch of applications if Franchisee is using the same Small Cell Facility configuration for all installations within that batch, or may submit one Emissions Report for each subgroup installation identified in the batch.

(c) Nothing in this Franchise prohibits the City from requiring periodic testing of Franchisee's Facilities. The City may inspect any of Franchisee's Facilities and equipment located in the Rights-of-Way. If the City discovers that the emissions from a Facility exceeds the FCC standards, then the City may order Franchisee to immediately turn off the Facility or portion thereof committing the violation, until the emissions exposure is remedied. Such notification shall be made orally by calling 1-800-264-6620 and by written notice pursuant to Section 32. Franchisee is required to promptly turn off that portion of the Facility that is in violation, no later than forty-eight (48) hours after receipt of oral notice. If Franchisee's Facilities are found to exceed FCC standards, then Franchisee shall reimburse the City for any costs incurred by the City for testing the Facility and providing notice as described in Section 14.3 and Section 14.4.

(11) Interference with Public Facilities. Franchisee's Small Cell Facilities shall not physically interfere or cause harmful interference, as defined in 47 CFR 15.3(m), with any City operations (including, but not limited to, traffic lights, public safety radio systems, or other City communications infrastructure), or the emergency communications operation or equipment. If the Small Cell Facilities cause such harmful interference, Franchisee shall respond to the City's request to address the source of the interference as soon as practicable, but in no event later than forty-eight (48) hours after receipt of notice. The City may require, by written notice, that Franchisee power down the specific Small Cell Facilities, or portion thereof, causing such interference if such interference is not remedied within forty-eight (48) hours after notice. If, within thirty (30) days after receipt of such written notice from the City of such interference, Franchisee has not abated such interference, such Small Cell Facility may be deemed an Unauthorized Facility and subject to the provisions of Section 15.8 or removal by the City consistent with Section 13.

(12) Interference with Other Facilities. Franchisee is solely responsible for determining whether its Small Cell Facilities interfere with telecommunications facilities of other utilities and franchisees within the Rights-of-Way. Franchisee shall comply with the rules and regulations of the Federal Communications Commission regarding radio frequency interference when siting its Small Cell Facilities within the Franchise Area. Franchisee, in the performance and exercise of its rights and obligations under this Franchise shall not physically or technically interfere in any manner with the existence and operation of any and all existing utilities, sanitary sewers, water mains, storm drains, gas mains, poles, aerial and underground electrical and telephone wires, electroliers, cable television, and other telecommunications, utility, or municipal property, without the express written approval of the owner or owners of the affected property or properties, except as expressly permitted by applicable law or this Franchise.

#### **Sec. 16. Indemnification.**

(1) Franchisee releases, covenants not to bring suit, and agrees to indemnify, defend, and hold harmless the City, its officers, employees, agents, volunteers and representatives from any and all claims, costs, judgments, awards, or liability to any person, for injury or death of any person, or damage to property caused by or arising out of any acts or omissions of Franchisee,

its agents, servants, officers, or employees in the performance of this Franchise and any rights granted within this Franchise. Further, Franchisee shall indemnify, defend and hold harmless the City, its officers, employees, agents, volunteers and representatives from any and all claims, costs, judgments, awards or liability to any person arising from radio frequency emissions or radiation emitted from Franchisee's Facilities located in the Rights-of-Way, regardless of whether Franchisee's equipment complies with applicable federal statutes and/or FCC regulations related thereto. These indemnification obligations shall extend to claims that are not reduced to a suit and any claims that may be compromised, with Franchisee's prior written consent, prior to the culmination of any litigation or the institution of any litigation.

(2) Inspection or acceptance by the City of any work performed by Franchisee at the time of completion of construction shall not be grounds for avoidance by Franchisee of any of its obligations under this Section 16.

(3) The City shall promptly notify Franchisee of any claim or suit and request in writing that Franchisee indemnify the City. Franchisee may choose counsel to defend the City subject to this Section 16.3. City's failure to so notify and request indemnification shall not relieve Franchisee of any liability that Franchisee might have, except to the extent that such failure prejudices Franchisee's ability to defend such claim or suit. In the event that Franchisee refuses the tender of defense in any suit or any claim, as required pursuant to the indemnification provisions within this Franchise, and said refusal is subsequently determined by a court having jurisdiction (or such other tribunal that the parties shall agree to decide the matter), to have been a wrongful refusal on the part of Franchisee, Franchisee shall pay all of the City's reasonable costs for defense of the action, including all expert witness fees, costs, and attorney's fees, and including costs and fees incurred in recovering under this indemnification provision. If separate representation to fully protect the interests of both parties is necessary, such as a conflict of interest between the City and the counsel selected by Franchisee to represent the City, then upon the prior written approval and consent of Franchisee, which shall not be unreasonably withheld, the City shall have the right to employ separate counsel in any action or proceeding and to participate in the investigation and defense thereof, and Franchisee shall pay the reasonable fees and expenses of such separate counsel, except that Franchisee shall not be required to pay the fees and expenses of separate counsel on behalf of the City for the City to bring or pursue any

counterclaims or interpleader action, equitable relief, restraining order or injunction. The City's fees and expenses shall include all out-of-pocket expenses, such as consultants and expert witness fees, and shall also include the reasonable value of any services rendered by the counsel retained by the City but shall not include outside attorneys' fees for services that are unnecessarily duplicative of services provided the City by Franchisee. Each party agrees to cooperate and to cause its employees and agents to cooperate with the other party in the defense of any such claim and the relevant records of each party shall be available to the other party with respect to any such defense.

(4) Except to the extent that damage or injury arises from the sole negligence or willful misconduct of the City, its officers, officials, employees or agents, the obligations of Franchisee under the indemnification provisions of this Section 16, and any other indemnification provision herein shall apply regardless of whether liability for damages arising out of bodily injury to persons or damages to property were caused or contributed to by the concurrent negligence of the City, its officers, officials, employees or agents and the Franchisee. Notwithstanding the preceding sentence, to the extent the provisions of RCW 4.24.115 are applicable, the parties agree that the indemnity provisions hereunder shall be deemed amended to conform to said statute and liability shall be allocated as provided therein. It is further specifically and expressly understood that the indemnification provided constitutes Franchisee's waiver of immunity under Title 51 RCW, solely for the purposes of this indemnification, relating solely to indemnity claims made by the City directly against the Franchisee for claims made against the City by Franchisee's employees. This waiver has been mutually negotiated by the parties.

(5) Notwithstanding any other provisions of this Section 16, Franchisee assumes the risk of damage to its Facilities located in the Rights of Way and upon City-owned property from activities conducted by the City, its officers, agents, employees, volunteers, elected and appointed officials, and contractors, except to the extent any such damage or destruction is caused by or arises from any solely negligent, willful misconduct, or criminal actions on the part of the City, its officers, agents, employees, volunteers, or elected or appointed officials, or contractors. Franchisee releases and waives any and all such claims against the City, its officers, agents, employees, volunteers, or elected or appointed officials, or contractors.

Franchisee further agrees to indemnify, hold harmless and defend the City against any claims for damages, including, but not limited to, business interruption damages, lost profits and consequential damages, brought by or under users of Franchisee's Facilities as the result of any interruption of service due to damage or destruction of Franchisee's Facilities caused by or arising out of activities conducted by the City, its officers, agents, employees or contractors, except to the extent any such damage or destruction is caused by or arises from the sole negligence or any willful misconduct on the part of the City, its officers, agents, employees, volunteers, or elected or appointed officials, or contractors.

(6) The provisions of this Section 16 shall survive the expiration, revocation, or termination of this Franchise.

**Sec. 17. Insurance.**

(1) Franchisee shall procure and maintain for so long as Franchisee has Facilities in the Public Ways, insurance against claims for injuries to persons or damages to property which may arise from or in connection with the exercise of rights, privileges and authority granted to Franchisee. Franchisee shall require that every subcontractor maintain substantially the same insurance coverage with substantially the same policy limits as required of Franchisee. Franchisee shall procure insurance from insurers with a current A.M. Best rating of not less than A-. Franchisee shall provide a copy of a certificate of insurance and blanket additional insured endorsement to the City for its inspection at the time of acceptance of this Franchise, and such insurance certificate shall evidence a policy of insurance that includes:

(a) Automobile Liability insurance with limits of no less than \$5,000,000 combined single limit per occurrence for bodily injury and property damage.

(b) Commercial General Liability insurance, written on an occurrence basis with limits of no less than \$5,000,000 per occurrence for bodily injury and property damage and \$5,000,000 general aggregate including personal and advertising injury, blanket contractual; premises; operations; independent contractors; products and completed operations; and broad form property damage; explosion, collapse and underground (XCU)

(c) Workers' Compensation coverage as required by the Industrial Insurance laws of the State of Washington and Employer's Liability with a limit of \$1,000,000 each accident/disease/policy limit and

(d) Excess Umbrella liability policy with limits of no less than \$5,000,000 per occurrence and in the aggregate.

(2) Payment of deductible or self-insured retention shall be the sole responsibility of Franchisee. Franchisee may utilize primary and umbrella liability insurance policies to satisfy the insurance policy limits required in this Section 17. Franchisee's umbrella liability insurance policy shall provide "follow form" coverage over its primary liability insurance policies.

(3) The insurance policies, with the exception of Workers' Compensation and Employer's Liability obtained by Franchisee shall include the City, its officers, officials, employees, agents, and volunteers ("Additional Insureds"), as an additional insured with regard to activities performed by or on behalf of Franchisee. The coverage shall contain no special limitations on the scope of protection afforded to the Additional Insureds. In addition, the insurance policy shall contain a clause stating that coverage shall apply separately to each insured against whom a claim is made, or suit is brought, except with respect to the limits of the insurer's liability. Franchisee shall provide to the City upon acceptance a certificate of insurance and blanket additional insured endorsement. Receipt by the City of any certificate showing less coverage than required is not a waiver of Franchisee's obligations to fulfill the requirements. Franchisee's insurance shall be primary insurance with respect to the Additional Insureds. Any insurance maintained by the Additional Insureds shall be in excess of Franchisee's insurance and shall not contribute with it.

(4) Upon receipt of notice from its insurer(s) Franchisee shall provide the City with thirty (30) days prior written notice of any cancellation of any insurance policy, required pursuant to this Section 17. Franchisee shall, prior to the effective date of such cancellation, obtain replacement insurance policies meeting the requirements of this Section 17. Failure to provide the insurance cancellation notice and to furnish to the City replacement insurance policies meeting the requirements of this Section 17 shall be considered a material breach of this Franchise and subject to the City's election of remedies described in Section 20 below. Notwithstanding the cure period described in Section

20.2, the City may pursue its remedies immediately upon a failure to furnish replacement insurance.

(5) Franchisee's maintenance of insurance as required by this Section 17 shall not be construed to limit the liability of Franchisee to the coverage provided by such insurance, or otherwise limit the City's recourse to any remedy available at law or equity. Further, Franchisee's maintenance of insurance policies required by this Franchise shall not be construed to excuse unfaithful performance by Franchisee.

(6) The City may review all insurance limits once every calendar year during the Term and may make reasonable adjustments in the limits upon thirty (30) days' prior written notice to Franchisee. Franchisee shall then issue a certificate of insurance to the City showing compliance with these adjustments. Upon request by the City, Franchisee shall furnish certified copies of all required insurance policies, including endorsements, required in this Franchise and evidence of all contractors' coverage.

(7) As of the Effective Date of this Franchise, Franchisee is not self-insured. Should Franchisee wish to become self-insured at the levels outlined in this Franchise at a later date. Franchisee shall comply with the following: (i) provide the City, upon request, a copy of Franchisee's, or its parent company's, most recent audited financial statements, if such financial statements are not otherwise publicly available; (ii) Franchisee or its parent company is responsible for all payments within the self-insured retention; and (iii) Franchisee assumes all defense and indemnity obligations as outlined in the indemnification Section of this Franchise.

**Sec. 18. Abandonment of Franchisee's Telecommunications Network.**

(1) Where any Facilities or portions of Facilities are no longer needed, and their use is to be discontinued, the Franchisee shall immediately report such Facilities in writing ("Deactivated Facilities") to the Public Works Director. This notification is in addition to the inventory revisions addressed in Section 15.7. Deactivated Facilities, or portions thereof, shall be completely removed within ninety (90) days and the site, pole or infrastructure restored to its pre-existing condition.

(2) If Franchisee leases a structure from a landlord and such landlord later abandons the structure, Franchisee shall

remove its Facilities from the abandoned structure within ninety (90) days of such notification from the landlord at no cost to the City and shall remove the pole if so required by the landlord. Notwithstanding the preceding sentence, the timelines determined by the City for relocation projects described in Section 5 above shall apply.

(3) Upon the expiration, termination, or revocation of the rights granted under this Franchise, Franchisee shall remove all of its Facilities from the Rights-of-Way within ninety (90) days of receiving written notice from the Public Works Director or his/her designee. The Facilities, in whole or in part, may not be abandoned by Franchisee without written approval by the City. Any plan for abandonment or removal of Franchisee's Facilities must be first approved by the Public Works Director or his/her designee, and all necessary permits must be obtained prior to such work. Franchisee shall restore the Rights-of-Way to at least the same condition the Rights-of-Way were in immediately prior to any such installation, construction, relocation, maintenance or repair, provided Franchisee shall not be responsible for any changes to the Rights-of-Way not caused by Franchisee or any person doing work for Franchisee. Franchisee shall be solely responsible for all costs associated with removing its Facilities.

(4) Notwithstanding Section 18 above, the City may permit Franchisee's Facilities to be abandoned in place in such a manner as the City may prescribe. Upon permanent abandonment, and Franchisee's agreement to transfer ownership of the Facilities to the City, Franchisee shall submit to the City a proposal and instruments for transferring ownership to the City.

(5) Any Facilities which are not removed within one hundred and eighty (180) days of either the date of termination or revocation of this Franchise or the date the City issued a permit authorizing removal, whichever is later, shall automatically become the property of the City. Any costs incurred by the City in safeguarding such Facilities or removing the Facilities shall be reimbursed by Franchisee. Nothing contained within this Section 18 shall prevent the City from compelling Franchisee to remove any such Facilities through judicial action when the City has not permitted Franchisee to abandon said Facilities in place.

(6) The provisions of this Section 18 shall survive the expiration, revocation, or termination of this Franchise and for so long as Franchisee has Facilities in Rights-of-Way.

**Sec. 19. Bonds**

(1) Franchisee shall furnish a performance bond ("Performance Bond") written by a corporate surety reasonably acceptable to the City equal to at least 120% of the estimated cost of constructing Franchisee's Facilities within the Rights-of-Way of the City prior to commencement of any such work or such other amount as deemed appropriate by the Public Works Director. The Performance Bond shall guarantee the following: (1) timely completion of construction; (2) construction in compliance with all applicable plans, permits, technical codes, and standards; (3) proper location of the Facilities as specified by the City; (4) restoration of the Rights-of-Way and other City properties affected by the construction; (5) submission of as-built drawings after completion of construction; and (6) timely payment and satisfaction of all claims, demands, or liens for labor, materials, or services provided in connection with the work which could be asserted against the City or City property. Said bond must remain in full force until the completion of construction, including final inspection, corrections, and final approval of the work, recording of all easements, provision of as-built drawings, and the posting of a Maintenance Bond as described in Section 19.2. Compliance with the Performance Bond requirement of the City's current Design and Construction Standards shall satisfy the provisions of this Section 19. In lieu of a separate Performance Bond for individual projects involving work in the Franchise Area, Franchisee may satisfy the City's bond requirements by posting a single on-going performance bond in an amount approved by City.

(2) Maintenance Bond. Franchisee shall furnish a two (2) year maintenance bond ("Maintenance Bond"), or other surety acceptable to the City, at the time of final acceptance of construction work on Facilities within the Rights-of-Way. The Maintenance Bond amount will be equal to ten percent (10%) of the documented final cost of the construction work. The Maintenance Bond in this Section 19.2 must be in place prior to City's release of the bond required by Section 19.1. Compliance with the Maintenance Bond requirement of the City's current Design and Construction Standards shall satisfy the provisions of this Section 19.2.

(3) Franchise Bond. Franchisee shall provide City with a bond in the amount of Fifty Thousand Dollars (\$50,000.00) ("Franchise Bond") running or renewable for the term of this Franchise, in a form and substance reasonably acceptable to City. In the event Franchisee shall fail to substantially comply with

any one or more of the provisions of this Franchise following notice and a reasonable opportunity to cure, then there shall be recovered jointly and severally from Franchisee and the bond any actual damages suffered by City as a result thereof, including but not limited to staff time, material and equipment costs, compensation or indemnification of third parties, and the cost of removal or abandonment of facilities hereinabove described. Franchisee specifically agrees that its failure to comply with the terms of this Section 19 shall constitute a material breach of this Franchise. The amount of the bond shall not be construed to limit Franchisee's liability or to limit the City's recourse to any remedy to which the City is otherwise entitled at law or in equity.

**Sec. 20. Remedies to Enforce Compliance.**

(1) The City may elect, without any prejudice to any of its other legal rights and remedies, to obtain an order from the superior court having jurisdiction compelling Franchisee to comply with the provisions of the Franchise and to recover damages and costs incurred by the City by reason of Franchisee's failure to comply. In addition to any other remedy provided herein, the City reserves the right to pursue any remedy to compel or force Franchisee and/or its successors and assigns to comply with the terms hereof, and the pursuit of any right or remedy by the City shall not prevent the City from thereafter declaring a forfeiture or revocation for breach of the conditions herein. Provided, further, that by entering into this Franchise, it is not the intention of the City or Franchisee to waive any other rights, remedies, or obligations as otherwise provided by law equity, or otherwise, and nothing contained here shall be deemed or construed to affect any such waiver.

(2) If Franchisee shall violate, or fail to comply with any of the provisions of this Franchise, or should it fail to heed or comply with any notice given to Franchisee under the provisions of this Franchise, the City shall provide Franchisee with written notice specifying with reasonable particularity the nature of any such breach and Franchisee shall undertake all commercially reasonable efforts to cure such breach within thirty (30) days of receipt of notification. If the parties reasonably determine the breach cannot be cured within (30) thirty days, the City may specify a longer cure period, and condition the extension of time on Franchisee's submittal of a plan to cure the breach within the specified period, commencement of work within the original thirty (30) day cure period, and diligent prosecution of the work to

completion. If the breach is not cured within the specified time, or Franchisee does not comply with the specified conditions, the City may, at its discretion, (1) commence revocation proceedings, pursuant to Section 21, or (2) claim damages of Two Hundred Fifty Dollars (\$250.00) per day against the Franchise Bond, or (3) suspend the issuance of additional permits, or (4) pursue other remedies as described in Section 20.1 above.

**Sec. 21. Forfeiture and Revocation.** If Franchisee willfully violates or fails to comply with any material provisions of this Franchise, then at the election of the Des Moines City Council after at least thirty (30) days written notice to Franchisee specifying the alleged violation or failure and an opportunity to cure, the City may revoke all rights conferred and this Franchise may be revoked by the City Council after a hearing held upon such notice to Franchisee. Such hearing shall be open to the public and Franchisee and other interested parties may offer written and/or oral evidence explaining or mitigating such alleged noncompliance. Within thirty (30) days after the hearing, the Des Moines City Council, on the basis of the record, will make the determination as to whether there is cause for revocation, whether the Franchise will be terminated, or whether lesser sanctions should otherwise be imposed. The Des Moines City Council may in its sole discretion fix an additional time period to cure violations. If the deficiency has not been cured at the expiration of any additional time period or if the Des Moines City Council does not grant any additional period, the Des Moines City Council may by resolution declare the Franchise to be revoked and forfeited or impose lesser sanctions. If Franchisee appeals revocation and termination, such revocation may be held in abeyance pending judicial review by a court of competent jurisdiction, provided Franchisee is otherwise in compliance with the Franchise.

**Sec. 22. Non-Waiver.** The failure of the City to insist upon strict performance of any of the covenants and agreements of this Franchise or to exercise any option herein conferred in any one or more instances, shall not be construed to be a waiver or relinquishment of any such covenants, agreements or option or any other covenants, agreements or option.

**Sec. 23. City Ordinances and Regulations.** Nothing herein shall be deemed to restrict the City's ability to adopt and enforce all necessary and appropriate ordinances regulating the performance of the conditions of this Franchise, including any valid ordinance made in the exercise of its police powers in the interest of public safety and for the welfare of the public. The

City shall have the authority at all times to reasonably control by appropriate regulations the location, elevation, manner of construction and maintenance of Facilities by Franchisee, and Franchisee shall promptly conform with all such regulations, unless compliance would cause Franchisee to violate other requirements of law. In the event of a conflict between the provisions of this Franchise and any other generally applicable ordinance(s) enacted under the City's police power authority, such other ordinances(s) shall take precedence over the provisions set forth herein.

**Sec. 24. Cost of Publication.** The cost of publication of this Franchise shall be borne by Franchisee.

**Sec. 25. Acceptance.** Franchisee shall execute and return to the City its execution and acceptance of this Franchise in the form attached hereto as Exhibit A. In addition, Franchisee shall submit proof of insurance obtained and additional insured endorsement pursuant to Section 17, any Performance Bond, if applicable, pursuant to Section 19.1 and the Franchise Bond required pursuant to Section 19.3. The administrative fee pursuant to Section 14.1 is due within thirty (30) days of receipt of the invoice from the City.

**Sec. 26. Survival.** All of the provisions, conditions, and requirements of Section 5, Section 6, Section 8, Section 12, Section 16, Section 18, Section 26, Section 27.3 and Section 39.2 of this Franchise shall be in addition to any and all other obligations and liabilities Franchisee may have to the City at common law, by statute, or by contract, and shall survive the City's Franchise to Franchisee for the use of the Franchise Area, and any renewals or extensions thereof. All of the provisions, conditions, regulations and requirements contained in this Franchise shall further be binding upon the heirs, successors, executors, administrators, legal representatives and assigns of Franchisee and all privileges, as well as all obligations and liabilities of Franchisee shall inure to its heirs, successors and assigns equally as if they were specifically mentioned where Franchisee is named herein.

**Sec. 27. Assignment.**

(1) This Franchise may not be directly or indirectly assigned, transferred, or disposed of by sale, merger, consolidation or other act of Franchisee, by operation of law or otherwise, unless approved in writing by the City, which approval shall not be unreasonably withheld, conditioned or delayed. The

above notwithstanding, Franchisee may freely assign this Franchise in whole or in part to a parent, subsidiary, or affiliated entity, unless there is a change of control as described in Section 27.2 below, or for collateral security purposes. Franchisee shall provide prompt, written notice to the City of any such assignment. In the case of transfer or assignment as security by mortgage or other security instrument in whole or in part to secure indebtedness, such consent shall not be required unless and until the secured party elects to realize upon the collateral. For purposes of this Section 27, no assignment or transfer of this Franchise shall be deemed to occur based on the public trading of Franchisee's stock; provided, however, any tender offer, merger, or similar transaction resulting in a change of control shall be subject to the provisions of this Franchise.

(2) Any transactions that singularly or collectively result in a change of more than fifty percent (50%) of the: ultimate ownership or working control of Franchisee, ownership or working control of the Facilities, ownership or working control of affiliated entities having ownership or working control of Franchisee or of the Facilities, or of control of the capacity or bandwidth of Franchisee's Facilities, shall be considered an assignment or transfer requiring City approval. Transactions between affiliated entities are not exempt from City approval if there is a change in control as described in the preceding sentence. Franchisee shall promptly notify the City prior to any proposed change in, or transfer of, or acquisition by any other party of control of Franchisee. Every change, transfer, or acquisition of control of Franchisee shall cause a review of the proposed transfer. The City shall approve or deny such request for an assignment or transfer requiring City's consent within one-hundred twenty (120) days of a completed application from Franchisee, unless a longer period of time is mutually agreed to by the parties or when a delay in the action taken by the City is due to the schedule of the City Council and action cannot reasonably be obtained within the one hundred twenty (120) day period. In the event that the City adopts a resolution denying its consent and such change, transfer, or acquisition of control has been affected, the City may revoke this Franchise, following the revocation procedure described in Section 21 above. The assignee or transferee must have the legal, technical, financial, and other requisite qualifications to own, hold, and operate Franchisee's Services. Franchisee shall reimburse the City for all direct and indirect costs and expenses reasonably incurred by the City in considering a request to transfer or assign this

Franchise, in accordance with the provisions of Section 14.3 and Section 14.4, and shall pay the applicable application fee.

(3) Franchisee may, without prior consent from the City: (i) lease the Facilities, or any portion, to another person; (ii) grant an indefeasible right of user interest in the Facilities, or any portion, to another person; or (iii) offer to provide capacity or bandwidth in its Facilities to another person, provided further, that Franchisee shall at all times retain exclusive control over its Facilities and remain fully responsible for compliance with the terms of this Franchise, and Franchisee shall furnish, upon request from the City, proof of any such lease or agreement, to include the first and last page the lease or agreement, provided that Franchisee may redact the name, street address (except for City and zip code), Social Security Numbers, Employer Identification Numbers or similar identifying information, and other information considered confidential under applicable laws provided in such lease or agreement, and the lessee complies, to the extent applicable, with the requirements of this Franchise and applicable City codes. Franchisee's obligation to remain fully responsible for compliance with the terms under this Section 27.3 shall survive the expiration of this Franchise but only if and to the extent and for so long as Franchisee is still the owner or has exclusive control over the Facilities used by a third party.

**Sec. 28. Extension.** If this Franchise expires without renewal, the City may, subject to applicable law:

(1) Allow Franchisee to maintain and operate its Facilities on a month-to-month basis, provided that Franchisee maintains insurance for such Facilities during such period and continues to comply with this Franchise; or

(2) The City may order the removal of any and all Facilities at Franchisee's sole cost and expense consistent with Section 18.

**Sec. 29. Entire Agreement.** This Franchise constitutes the entire understanding and agreement between the parties as to the subject matter herein and no other agreements or understandings, written or otherwise, shall be binding upon the parties upon execution of this Franchise.

**Sec. 30. Eminent Domain.** The existence of this Franchise shall not preclude the City from acquiring by condemnation in accordance with applicable law, all or a portion of the

Franchisee's Facilities for the fair market value thereof. In determining the value of such Facilities, no value shall be attributed to the right to occupy the area conferred by this Franchise.

**Sec. 31. Vacation.** If at any time the City, by ordinance, vacates all or any portion of the area affected by this Franchise, the City shall not be liable for any damages or loss to the Franchisee by reason of such vacation. The City shall notify the Franchisee in writing not less than sixty (60) days before vacating all or any portion of any such area. The City may, after sixty (60) days written notice to the Franchisee, terminate this Franchise with respect to such vacated area.

**Sec. 32. Notice.** Any notice required or permitted under this Franchise shall be in writing, and shall be delivered personally, delivered by a nationally recognized overnight courier, or sent by registered or certified mail, return receipt requested, to the other party at the address listed below. If such notice, demand or other communication shall be served personally, service shall be conclusively deemed made at the time of such personal service. If such notice, demand or other communication is given by overnight delivery, it shall be conclusively deemed given the day after it was sent to the party to whom such notice, demand or other communication is to be given. If such notice, demand or other communication is given by mail, it shall be conclusively deemed given three (3) days after it was deposited in the United States mail addressed to the party to whom such notice, demand or other communication is to be given.

CITY OF DES MOINES:  
  
Attn: City Manager  
21630 11th Ave S, Suite A  
Des Moines, WA 98198

Franchisee:  
Attn: CFO  
Address: 3030 Warrenville Road,  
Suite 340  
Lisle, Illinois 60532

With a copy to:

CITY OF DES MOINES  
Attn: City Clerk  
21630 11th Ave S, Suite A  
Des Moines, WA 98198

With a Copy to: General Counsel & COO  
at same address  
Copy email to: NOTICE@extenetsystems.com

**Sec. 33. Severability.** If any section, sentence, clause or phrase of this Franchise should be held to be invalid or unconstitutional by a court of competent jurisdiction, such

invalidity or unconstitutionality shall not affect the validity or constitutionality of any other section, sentence, clause or phrase of this Franchise unless such invalidity or unconstitutionality materially alters the rights, privileges, duties, or obligations hereunder, in which event either party may request renegotiation of those remaining terms of this Franchise materially affected by such court's ruling.

**Sec. 34. Compliance with All Applicable Laws.** Franchisee agrees to comply with all present and future federal and state laws, ordinances, rules and regulations. Nothing herein shall be deemed to restrict the City's ability to adopt and enforce all necessary and appropriate ordinances regulating the performance of the conditions of this Franchise, including any valid ordinance made in the exercise of its police powers in the interest of public safety and for the welfare of the public. The City shall have the authority at all times to reasonably control by appropriate regulations the location, elevation, manner of construction and maintenance of Facilities by Franchisee, and Franchisee shall promptly conform with all such regulations, unless compliance would cause Franchisee to violate other requirements of law. Franchisee further expressly acknowledges that following the approval of this Franchise, the City may modify its Codes to address small cell deployment and such Code modifications shall apply to Franchisee's Facilities, except to the extent of a vested right or right under state or federal law. In the event of a conflict between the provisions of this Franchise and any other generally applicable ordinance(s) enacted under the City's police power authority, such other ordinances(s) shall take precedence over the provisions set forth herein. Notwithstanding the foregoing, Franchisee shall not be required to comply with any new ordinances to the extent that they impact existing Facilities to which Franchisee has a vested right in accordance with the vested rights doctrine under Washington case law or as codified at RCW 19.27.095.

**Sec. 35. Amendment.** The City reserves the right at any time to amend this Franchise to conform to any hereafter enacted, amended, or adopted federal or state statute or regulation relating to the public health, safety, and welfare, or relating to roadway regulation, or a City ordinance enacted pursuant to such federal or state statute or regulation upon providing Franchisee with ninety (90) days written notice of its action setting forth the full text of the amendment and identifying the statute, regulation, or ordinance requiring the amendment. Said amendment shall become automatically effective upon expiration of the notice period

unless, before expiration of that period, Franchisee makes a written request for negotiations over the terms of the amendment. If the parties do not reach agreement as to the terms of the amendment within thirty (30) days of the call for negotiations, the parties shall submit the issue to non-binding mediation. If such mediation is unsuccessful, the parties may then submit the issue to a court of competent jurisdiction.

**Sec. 36. Attorneys' Fees.** If a suit or other action is instituted in connection with any controversy arising out of this Franchise, the prevailing party shall be entitled to recover all of its costs and expenses, including such sum as the court may judge as reasonable for attorneys' fees, costs, expenses and attorneys' fees upon appeal of any judgment or ruling.

**Sec. 37. Hazardous Substances.** Franchisee shall not introduce or use any hazardous substances (chemical or waste), in violation of any applicable law or regulation, nor shall Franchisee allow any of its agents, contractors or any person under its control to do the same. Franchisee will be solely responsible for and will defend, indemnify and hold the City, its officers, officials, employees, agents and volunteers harmless from and against any and all claims, costs and liabilities including reasonable attorneys' fees and costs, arising out of or in connection with the cleanup or restoration of the property associated with Franchisee's use, storage, or disposal of hazardous substances, whether or not intentional, and the use, storage or disposal of such substances by Franchisee's agents, contractors or other persons acting under Franchisee's control, whether or not intentional.

**Sec. 38 Licenses, Fees and Taxes.** Prior to constructing any improvements, Franchisee shall obtain a business or utility license from the City. Franchisee shall pay promptly and before they become delinquent, all taxes on personal property and improvements owned or placed by Franchisee and shall pay all license fees and public utility charges relating to the conduct of its business, shall pay for all permits, licenses and zoning approvals, shall pay any other applicable tax unless documentation of exemption is provided to the City and shall pay utility taxes and license fees imposed by the City.

**Sec. 39. Miscellaneous.**

(1) City and Franchisee respectively represent that its signatory is duly authorized and has full right, power and authority to execute this Franchise.

(2) This Franchise shall be construed in accordance with the laws of the State of Washington. Venue for any dispute related to this Franchise shall be the United States District Court for the Western District of Washington, or King County Superior Court.

(3) Section captions and headings are intended solely to facilitate the reading thereof. Such captions and headings shall not affect the meaning or interpretation of the text herein.

(4) Where the context so requires, the singular shall include the plural and the plural includes the singular.

(5) Franchisee shall be responsible for obtaining all other necessary approvals, authorizations and agreements from any party or entity and it is acknowledged and agreed that the City is making no representation, warranty or covenant whether any of the foregoing approvals, authorizations or agreements are required or have been obtained by Franchisee by any person or entity.

(6) This Franchise may be enforced at both law and equity.

(7) Franchisee acknowledges that it, and not the City, shall be responsible for the premises and equipment's compliance with all marking and lighting requirements of the FAA and the FCC. Franchisee shall indemnify and hold the City harmless from any fines or other liabilities caused by Franchisee's failure to comply with such requirements. Should Franchisee or the City be cited by either the FCC or the FAA because the Facilities or the Franchisee's equipment is not in compliance and should Franchisee fail to cure the conditions of noncompliance within the timeframe allowed by the citing agency, the City may either terminate this Franchise immediately on notice to the Franchisee or proceed to cure the conditions of noncompliance at the Franchisee's expense.

**Sec. 40. Ordinance Effective Date.** This Ordinance, being an exercise of a power specifically delegated to the City legislative body, is not subject to referendum, and shall take effect five (5) days after passage and publication of an approved summary thereof consisting of the title ("Effective Date").

**PASSED BY** the City Council of the City of Des Moines this 5th day of September, 2019 and signed in authentication thereof this 5<sup>th</sup> day of September, 2019.



M A Y O R

APPROVED AS TO FORM:



City Attorney

ATTEST:



City Clerk

Published:

**LEGAL NOTICE**  
**SUMMARY OF ADOPTED ORDINANCE**  
**CITY OF DES MOINES**

ORDINANCE NO. 1721, Adopted, September 5, 2019.

DESCRIPTION OF MAIN POINTS OF THE ORDINANCE:

This Ordinance grants to Extenet Systems, Inc. and its affiliates, successors and assigns, the right, privilege, authority and nonexclusive Franchise for ten (10) years, to construct, maintain, operate, replace, and repair a telecommunications network, in, across, over, along, under, through and below certain designated public rights-of-way of the City of Des Moines, Washington.

The full text of the Ordinance will be mailed without cost upon request.

Bonnie Wilkins, CMC  
City Clerk

Published: September 10, 2019

EXHIBIT A

STATEMENT OF ACCEPTANCE

Extenet Systems, Inc., for itself, its successors and assigns, hereby accepts and agrees to be bound by all lawful terms, conditions and provisions of the Franchise attached hereto and incorporated herein by this reference.

Attn: CFO  
Address: 3030 Warrenville Road, Suite 340  
Lisle, Illinois 60532

By: [Signature] Date: 9/25/19  
Name: RICHARD J. COYLE, JR  
Title: VP - COO

STATE OF ILLINOIS )  
 ) ss.  
COUNTY OF DUPAGE )

On this 25<sup>th</sup> day of SEPTEMBER, 2019, before me the undersigned, a Notary Public in and for the State of ILLINOIS, duly commissioned and sworn, personally appeared, RICHARD J. COYLE, JR of EXTENET SYSTEMS, INC, the company that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said company, for the uses and purposes therein mentioned, and on oath stated that he/she is authorized to execute said instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal on the date hereinabove set forth.

[Signature]  
Signature  
TERESA R. OLERICH - COX  
(Print)

NOTARY PUBLIC in and for the State of ILLINOIS, residing at \_\_\_\_\_

MY COMMISSION EXPIRES: 1/23/20

