

Company agrees that the following amounts are liquidated damages, not a penalty or forfeiture and the payment of such liquidated damages shall not be deemed to be part of the compensation to be paid to the City by the Company pursuant to Section 8.1 hereof. The defaults for which liquidated damages are appropriate are:

(i) Failure to comply with Section 14.8.1, "Compliance with Laws; Licenses and Permits": One Thousand (\$1,000.00) Dollars per day for each day or part thereof such failure occurs or continues;

(ii) Failure to provide the data, documents, records, reports or information to the City required pursuant to the terms of this Agreement: Two Hundred Fifty (\$250.00) Dollars per day, for each day or part thereof that such failure continues;

(iii) Failure to substantially complete installation of the City Fiber within the Midtown Backbone, Harlem Backbone, Bronx Backbone, Brooklyn Backbone, Queens Backbone, Queens Backbone Extension or Additional Backbone, as the case may be, at the same time as the completion of the installation of the Midtown Backbone, Harlem Backbone, Bronx Backbone, Brooklyn Backbone, Queens Backbone, Queens Backbone Extension (provided the Company constructs the Queens Backbone Extension) or Additional Backbone, as the case may be, One

Thousand Five Hundred (\$1,500.00) Dollars per day for each day or part thereof that such delay continues; or

(iv) Failure, during the term of the Agreement, to take reasonable steps, under the circumstances, to return the City Fiber and the portions of the Drop Cable to the Bronx County Courthouse to good working order as soon as possible, but in no event in more than one business day, after notice, as provided in Sections 12.4.1(u) and 12.4.3, that the City Fiber and such portions of the Drop Cable is not in good working order, in accordance with Appendix C hereof, and such failure significantly affects the City's operations on the City Fiber: Ten Thousand (\$10,000.00) Dollars per day for each day or part thereof that such failure occurs or continues.

(b) Liquidated damages shall not be imposed unless such Events of Default are not cured by the Company to the reasonable satisfaction of the Director within the time set forth in Section 12.4.1 after receipt of notice, in accordance with Section 12.4.3. The accrual of liquidated damages shall commence only at the end of the specified cure period.

#### 12.4 Default.

12.4.1 Events of Default. Each of the following shall be an Event of Default hereunder:

(a) If the Company fails to satisfy the requirements regarding the construction of the City Fiber, as provided in this Agreement, and such failure continues for a period of sixty (60) days after notice, pursuant to Section 12.4.3 hereof;

(b) (i) If the Company fails to substantially complete construction of the Midtown Backbone within twelve (12) months after the Commencement Date, subject to Unavoidable Delays, and such failure shall continue for a period of sixty (60) days after notice, pursuant to Section 12.4.3 hereof;

(ii) If the Company fails to substantially complete construction of the Harlem Backbone within eighteen (18) months after the Commencement Date, subject to Unavoidable Delays, and such failure shall continue for a period of sixty (60) days after notice, pursuant to Section 12.4.3 hereof;

(iii) If the Company fails to substantially complete construction of the Bronx Backbone and to install a Drop Cable in the Bronx County Courthouse within twenty-four (24) months after the Commencement Date, subject to Unavoidable Delays, and such failure shall continue for a period of sixty (60) days after notice, pursuant to Section 12.4.3 hereof;

(iv) If the Company fails to substantially complete construction of the Brooklyn Backbone and to install a Drop Cable in the Brooklyn Borough Hall and a Drop Cable in the Brooklyn Municipal Building by December 31, 1992, subject to Unavoidable Delays, and such failure shall continue for a period of sixty (60) days after notice, pursuant to Section 12.4.3 hereof;

(v) If the Company fails to substantially complete construction of the Queens Backbone by December 31, 1992, subject to Unavoidable Delays, and such failure shall continue for a period of sixty (60) days after notice, pursuant to Section 12.4.3 hereof;

(vi) If the Company has not commenced construction of the Queens Backbone Extension and has not deposited Six Hundred Thousand (\$600,000) Dollars in the Telecommunications Fund, pursuant to Section 2.4.3(e)(ii), within twelve (12) months after the Queens Borough President makes its written request for the installation of the Queens Backbone Extension, subject to Unavoidable Delays, and such failure shall continue for a period of sixty (60) days after notice, pursuant to Section 12.4.3 hereof;

(vii) If the Company fails to substantially complete construction of the Queens Backbone Extension within twelve (12) months after it has commenced construction thereof, subject to unavoidable delays and such failure shall continue for a period of sixty (60) days after notice, pursuant to Section 12.4.3 hereof;

(c) If the Company fails to comply with the Company's employment, purchasing and reporting obligations, as provided in Section 7 hereof, and such failure shall continue for a period of thirty (30) days after notice, pursuant to Section 12.4.3 hereof;

(d) If the Company transfers or assigns Control of the Company, of the franchise, or of the Company's interest in the franchise, in violation of the provisions of Section 10 hereof, and such failure shall continue for a period of ninety (90) days after notice, pursuant to Section 12.4.3 hereof;

(e) If the Company fails to replenish the Security Fund pursuant to Section 12.2.3 hereof and such failure continues for a period of ten (10) days after notice, pursuant to Section 12.4.3 hereof;

(f) If the Company fails to comply with all laws applicable to this Agreement and such failure continues for a period of thirty (30) days after notice, pursuant to Section 12.4.3 hereof;

(g) If the Company fails to make any payments required hereunder and such failure continues for a period of ten (10) days after notice, pursuant to Section 12.4.3 hereof;

(h) If the Company fails to comply with the reporting provisions of Section 9 hereof and such failure continues for a period of thirty (30) days after notice, pursuant to Section 12.4.3 hereof;

(i) If the Company takes any action which requires the approval or consent of the Board without having first obtained said approval or consent, and such action continues for a period of thirty (30) days after notice, pursuant to Section 12.4.3 hereof;

(j) If the Company fails to furnish and maintain, throughout the term of this Agreement, the liability insurance policy or policies, as provided in Section 11.2 hereof, and such failure continues for a period of ten (10) days after notice, pursuant to Section 12.4.3 hereof;

(k) If any material misrepresentation has been made in writing by or on behalf of the Company in its Petition and related submissions to the Board, the Director, or in this Agreement, and the Company fails to satisfactorily rebut the existence of such misrepresentation within thirty (30) days after notice, pursuant to Section 12.4.3 hereof;

(l) If (i) the Company, any Person holding a Controlling Interest in the Company, any director or officer of the Company or any employee or agent of the Company or any Controlling Person, acting pursuant to the express direction, or with the actual consent of the foregoing, is convicted, and such conviction is a final, non-appealable judgment, or enters a guilty plea with respect to: (x) any criminal offense committed on behalf or for the benefit of the Company, excluding Class B misdemeanors, violations, and traffic infractions as designated in the New York State Penal Law or their equivalents in other jurisdictions; or (y) any criminal offense, including, without limitation, bribery or fraud, arising out of or in connection with (1) this Agreement, (2) the award of the franchise granted pursuant to this Agreement, or (3) any act to be taken following the Effective Date, pursuant to this Agreement by the City, its officers, employees, or agents, provided that the right to terminate this Agreement in the event of said convictions or guilty pleas shall arise only with respect to any of the foregoing convictions of the Company itself and, in the event of

the conviction or guilty plea of any of the other Persons specified in this subsection (l), and

(ii) if the Company fails to disassociate itself from, or terminate the employment of, said Person with respect to activities in the City or any other activities affecting the franchise pursuant to this Agreement, within thirty (30) days after the Director notifies the Company pursuant to Section 12.4.3 hereof, that the City orders the same;

(m) The conviction, provided such conviction is a final non appealable judgment, or guilty plea of any City officer, employee, or agent of the offense of bribery or fraud with respect to this Agreement which arises out of or in connection with any act of the Company, of any Person holding a Controlling Interest in the Company, or of any agent or employee thereof acting under the express direction or actual consent of the foregoing, after notice pursuant to Section 12.4.3 hereof, and the Company fails to satisfactorily rebut the existence of such conviction within thirty (30) days after notice, pursuant to Section 12.4.3 hereof;

(n) If the Company knowingly makes any material false entry in the books of account or records of the Company, or knowingly makes any material false statement in any report to the City required pursuant to this Agreement by the Company, any director, officer, or other Person holding a Controlling Interest

in the Company, or any employee or agent of the Company acting under the express direction or with the actual consent of any of the foregoing and such false entry or statement continues uncorrected for a period of thirty (30) days after notice, pursuant to Section 12.4.3 hereof;

(o) If any event occurs relating to the financial status of the Company which may reasonably lead to the foreclosure or other judicial or nonjudicial sale of all or any material part of the System, and the Company fails to demonstrate to the reasonable satisfaction of the Director within thirty (30) days after notice, pursuant to Section 12.4.3, that such event will not lead to such foreclosure or other judicial or nonjudicial sale;

(p) The condemnation by public authority, other than the City, or sale or dedication under threat or in lieu of condemnation, of all or substantially all of the System, the effect of which would materially frustrate or impede the ability of the Company to carry out its obligations, and the purposes of this Agreement and the Company fails to demonstrate to the reasonable satisfaction of the Director, within thirty (30) days after notice, pursuant to Section 12.4.3, that such condemnation sale or dedication would not materially frustrate or impede such ability of the Company;

(q) In the event that: (i) the Company shall make an assignment of the Company or the System for the benefit of creditors, shall become and be adjudicated insolvent, shall petition or apply to any tribunal for, or consent to, the appointment of, or taking possession by, a receiver, custodian liquidator or trustee or similar official pursuant to state or local laws, ordinances or regulations of or for it or any substantial part of its property or assets, including all or any part of the System; (ii) a writ or warranty of attachment, execution, distraint, levy, possession or any similar process shall be issued by any tribunal against all or any material part of the Company's property or assets; (iii) any creditor of the Company petitions or applies to any tribunal for the appointment of, or taking possession by, a trustee, receiver, custodian, liquidator or similar official for the Company or of any substantial parts of the assets of the Company under the law of any jurisdiction, whether now or hereinafter in effect, and an order, judgment or decree is entered appointing any such trustee, receiver, custodian, liquidator or similar official, or approving the petition in any such proceedings; or (iv) any order, judgment or decree is entered in any proceedings against the Company decreeing the voluntary or involuntary dissolution of the Company, three (3) days after notice, pursuant to Section 12.4.3;

(r) If there shall occur any denial, forfeiture or revocation by any federal or state governmental authority having regulatory jurisdiction over the Company of any authorization required by law or the expiration without renewal of any such authorization, and such events either individually or in the aggregate, materially jeopardize the System or its operation, and the Company fails to rebut the conclusion that such action will materially jeopardize the System or its operation within thirty (30) days after notice, pursuant to Section 12.4.3;

(s) Substantial failure by the Company to establish and maintain managerial and operational standards, procedures and controls to enable the Company to prove to the reasonable satisfaction of the City, in reasonable detail, at all times throughout the term of this Agreement, that it is, or has been, in compliance with each term and condition of this Agreement and such failure continues for a period of thirty (30) days after notice, pursuant to Section 12.4.3;

(t) The provision or distribution of any Service, or any other action in connection with the operation of the System, which has tended to create or has created a monopoly or has restrained trade, as those terms are used in state and federal law and the Company fails to cure such situation, if a cure is possible, within sixty (60) days after the Board has made

such a determination, provided the Director notified the Company of the alleged monopoly or restraint of trade, pursuant to Section 12.4.3, and the Board has held a hearing, with all due process protections, regarding the matter no sooner than sixty (60) days after the Director's notice. This subsection is not limited to a formal court finding of monopolization or restraint of trade as contemplated by Section 3.3 hereof;

(u) The failure, during the term of the Agreement, to take reasonable steps under the circumstances, to return the City Fiber and the portions of the Drop Cables Bronx County Courthouse, the Brooklyn Borough Hall, and the Brooklyn Municipal Building to good working order as soon as possible, but in no event in more than one business day, after notice, pursuant to Section 12.4.3, except that such notice may be by voice, that the City Fiber and such portion of the Drop Cables that are outside said buildings are not in good working order, in accordance with Appendix C, and such failure significantly affects the City's operations on the City Network; and

(v) If the Company fails to satisfy the requirements regarding routine maintenance of the City Fiber, as provided in this Agreement, and such failure continues for a period of thirty (30) days after notice, pursuant to Section 12.4.3 hereof.

12.4.2 No Independent Failure to Comply. If, as a result of a failure or alleged failure to comply with a material provision of this Agreement as delineated in the foregoing subsections (a) through (v) of Section 12.4.1 hereof, the Company is unable to comply with any other material provision(s), and such inability necessarily and directly arises out of said failure or alleged failure as delineated in said subsections, such inability to comply with such other provision(s) shall not be deemed to be an independent failure to comply with a material provision of this Agreement.

12.4.3 Cure Procedures. (a) The Director shall notify the Company, in writing, of any default under this Agreement, in accordance with Section 14.6. The notice shall specify the alleged failure with reasonable particularity. The Company shall, within the number of days set forth in the applicable provision of this Agreement, or such longer period of time as the Director may specify in such notice, either (i) cure such alleged failure, or (ii) in a written response submitted to the Director within the time periods set forth in Section 12.4.3(c), present facts and arguments in refutation or excuse of such alleged failure. The submission of such a response shall toll the running of the applicable cure period, as provided in subsection (c), below. Notwithstanding the preceding, no Event of Default shall exist if a particular default requires work to be performed, acts to be done, or conditions to be removed which

cannot, by their nature, reasonably be performed, done or removed within the cure period provided, so long as the Company shall have commenced curing the same within the cure period provided and shall diligently and continuously prosecute the same promptly to completion.

(b) If, after the Company makes a presentation to the Director, the Director determines, in his reasonable discretion, that a default under this Agreement has occurred, the Company shall cure such default within the balance of the time period to cure that remained when the submission was made.

(c) If the cure period set forth in the applicable subsection of Section 12.4.1 is three (3) days, then the submission authorized by Section 12.4.3(a)(ii) must be made within twenty-four (24) hours of receipt of notice; if such cure period is ten (10) days, then such submission must be made within forty-eight (48) hours of receipt of notice; if such cure period is thirty (30) days, then such submission must be made within seven (7) days of the mailing of notice; if such cure period is sixty (60) days, then such submission must be made within fourteen (14) days of the mailing of notice; if such cure period is ninety (90) days, then such submission must be made within twenty one (21) days of the mailing of notice.

12.4.4 Remedies of the Director. (a) Upon an Event of Default, the Director may (i) cause a withdrawal from the Security Fund for any amount(s) specified as liquidated damages in Section 12.3 hereof, (ii) cause a withdrawal from the Security Fund for any other specified amounts due the City under this Agreement, (iii) refer the matter to the Board, or (iv) extend any period set forth herein to cure a default.

(b) The Director shall give the Company notice in writing of the remedy, upon its election thereof. Nothing herein shall prevent the Director from electing more than one remedy, simultaneously or consecutively, for any default, provided the Company is notified, as provided in the foregoing sentence, of each such election.

12.4.5 Remedies of the Board. (a) Upon an "Event of Default" of this Agreement, as provided in Sections 12.4.1 or 3.2 hereof, then, in accordance with the procedures provided in Sections 12.4.3 and 12.4.4, the Board may:

(i) seek money damages from the Company as compensation for such Event of Default;

(ii) revoke the franchise granted pursuant to this Agreement by termination of this Agreement;

(iii) make withdrawals from the Security Fund;

(iv) restrain by injunction the default or anticipated default by the Company of any term or provision of this Agreement; and

(v) seek any other remedy that would be permitted by law.

(b) The Company expressly waives any right to limit the availability of the foregoing remedies. The Board shall give the Company notice in writing of the remedy, upon its election thereof. Nothing herein shall prevent the Board from electing more than one remedy, simultaneously or consecutively, for any default, provided the Company is notified, as provided in the foregoing sentence, of each such election.

## 12.5 Termination

12.5.1 Rights Upon Termination. In the event of any termination of this Agreement, whether by the expiration of its term, its revocation by the Board, or the Company's abandonment of the System, the Company, at the City's election, shall (a) sell to the City or to the City's designee the Fiber (excluding the City Fiber) installed in the Streets by the

Company for the System at fair value, as defined in Section 12.5.2, excluding the value of the City Fiber, and/or (b) sell to the City or to the City's designee the portion of the System that is not within the Streets for fair market value, as defined in Section 12.5.2 (excluding the Drop Cables), and/or (c) remove the Fiber installed in the Streets by the Company for the System and/or the City Fiber at the Company's own cost and expense, pursuant to Section 12.6, and/or (d) purchase the City Network for One (\$1) Dollar.

12.5.2 Price. (a) "Fair value," for the purpose of Section 12.5.1, shall be the Company's purchase price for such Fiber, plus the direct cost of labor to install such Fiber, with a deduction for any and all accumulated depreciation and amortization.

(b) "Fair market value," for the purpose of Section 12.5.1, shall include the value of any intangible assets of the System, including, but not limited to, Customer lists or goodwill, plus the value of the Company's tangible assets, including, but not limited to, the unexpired term of any leases, the Company's furniture and equipment, but excluding the fair market value of the Fiber that is in the Streets and any value attributable to the franchise.

(c) The date of valuation for Section 12.5.1 shall be the date of termination of the Agreement. For the purpose of determining such valuation, the parties shall select a mutually agreeable independent appraiser to compute the purchase price in accordance with industry practice and the aforementioned standards. If they cannot agree on an appraiser in ten (10) days, the parties will seek an appraiser from the American Arbitration Association. The appraiser shall be instructed to make the appraisal as expeditiously as possible, but in no event in more than sixty (60) days and shall submit to both parties a written appraisal. The appraiser shall be afforded access to the Company's books and records, as necessary to make the appraisal. Notwithstanding the provisions of Section 8.2.2 to the contrary, the parties shall share equally the costs and expenses of the appraiser.

(d) The City will notify the Company, within thirty (30) days after receipt of the appraisal, of its election of rights pursuant to Section 12.5.1. If it elects to make any of the purchases permitted under Section 12.5.1, it will purchase the same at a closing to occur within a reasonable time after its election.

(e) The Company agrees, at the request of the City, (i) to operate the System or maintain the City Fiber on behalf of the City pursuant to the provisions of this Agreement

and such additional terms and conditions as are equitable to the City and the Company for a period of up to four (4) months after the termination of this Agreement, until the City either elects not to purchase any portion of the System or the Fiber, exclusive of the network, or closes on such a purchase, or (ii) to cease all construction and operational activities in a prompt and workmanlike manner. Thereafter, the Company agrees to cooperate with the City to effectuate an orderly transfer of records and information about the City Network to the City.

12.5.3 Company's Obligations. In the event of any acquisition of the Fiber or the System, exclusive of the City Network, by the City pursuant to Section 12.5.1 hereof, the Company shall:

(a) cooperate with the City to effectuate an orderly transfer of records and information about the Fiber or the System, as the case may be, to the City;

(b) promptly execute all appropriate documents to transfer to the City, subject to any liabilities, title to the Fiber or the System, as the case may be, as well as all contracts, leases, licenses, permits, rights-of-way, and any other rights, contracts or understandings necessary to maintain and operate the Fiber or the System, as appropriate; provided that such transfers shall be made subject to the rights, under

Article 9 of the Uniform Commercial Code as in effect in the State of New York and, to the extent that any collateral consists of real property, under the New York Real Property Law, of banking or any other lending institutions which are secured creditors or mortgagees of the Company at the time of such transfers; and provided that, with respect to such creditors or mortgagees, the City shall have no obligation following said transfers to pay, pledge, or otherwise commit in any way any general or any other revenues or funds of the City, other than the gross operating revenues received by the City from its operation of the System, in order to repay any amounts outstanding on any debts secured by the System which remain owing to such creditors or mortgagees; and provided, finally, that the total of such payments by the City to such creditors and mortgagees, from the gross operating revenues received by the City from its operation of the System, shall in no event exceed the lesser of: (a) the fair value of the System on the date of the transfer of title to the City or (b) the outstanding debt owed to such creditors and mortgagees on said date. Nothing in this Section 12.5 shall be construed to limit the rights in any such secured creditors to exercise its or their rights as secured creditors or mortgagees at any time prior to the payment of all amounts due pursuant to the applicable debt instruments; and

(c) promptly supply the Director with all necessary records to reflect the City's ownership of the Fiber or the System, as the case may be, and to operate and maintain the Fiber or the System, as the case may be, including, without limitation, all Customer records and plant and equipment layout documents.

12.5.4 Cessation of Business. In the event the Company decides to cease engaging in the business of providing Service on the System, it shall notify the Director of its decision at least six (6) months before the date it intends to cease the business. This Agreement, and the franchise granted pursuant hereto, shall terminate on the date the Company sets forth in its notice, and the obligations in the event of termination, set forth in Sections 12.5 and 12.6, shall apply, provided, however, that upon such termination, the Company shall have no obligation to maintain the City Network.

12.6 Removal.

12.6.1 Discretion of Board. Upon any termination, the Board, in its sole discretion, may, but shall not be obligated to, direct the Company to remove, at the Company's sole cost and expense, all or any portion of the Fiber, including the City Fiber, installed by the Company from the Streets in accordance

with all applicable requirements of the City and subject to the following:

(a) this provision shall not apply to buried cable which cannot be removed;

(b) in removing such Fiber, or part thereof, the Company shall refill and compact, at its own expense, any excavation that shall be made by it and shall leave all Streets and other property in as good condition as that prevailing prior to the Company's removal of the Fiber from the Streets and without affecting, altering or disturbing in any way any electric, telephone or other cables, wires or attachments;

(c) the City shall have the right to inspect and approve the condition of such Streets after removal;

(d) the Security Fund, liability insurance and indemnity provisions of this Agreement shall remain in full force and effect during the entire period of removal and associated repair of all Streets;

(e) removal shall be commenced within thirty (30) days of the removal order by the Board and shall be completed within six (6) months thereafter including all associated repair of all Streets.

12.6.2 Failure to Commence Removal. If, in the reasonable judgment of the Director, the Company fails to commence removal of the Fiber as designated by the Board within thirty (30) days after the Board's removal order, or if the Company fails to substantially complete such removal, including all associated repair of Streets and other property within six (6) months thereafter, then, to the extent not inconsistent with applicable law, the City shall have the right to:

(a) declare that all rights, title and interest to the System belong to the City with all rights of ownership, including, but not limited to, the right to connect the Fiber to a system or to effect a transfer of all right, title and interest in the Fiber to another Person for operation; or

(b) authorize removal of the Fiber installed by the Company in the Streets, at the Company's cost, by another Person; and

(c) to the extent not inconsistent with applicable law, any portion of the Company's Fiber in the Streets designated by the Board for removal and not yet removed shall belong to and become the property of the City without payment to the Company notwithstanding the provisions of Section 12.5.1 and the Company shall execute and deliver such documents, as the

Director shall request, in form and substance acceptable to the Director, to evidence such ownership by the City.

12.6.3 Company's Options Regarding Removal. In the event the City elects to retain the City Network but not to purchase the balance of the System or the Fiber in the Streets, then notwithstanding anything in the foregoing regarding removal of the Fiber in the Streets associated with the System to the contrary, the Company, at its option, may:

(a) decommission the Fiber for the System, but leave the City Fiber in the Streets, or

(b) remove the Fiber for the System and the City Fiber and replace the City Fiber. The Company agrees to perform such work so as to minimize disruption to the City's service.

12.7 Return of Security Fund. Upon the later to occur of one hundred and twenty (120) days after the termination of this Agreement for any reason, and the completion of removal of the Fiber from the Streets pursuant to Section 12.6.1, the Company shall be entitled to the return of the Security Fund deposited pursuant to Section 12.2.1 hereof, or portion thereof as remains on deposit with the Comptroller at said termination, provided that all offsets necessary (a) to compensate the City pursuant to Section 12.2.2, (b) to cover any costs, loss or damage incurred

by the City as a result of any Event of Default, in the event of termination of this Agreement by the Board pursuant to Section 12.4.5, and (c) to reimburse the City for the cost of removal of the Fiber from the Streets pursuant to Section 12.6.2 have been taken by the City.

12.8 Other Provisions. The City and the Company shall negotiate in good faith all other terms and conditions of any such acquisition or transfer, except that the Company hereby waives its rights, if any, to relocation costs that may be provided by law and except that, in the event of any acquisition of the System or the Fiber, exclusive of the City Network, by the City: (i) the City shall not be required to assume any of the obligations of any collective bargaining agreements or any other employment contracts held by the Company or any other obligations of the Company or its officers, employees, or agents, including, without limitation, any pension or other retirement, or any insurance obligations; and (ii) the City may lease, sell, operate, or otherwise dispose of all or any part of the System in any manner.