ATTACHMENT 8

RESOLUTION NO. 73357

A RESOLUTION OF THE COUNCIL OF THE CITY OF SAN JOSE APPROVING A NON-EXCLUSIVE STANDARD FORM AGREEMENT FOR PLACEMENT OF TELECOMMUNICATIONS EQUIPMENT ON MULTIPLE SITES OWNED BY THE CITY, AND AUTHORIZING THE CITY MANAGER TO EXECUTE SUCH NON-EXCLUSIVE PROPERTY USE AGREEMENT IF SUBMITTED FOR EXECUTION WITHOUT SUBSTANTIVE AMENDMENT

WHEREAS, Resolution No. 70538, adopted August 7, 2001, delegated authority to the City Manager to execute single site nonexclusive standard form agreements for placement of telecommunications equipment to City properties (including Airport); and

WHEREAS, the City Council desires to add to such authority, by delegating to the City Manager the authority to execute agreements for the placement of telecommunications equipment on multiple sites owned by the City, and authorizing the City Manager to execute such non-exclusive property use agreements if submitted for execution without substantive amendment,

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF SAN JOSE THAT:

Section 1. The Multi-Site Standard Form Property Use Agreement for placement of telecommunications equipment on City property (including Airport), attached hereto as "Exhibit A", is hereby approved.

Section 2. The City Manager is authorized to execute the Multi-Site Standard Form Property Use Agreement on behalf of the City, provided such Standard Form Agreement is in conformance with the Rate Schedule approved by the City Council, is presented for execution without substantive modification, excepting such minor changes as are necessary to properly fill out the form and exhibits (e.g., contracting party, names

of responsible City officers; update insurance requirements; correct typographical errors or change the agreements to reflect minor changes in the law).

ADOPTED this 22nd day of August, 2006, by the following vote:

AYES:	CAMPOS, CHAVEZ, CHIRCO, LeZOTTE, NGUYEN, PYLE, REED, WILLIAMS, YEAGER; GONZALES
NOES:	NONE
ABSENT:	CORTESE
DISQUALIFIED:	NONE

RON GONZALES
Mayor

ATTEST:

LEE PRICE, MMC
City Clerk

[INCLUDING CITY OWNED LIGHT POLES]

NON-EXCLUSIVE MULTI-SITE ANTENNA INSTALLATION AND PROPERTY USE AGREEMENT BETWEEN THE CITY OF SAN JOSÉ AND _____

This NON-EXCLUSIVE MULTI-SITE ANTENNA INSTALLATION AND PROPERTY USE AGREEMENT ("AGREEMENT") is made and entered into by and between the CITY OF SAN JOSÉ, a municipal corporation ("CITY"), and _____ ("COMPANY"), upon execution by CITY ("Effective Date").

RECITALS

A. **WHEREAS**, CITY is the owner of various properties located in the City of San Jose; and

B. **WHEREAS**, COMPANY desires to construct and install at no cost to CITY certain telecommunications facilities and appurtenant structures on City owned property, which properties shall be identified by COMP0ANY and be reviewed and shall be subject to review and permit by the CITY as herein described and upon CITY approval shall be described with individual site maps/parcel maps in **EXHIBIT "A"**, attached hereto as property description, and addendums thereto and incorporated herein by reference ("PROPERTY"), and,

C. **WHEREAS**, COMPANY desires to provide services which services are more particularly described in **EXHIBIT "B"**, attached hereto ("SERVICES"); and

D. **WHEREAS,** in order to provide SERVICES, COMPANY desires to obtain from CITY and CITY desires to grant to COMPANY the right to use certain portions of the PROPERTY, which portions are further described in **EXHIBIT "C"** (the "LICENSED AREAS") for the purposes of installing, maintaining and operating a telecommunication facility and associated equipment to provide SERVICES, which antenna and associated equipment are more particularly described on the "Antenna Facility Description" attached hereto as **EXHIBIT "D"** and the individual site facility/antenna equipment are attached to this exhibit as an addendum and incorporated herein by this reference ("ANTENNA FACILITY"); and

E. **WHEREAS**, COMPANY desires to obtain from CITY and CITY desires to grant to COMPANY the right to multiple City-owned sites with one single AGREEMENT; and

F. **WHEREAS**, CITY desires to have the SERVICES available in CITY in accordance with the terms and conditions contained in this AGREEMENT.

NOW, THEREFORE, for valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

SECTION 1. RIGHT TO USE CITY PROPERTY

A. Right to Use.

CITY hereby grants COMPANY the right to use the LICENSED AREAS on a non-exclusive basis, for the purpose of installing, maintaining and operating the ANTENNA FACILITY to provide SERVICES and for no other purpose.

B. Access.

1. COMPANY will be given reasonable access to the LICENSED AREAS between the hours of 6:00 a.m. and 6:00 p.m. to install, repair, maintain or remove the ANTENNA FACILITY, provided COMPANY provides CITY with at least five (5) days prior written notice of the times that COMPANY will need access to that portion of the LICENSED AREAS located on the PROPERTY and at least forty-eight (48) hour's actual prior oral confirmation to CITY of the dates and times that COMPANY will need access to any other portion of the LICENSED AREAS or PROPERTY. The individuals or departments listed in **EXHIBIT "C"** (hereinafter "PROPERTY MANAGER") shall be CITY's contact for these purposes, unless CITY otherwise indicates in writing.

2. If an emergency repair of the ANTENNA FACILITY is necessary, COMPANY may be allowed reasonable access to the LICENSED AREAS between 6:00 p.m. and 6:00 a.m., provided that COMPANY obtains the PROPERTY MANAGER's prior permission to enter the LICENSED AREAS. The CITY shall provide COMPANY with the phone number of the PROPERTY MANAGER, which number shall permit contact with the PROPERTY MANAGER, or his/her designate, twenty-four hours per day.

3. COMPANY shall allow a representative of the CITY to observe any repair, maintenance or removal work performed at the LICENSED AREAS or any other portion of the PROPERTY.

C. Relocation and Removal.

1. At any time during the term of this AGREEMENT, CITY may require relocation of the ANTENNA FACILITY to a location designated by CITY, provided that CITY shall provide COMPANY with a one hundred and twenty (120) day prior written notice that the ANTENNA FACILITY must be relocated.

2. If, notwithstanding COMPANY's agreement to relocate the ANTENNA FACILITY, COMPANY fails to relocate the ANTENNA FACILITY or repair or restore the affected areas of the LICENSED AREAS and PROPERTY within the one hundred and twenty (120) day period, as that period may be extended as provided in this SECTION, City Manager, in his or her sole discretion and without limitation with respect to any other rights or remedies

which he/she may have, may terminate the permit as issued for that LICENSED AREAS pursuant to **SECTION 9** of this AGREEMENT, effective no earlier than seven (7) days after the date of notice of termination, and CITY may remove any of COMPANY's PROPERTY, including the ANTENNA FACILITY from the PROPERTY.

3. If CITY removes the ANTENNA FACILITY pursuant to this Section, COMPANY shall pay to CITY all costs associated with CITY's removal of the ANTENNA FACILITY, including any storage costs and costs to repair and restore the PROPERTY, including the LICENSED AREAS, within ten (10) days after receipt by COMPANY of an itemized bill therefor.

D. Title to the ANTENNA FACILITY.

Title to the ANTENNA FACILITY shall be and remain with COMPANY while the ANTENNA FACILITY is installed and maintained at the PROPERTY in accordance and compliance with all of the terms of this AGREEMENT.

E. Title to improvements to the PROPERTY.

Notwithstanding Section 1.D above, title to the improvements to the PROPERTY, or LICENSED AREAS required for approval for the placement of the ANTENNA FACILITY, including buildings or other structures placed thereon, shall be and remain with CITY. Title to all equipment installed for purposes of operating and providing wireless communications services pursuant to this Agreement shall be and remain with COMPANY.

F. No Warranties of Suitability of PROPERTY.

It is COMPANY's election to install and maintain the ANTENNA FACILITY at the PROPERTY and COMPANY does so solely at its own risk. CITY makes no representations or warranties regarding the suitability, condition or fitness of the PROPERTY for the installation, maintenance or use of the ANTENNA FACILITY.

G. Right of CITY Access.

CITY reserves, and COMPANY agrees to, the right of CITY, its authorized officers, employees, agents or contractors, to enter into and access the LICENSED AREAS and the PROPERTY at any time. Without limiting the foregoing, CITY and COMPANY agree that CITY may: (1) inspect the PROPERTY, LICENSED AREAS and ANTENNA FACILITY for COMPANY's compliance with the terms of this AGREEMENT; (2) make repairs, alterations or additions to the PROPERTY or LICENSED AREAS or maintain or use the PROPERTYor LICENSED AREAS in any manner not prohibited by the terms of this AGREEMENT, all without a claim by COMPANY for any loss of occupation or use of, or any abatement of, the USE CHARGE for use of the LICENSED AREAS.

SECTION 2. TERM

A. Initial Term.

The term of this AGREEMENT shall commence on the EFFECTIVE DATE set forth above, and shall continue for five (5) years, expiring at 11:59 p.m. on the fifth anniversary of said EFFECTIVE DATE ("EXPIRATION DATE"), unless earlier terminated as pursuant to the terms of this AGREEMENT.

B. Option to Extend.

COMPANY shall have the option to extend the term of this AGREEMENT beyond the initial term described herein for one additional five (5) year period on the same terms, covenants and conditions that are contained in this AGREEMENT; CITY shall increase the USE CHARGE during the option period in the manner as provided in Section 3B below. **COMPANY shall exercise its option to extend this AGREEMENT, if at all, by providing CITY with written notice that COMPANY intends to exercise its option no later than one hundred and eighty (180) days prior to the EXPIRATION DATE.**

SECTION 3. Use Charge.

A. Charge and Payment.

Commencing upon the EFFECTIVE DATE, COMPANY shall pay CITY, for five initial sites, the payment due is in accordance with the CITY's Rate Schedule as shown in **EXHIBIT "E"** ("USE CHARGE"). The USE CHARGE shall be due and payable in full on the EFFECTIVE DATE. COMPANY shall make all payments to CITY at the following address

City of San Jose
Office of Economic Development
Real Estate & Asset Management
200 East Santa Clara Street, 4th Floor
San Jose, CA 95113-1905

Initial payment by COMPANY for adjustments made for addition of antennae, pursuant to **EXHIBIT "E"** shall be due and payable at the address set forth above on the date CITY approves placement of said additional antennae on the ANTENNA FACILITY and shall be prorated to reflect the remainder of the year of the Term ("Term Year"). CITY shall reimburse COMPANY for Adjustments reflecting removal of antenna(e) no later than sixty (60) days after CITY is notified by COMPANY in writing of the completion of such removal. Adjustments to reflect removal of antenna(e) shall be prorated to reflect the portion of the Term Year remaining after CITY receives said written notice of such removal.

B. Adjustment of USE CHARGE.

1. The USE CHARGE shall be increased annually, up to the maximum amount set forth below, to equal the greater of: (i) 4% of the then current USE CHARGE, or (ii) the extent of any percentage change which occurred in the Consumer Price Index (All Items, Base 1982-84 = 100) as published by the United States Department of Labor, Bureau of Labor Statistics for All Consumers for the San Francisco-Oakland-San Jose Metropolitan area (hereinafter "CPI"). The percentage change in the CPI shall be calculated by a fraction, the denominator of which is the CPI in effect as of the calendar month fourteen (14) full months prior to the adjustment date, and the numerator of which is the CPI in effect two (2) full months prior to the adjustment date.

2. The rate for the option period will increase from the execution date to the date beginning the five year option term by the greater of twenty one and seven tenths percent (21.7% based on a compounded rate increase of 4% per annum) or the total increase in the Consumer Price Index All Urban Consumers for the San Francisco-Oakland Metropolitan Area.

3. If the Department of Labor discontinues publishing the index mentioned above, CITY may use a comparable index to calculate the percentage change in the CPI.

4. The USE CHARGE adjustment shall occur on each Anniversary Date.

5. Should COMPANY enter into an agreement for the same, or substantially similar, ANTENNA FACILITIES with another Governmental Entity for use of any structure owned by such Governmental Entity anywhere in the San Francisco-Oakland-San Jose Metropolitan Area as defined by the Bureau of Labor Statistics for its CPI Index which agreement requires COMPANY to pay higher use rates ("Higher Use Rate") than the rate then in effect hereunder, COMPANY shall so notify CITY within thirty (30) days of the effective date of such agreement. In the event COMPANY enters into such an agreement, COMPANY shall begin paying such Higher Use Rate to CITY within sixty (60) of the effective date of such agreement. The first payment shall be made in one lump sum to CITY and shall be equal to the Higher Use Rate for the period beginning on the effective date of the agreement with the Governmental Entity and ending on the following Anniversary Date less the amount then already paid for the same period. For each year thereafter, COMPANY shall pay annually to CITY the Higher Use Rate. For purposes of this Agreement, "Governmental Entity" shall mean any federal, state or local government agency thereof, including, but not limited to, Federal and State Governments or Feral and State Governmental entities, all County and Municipal Governments, Redevelopment Agencies, and governmental transit authorities. The provisions of this paragraph shall not apply to extensions of existing contracts between Government Entities and COMPANY, which are in

effect as of Commencement Date.

SECTION 4. Right to Use Applicable Only to PROPERTY.

This AGREEMENT shall not be construed to permit construction, installation, maintenance or use of an ANTENNA FACILITY on any property other than the ANTENNA FACILITY on the LICENSED AREAS.

SECTION 5. Compliance with Applicable Law and Approvals.

A. Facility to be Constructed in Accordance with Law.

COMPANY shall construct, install, operate, maintain and remove the ANTENNA FACILITY in accordance with all applicable federal, state and local governmental laws, rules and regulations now in existence or as hereafter enacted or amended. Without limiting the foregoing, COMPANY shall obtain, maintain and fully comply with any and all permits or approvals required from CITY.

B. Utility User's Tax.

COMPANY acknowledges and agrees that CITY requires users of communications services such as the SERVICES to pay to CITY a utility users' tax pursuant to Chapter 4.68 of Title 4 of the San José Municipal Code, as the same may be amended from time to time. Without limiting the other provisions of this SECTION, COMPANY agrees that COMPANY shall collect from the users of the SERVICES and remit to CITY said utility users' tax all in the manner described in, and in compliance with, Chapter 4.68 of Title 4 of the San José Municipal Code.

C. Licensing and Authorization.

(Applicable only if COMPANY operates its ANTENNA FACILITY in such a way as to require licensure by the Federal Communications Commission)

COMPANY represents that it is licensed by the Federal Communications Commission to operate the ANTENNA FACILITIES and provide the SERVICES, and COMPANY agrees provides documentation evidencing such licensing and authorization within ten (10) days of a receiving a request by CITY for such documentation.

SECTION 6. Maintenance and Repair.

A. COMPANY shall maintain and repair the ANTENNA FACILITY, at no cost to CITY (except as specifically provided otherwise in this AGREEMENT) and to CITY's reasonable satisfaction, any and all damage to the PROPERTY or the LICENSED AREAS that may result from any relocation or removal of an ANTENNA FACILITY or COMPANY's exercise of any of the rights and privileges hereby granted, including, without limitation, damage to any walls, floors, ceilings, doors or electrical system in the PROPERTY or the LICENSED AREAS. Upon removal of

the ANTENNA FACILITY and termination of this AGREEMENT, COMPANY shall restore the affected areas of the PROPERTY to at least as good condition and repair as before COMPANY's use thereof, except for ordinary wear and tear.

B. COMPANY agrees to and shall: (1) shall keep each ANTENNA FACILITY and the LICENSED AREAS in neat, clean and orderly condition at all times; (2) not cause rubbish, garbage or debris to accumulate or remain on or around the ANTENNA FACILITY, LICENSED AREAS or PROPERTY at any time; (3) not commit, suffer or allow any acts to be done at or around each ANTENNA FACILITY, LICENSED AREAS or PROPERTY in violation of any law, regulation, permit or rule; and, (4) not use or allow the use of an ANTENNA FACILITY, LICENSED AREAS or PROPERTY for any illegal or immoral purpose.

C. COMPANY shall mark cabling every 18 inches with identifying ownership markings and identify the antenna with similar ownership markings.

D. Prior to installation COMPANY shall submit plans and specifications to the CITY for approval any proposed cable runs.

SECTION 7. Termination.

A. Termination with Cause.

Except as otherwise provided in this AGREEMENT, CITY shall have the right to terminate this AGREEMENT or any particular LICENSED AREAS, immediately .(i) if COMPANY fails to cure a material breach (the materiality of which shall be determined in CITY's sole discretion) of any term or condition hereof, within thirty (30) days after CITY has notified COMPANY of such breach; or (ii) if said cure cannot be reasonably be completed within thirty (30) days and COMPANY has not commenced curative action within said thirty (30) days and thereafter diligently (in CITY'S sole opinion) prosecuted such cure to completion; or (iii) if COMPANY's operation is deemed by CITY to endanger or pose a threat to the public health, safety or welfare, including, without limitation, and as an example, if operation of the ANTENNA FACILITY adversely interferes with, or otherwise adversely affects CITY communications or operations; (iv) if CITY is mandated by law, a court order or decision, or the federal, state or local government to take certain actions that will cause or require the removal of the ANTENNA FACILITY from the LICENSED AREAS; or (v) if the removal of the ANTENNA FACILITY from the LICENSED AREAS is needed to accommodate the construction, installation, operation, repair or maintenance of any improvement desired by CITY.

B. Termination without Cause.

CITY may terminate this AGREEMENT or any particular LICENSED AREAS without cause upon one hundred eighty (180) days' prior written notice to COMPANY.

C. Removal of Facility Upon Termination.

COMPANY shall remove the ANTENNA FACILITY and repair and restore the affected areas of the LICENSED AREAS and the PROPERTY prior to the expiration of this AGREEMENT. If this AGREEMENT is terminated by either party earlier than the expiration of the term, COMPANY shall remove the ANTENNA FACILITY and repair and restore the affected areas of the LICENSED AREAS and the PROPERTY no later than sixty (60) days after notice of termination, provided that termination due to required relocation of the ANTENNA FACILITY shall be governed by **SECTION 1.C**. Removal of the ANTENNA FACILITY shall be at COMPANY's sole cost and expense, except as specifically provided otherwise in this AGREEMENT.

D. Prorated Use Charge Reimbursement

In the event of the early termination of this AGREEMENT or LICENSED AREAS, CITY will reimburse COMPANY the unused portion of the USE CHARGE after proration and proper computation.

SECTION 8. No Liability.

A. Liability.

CITY, its agents, officers, employees or contractors, shall not be liable for any damage from any cause whatsoever to the ANTENNA FACILITY, specifically including, without limitation, damage, if any, resulting from CITY's maintenance operations adjacent to the ANTENNA FACILITY or from vandalism or unauthorized use of the ANTENNA FACILITY, except as such damage is solely caused by the gross negligence or willful misconduct of CITY, its agents, officers, employees or contractors.

B. Security.

COMPANY shall take reasonable precautions against damage to or unauthorized use of the ANTENNA FACILITY. CITY shall not be liable for any vandalism or other damage that may occur to the ANTENNA FACILITY or in the LICENSED AREAS or any unauthorized use of the ANTENNA FACILITY except as provided in **SECTION 8.A.**, above.

SECTION 9. PLANS AND SPECIFICATIONS; PERMITS

A. Before COMPANY installs any ANTENNA FACILITY on CITY PROPERTY, COMPANY shall submit the location, plans and specifications of the ANTENNA FACITILITY to the CITY. City staff shall distribute the information, preferably in electronic format, to all departments that require prior approval prior to submittal to the appropriate permitting department. Upon receipt of the required prior

approval, City staff shall meet with COMPANY and the appropriate permitting department to submit four (4) sets of such plans and specifications and any required permitting fees. COMPANY shall supply the CITY any additional information it may request before approving the plans and specifications for permit. Approval of plans, specifications and permits shall not release COMPANY from the responsibility for, or the correction of, any errors, omissions or other mistakes that may be contained in the plans, specifications and/or permits. COMPANY shall be responsible for notifying CITY and all other relevant parties immediately upon discovery of such omissions and/or errors.

B. COMPANY agrees to perform any work in furtherance of the plans, specifications and permits at COMPANY's sole expense and in accordance with and in a manner CITY is satisfied conforms to plans, specifications and permits as may be approved by CITY in furtherance of this AGREEMENT.

C. COMPANY shall apply for and obtain all applicable permits as are required by CITY to perform the work described in this AGREEMENT and shall comply with all of the terms and conditions set forth in such permits, including, without limitation, allowing CITY personnel to inspect the installation of the ANTENNA FACILITY on CITY property. COMPANY shall arrange for, obtain and bear costs of all: permits (including without limitation any fees as required by any federal, state or local law, statue, ordinance, rule or regulation); plan check and inspection fees; licenses; environmental impact reports; site preparation; surface treatment and relocation of any facilities on the LEASED PROPERTY, as necessary or required for health or safety in the construction or alteration of the LEASED PROPERTY. As a condition of this AGREEMENT, COMPANY agrees to perform the covenants and conditions contained in any permit issued or to be issued to COMPANY by CITY's Chief Engineer or his designees.

D. COMPANY shall not commence physical installation of an ANTENNA FACILITY before approval of Plans and Specifications pursuant to **Subsection 9.A** and obtaining approval of all applicable permits pursuant to **Subsection 9.D**. Approval of Plans and Specifications by CITY Departments shall not release COMPANY from the responsibility for, or the correction of, any errors, omissions or other mistakes that may be contained in Plans and Specifications. COMPANY agrees to perform any work at COMPANY'S sole cost and at COMPANY'S sole expense and in accordance with and in a manner CITY is satisfied conforms to Plans and Specifications as may be approved by CITY in furtherance of this AGREEMENT.

SECTION 10. Indemnification.

COMPANY shall protect, defend, indemnify, and hold harmless CITY, its officers, employees and agents against any claim, loss or liability arising from or related to any damage, injury or loss caused by, or resulting from, the installation, maintenance, operation or use of the ANTENNA FACILITY, the provision of SERVICES, or resulting in any way from COMPANY's occupation or use of the PROPERTY or the LICENSED AREAS, including, without limitation, that which is due, in whole or in part, to the willful misconduct or negligent acts (active or passive) or omissions by COMPANY, its

officers, employees, consultants or agents. COMPANY's obligation to indemnify and hold harmless excludes only such claim, loss or liability that is due to the sole negligence or willful misconduct of CITY and/or its employees. All of COMPANY's obligations under this SECTION are intended to apply to the fullest extent permitted by law and shall survive the expiration or sooner termination of this AGREEMENT.

In an action or claim against CITY in which COMPANY is defending CITY, CITY shall have the right to approve legal counsel providing CITY's defense.

SECTION 11. Taxes.

A. COMPANY shall pay before delinquency any and all taxes, assessments, licenses, fees and other public charges which may be levied, assessed or imposed upon any of COMPANY's interests herein, upon COMPANY's businesses, upon COMPANY for the privilege of conducting business, or upon any property of COMPANY at the PROPERTY. COMPANY is advised that this AGREEMENT may, but is not intended to, create a possessory interest in the LICENSED AREAS, for which COMPANY may be subject to payment of possessory interest taxes therefore, for which CITY shall not be liable. Payment of any possessory interest tax shall not reduce in any way any charges or other fees required to be paid by COMPANY hereunder.

B. COMPANY shall not permit or suffer any liens to be imposed upon the PROPERTY or any portion thereof, without promptly discharging the same, provided, however, that COMPANY may, if it so desires, contest the legality of same following prior written notice to CITY. In the event of a contest of a lien, COMPANY shall provide a bond in an amount and in a form acceptable to CITY immediately following request therefore by CITY.

SECTION 12. Insurance.

A. COMPANY, at COMPANY's own expense throughout the Term of this AGREEMENT, as extended, shall comply with the insurance requirements attached hereto as **EXHIBIT "F"** and incorporated by reference herein. The procuring of the policy or policies of insurance required by **EXHIBIT "F"** shall neither be construed to limit COMPANY's liability hereunder nor to fulfill the indemnification provisions and requirements of this AGREEMENT. Notwithstanding the policy or policies of insurance, COMPANY shall be obligated for the full and total amount of any damage, injury or loss caused by its negligence or willful misconduct arising out of this AGREEMENT or COMPANY's use of the PROPERTY or the LICENSED AREAS.

B. COMPANY shall deposit with CITY, on or before the EFFECTIVE DATE, certificates of insurance and the required endorsements in forms reasonably satisfactory to CITY, indicating compliance with the insurance provisions of this AGREEMENT. COMPANY shall keep the insurance in effect, and the certificates evidencing the insurance on deposit with CITY, during the Term of the AGREEMENT and as the same may be extended.

SECTION 13. Frequency Interference.

A. COMPANY will not cause, permit or allow the installation, operation, maintenance or use of an ANTENNA FACILITY or any other equipment installed pursuant to this AGREEMENT to interfere with: (1) any CITY use of the PROPERTY; (2) CITY equipment used at the PROPERTY; (3) CITY communications; and/or (4) or any pre-existing third party uses of the PROPERTY or any other CITY property, including uses of communications equipment, which uses were authorized or planned by CITY prior to the execution of this Agreement. COMPANY shall immediately provide, in writing, to the CITY at the address set forth for notices in **SECTION 15**, herein, the frequencies utilized in the operation of the ANTENNA FACILITIES. COMPANY shall also provide the CITY, at the same address, with written notice of any intended changes in those frequencies, a description of those frequencies and the dates that those frequency changes are anticipated to occur, at least thirty (30) days prior to the date that those frequency changes are anticipated to occur. COMPANY shall not begin any work on the PROPERTY pursuant to this AGREEMENT until these frequencies have been approved in writing by CITY's Chief Information Officer or any other person that may be designated to make such approval by CITY's City Manager.

B. COMPANY shall ensure that its use of an ANTENNA FACILITY does not interfere with any communication transmissions in the vicinity of the PROPERTY, including without limitation, the CITY's public safety transmissions, police and fire communications, CITY's internal or external communications, communications by CITY's tenants, or communications used in the connection with the San Jose International Airport. COMPANY shall operate the ANTENNA FACILITY in such a manner that all communications sent or received by the ANTENNA FACILITY shall be separated from all CITY communications frequencies, including without limitation, CITY communications listed in the preceding sentence, by at least 1 megahertz.

C. If COMPANY's construction, installation, maintenance, operation, use or removal of an ANTENNA FACILITY violates this provision, COMPANY shall immediately eliminate such violation or interference. If COMPANY fails to immediately eliminate such violation or interference, CITY may, in addition to and without compromising any other remedy available to CITY, immediately cut off power to the facility in the manner set forth in **SECTION 14** below. CITY shall immediately provide notice to COMPANY of any interference or the exercise of CITY's shut off rights pursuant to this SECTION.

D. COMPANY shall use its best efforts to operate its communications equipment in a manner that is consistent with all applicable frequencies assigned to it by the Federal Communications Commission ("FCC"), if any, and in compliance with all applicable FCC rules and regulations.

SECTION 14. EMERGENCY

A. COMPANY understands that emergency situations may develop from time to time that require power to an ANTENNA FACILITY to be shut off. Notwithstanding **Section 13**, COMPANY agrees that in the event that such a situation occurs, and there are frequency interferences of any nature between CITY's communication equipment and that of COMPANY, CITY shall have the right to shut off immediately any power to an ANTENNA FACILITY and any equipment of COMPANY's located on the PROPERTY for the duration of the emergency. COMPANY agrees not to hold CITY responsible or liable for and shall protect, defend, indemnify and hold CITY harmless pursuant to **SECTION 10** for any damage, loss, claim or liability of any nature suffered as a result of the loss of the use of an ANTENNA FACILITY or other communication facilities at PROPERTY or affected by the power outage at PROPERTY.

B. COMPANY agrees to install a master power "cut-off" switch on their equipment for the purpose of assisting CITY in such an emergency.

C. Unless otherwise specifically provided in a notice of termination of this AGREEMENT, CITY's exercise of the right to shut off any power to an ANTENNA FACILITY pursuant to this SECTION is not intended to constitute a termination of this AGREEMENT by either party. COMPANY and CITY shall meet after the CITY determines that an emergency situation has ended to establish the time and manner in which power shall be restored to the ANTENNA FACILITY.

D. CITY shall have the right to determine what constitutes an "emergency situation" pursuant to this Section.

SECTION 15. NOTICES

Except as otherwise specifically set forth and allowed under this AGREEMENT, all notices herein required to be given or which may be given by either party to the other shall be deemed to have been fully given when served personally on CITY or COMPANY, or when made in writing and deposited in the United States Mail, certified mail, return receipt requested, postage prepaid and addressed as follows:

To CITY: City of San José
Office of Economic Development
Real Estate & Asset Management
200 East Santa Clara Street, 4th Floor
San Jose, CA 95113-1905

With a copy to: Office of the City Attorney
City of San José
200 E. Santa Clara Street
San José, CA 95113-1905

To COMPANY:

With a copy to:

Either party may change its address for notice by notifying the other party in the manner provided in this Paragraph.

SECTION 16. Right to Use Subordinate.

The right to use LICENSED AREAS herein granted by CITY to COMPANY, and all rights and privileges hereunder, are and shall be subordinate to the rights of CITY and to other existing tenants to use and occupy, and to any occupancy by them of the PROPERTY and LICENSED AREAS. In the event of conflict between COMPANY's right to use LICENSED AREAS and CITY's desired use thereof after the EFFECTIVE DATE, CITY may require COMPANY to redesign, adjust, relocate or remove an ANTENNA FACILITY. COMPANY's right to install, maintain and operate an ANTENNA FACILITY, or to remove an ANTENNA FACILITY, shall be subject at all times to such rights as CITY may have to require the removal or relocation of an ANTENNA FACILITY at the sole cost and expense of COMPANY, under the terms stated in **SECTION 1** of this AGREEMENT.

SECTION 17. ASSIGNMENT.

COMPANY shall not voluntarily or by operation of law, assign, transfer, mortgage, sublet, or otherwise transfer or encumber all or any part of COMPANY's interest in this AGREEMENT or in a LICENSED AREA, without CITY's prior written consent, which will not be unreasonably withheld, delayed or conditioned; provided, however, COMPANY shall have the right to sublease or assign its rights under this Agreement to any of its subsidiaries, affiliates or successor legal entities or to any entity acquiring substantially all of the assets of COMPANY.

SECTION 18. GOVERNING LAW.

This AGREEMENT shall be construed by, and in accordance with, the laws of the State of California.

SECTION 19. NO INTEREST IN PROPERTY.

Nothing herein shall be deemed to create a lease, or easement of any property, or to grant any interest in the PROPERTY, other than a real property license to use the LICENSED AREAS, revocable as set forth herein.

SECTION 20. INSPECTION

The LICENSED AREAS, including keys thereto, shall be at all times under control of the CITY, whose officials, employees and agents shall have the right to enter the LICENSED AREAS, and all portions thereof, for purposes of inspection (and other purposes contemplated by this AGREEMENT) at all times during the period covered by this AGREEMENT.

SECTION 21. UTILITIES

COMPANY shall be solely responsible for ensuring that a LICENSED AREAS has adequate electrical power and any other utility service necessary or useful to operation of an ANTENNA FACILITY. CITY is not obligated to make electricity or other utilities available if there is an interruption in such service to the LICENSED AREAS or to the PROPERTY. COMPANY shall not do, nor shall it permit anything to be done, which may interfere with the effectiveness or accessibility of the utility, heating, ventilation, diesel exhaust or air conditioning systems or portions thereof of the PROPERTY.

SECTION 22. NOT AGENT OF CITY

Neither anything in this AGREEMENT nor any acts of COMPANY shall authorize COMPANY or any of its employees, agents or contractors to act as agent, contractor, joint venturer or employee of CITY for any purpose.

SECTION 23. RESERVATION OF RIGHTS.

COMPANY understands, acknowledges and agrees that any and all authorizations granted to COMPANY under this AGREEMENT are nonexclusive and shall remain subject to all prior and continuing regulatory and proprietary rights and powers of CITY to regulate, govern and use CITY property, as well as any existing encumbrances, deeds, covenants, restrictions, easements, dedications and other claims of title that may affect CITY property. CITY and COMPANY agree that nothing contained in, or contemplated by, this AGREEMENT is intended to confer, convey, create or grant to COMPANY any perpetual interest in any CITY property or in any of CITY's public rights of way.

SECTION 24. CONFLICT OF INTEREST.

COMPANY shall avoid all conflict of interest or the appearance of conflict of interest in the performance of this AGREEMENT.

SECTION 25. GIFTS.

A. COMPANY is familiar with CITY's prohibition against the acceptance of any gift by a CITY officer or designated employee, which prohibition is found in Chapter 12.08 of the San José Municipal Code.

B. COMPANY agrees not to offer any CITY officer or designated employee any gift prohibited by said Chapter.

C. The offer or giving of any gift prohibited by Chapter 12.08 shall constitute a material breach of this AGREEMENT by COMPANY. In addition to any other remedies CITY may have in law or equity, CITY may terminate this AGREEMENT for such breach as provided in **SECTION 7** of this AGREEMENT.

SECTION 26. DISQUALIFICATION OF FORMER EMPLOYEES.

COMPANY is familiar with the provisions relating to the disqualification of former officers and employees of CITY in matters, which are connected with former duties, or official responsibilities as set forth in Chapter 12.10 of the San José Municipal Code ("Revolving Door Ordinance"). COMPANY shall not utilize either directly or indirectly any officer, employee, or agent of COMPANY to perform services under this AGREEMENT, if in the performance of such services, the officer, employee, or agent would be in violation of the Revolving Door Ordinance.

SECTION 27. MISCELLANEOUS

A. Whenever the singular number is used in this AGREEMENT and when required by the context, the same shall include the plural and the masculine gender shall include the feminine and neuter genders.

B. If there be more than one entity designated in, or signatory to, this AGREEMENT, the obligations hereunder imposed upon COMPANY shall be joint and several; and the term COMPANY as used herein shall refer to each and every of said signatory parties, severally as well as jointly.

C. This instrument contains all of the agreements and conditions entered into and made by and between the parties and may not be modified orally, or in any manner, other than by an agreement in writing signed by all the parties hereto or their respective successors-in interest.

D. Time is, and shall be, of the essence for each term and provision of this AGREEMENT.

E. Each and every term, condition, covenant and provision of this AGREEMENT is and shall be deemed to be a material part of the consideration for CITY's entry into this AGREEMENT and any breach hereof by COMPANY shall be deemed to be a material breach. Each term and provision of this AGREEMENT performable by COMPANY shall be construed to be both a covenant and a condition.

F. The headings of the several paragraphs and sections of this AGREEMENT are inserted only as a matter of convenience and for reference and in no way define, limit or describe the scope or intent of any provisions of this AGREEMENT and shall not be construed to affect in any manner the terms and provisions hereof or the interpretation or construction thereof.

G. In the event any covenant, condition or provision herein contained is held to be invalid by a court of competent jurisdiction, the invalidity of any such covenant,

condition or provision shall in no way affect any other covenant, condition or provision herein contained, provided the invalidity of any such covenant, condition or provision does not materially prejudice either CITY or COMPANY in its respective rights and obligations contained in the valid covenants, conditions and provisions of this AGREEMENT.

H. All exhibits and addenda referred to herein, and any exhibits or schedules which may from time to time be referred to in any duly executed amendment hereto, are by such reference incorporated herein and shall be deemed a part of this AGREEMENT as if set forth fully herein.

I. This Agreement shall be interpreted and construed only by the contents hereof, and there shall be no presumption or standard of construction in favor of or against either party.

J. Days, unless otherwise specified, shall mean calendar days.

K. Whenever in this AGREEMENT the approval or consent of a party is required, such approval or consent must be in advance, shall be in writing, and shall be executed by a person having the express authority to grant such approval or consent unless the terms of this AGREEMENT specifically allow an oral approval or consent of a party.

I. This Agreement may be executed simultaneously in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the parties have executed this AGREEMENT as of the EFFECTIVE DATE.

[Signatures on next page]

RD:EL
06-27-06

APPROVED AS TO FORM

_____
KENNETH D. JOHNSON
Senior Deputy City Attorney

"CITY"
City of San José,
a municipal corporation

By: _____
Name: _____
Title: _____

Date: _____

APPROVED:

By: _____
Name: _____
Title: _____

"COMPANY"

By: _____
Name: _____
Title: _____

[INCLUDING CITY OWNED LIGHT POLES]

EXHIBIT A

PROPERTY DESCRIPTION

(Individual site maps/parcel maps are attached to this exhibit as an addendum.)

RD:EL
06-27-06

EXHIBIT B

SERVICES

RD:EL
06-27-06

EXHIBIT "C"
Description of LICENSED AREAS

(Individual sites will be added to the spreadsheet as provided in this exhibit.)

ADDRESS	PARCEL #	COMPANY ID	SITE MANAGER	ACCESS NUMBER

RD:EL
06-27-06

Exhibit D

ANTENNA FACILITY

(Individual site facility/antenna equipment are attached to this exhibit as an addendum)

RD:EL
06-27-06

EXHIBIT E

RATE SCHEDULE FOR ATTACHMENT OF TELECOMMUNICATION ANTENNAE/EQUIPMENT TO CITY OF SAN JOSE OWNED PROPERTIES *

1 to 4 antennae **and/or** foundation/surface area containing equipment or cabinet is less than 150 square feet	$26,932.00 per annum
5 to 8 antennae **and/or** foundation/surface area containing equipment or cabinet is 150 to 499 square feet	$32,319.00 per annum
9 or more antennae **and/or** foundation/surface area containing equipment or cabinet is 500+ square feet but not more than 16 antennas and 2,000 square feet	$38,780.00 per annum
Requests for facilities containing more than 16 antennae and/or foundation/surface area containing equipment in excess of 2,000 square feet shall be reviewed and priced on a case-by-case basis	

- Lessees which choose to pay for 5 years upon commencement of the contract shall be charged at a 20% discount based upon the base rate x 5 without factor for inflation.

* The rates noted below are for Fiscal Year 2010-2011 ending June 30, 2011; rates increase annually by the greater of four percent (4%) or the change in the Consumer Price Index (All Items, Base 1982-84 = 100) as published by the United States Department of Labor, Bureau of Labor Statistics for All Consumers for the San Francisco-Oakland-San Jose Metropolitan area (hereinafter "CPI"). The CPI rose less than 4% for the 12 month period ending April 2010.

RD:EL
06-27-06

EXHIBIT F

INSURANCE

INSURANCE REQUIREMENTS. COMPANY shall procure and maintain for the duration of the agreement insurance against claims for injuries to persons or damages to property which may arise from, or in connection with, the performance of the work hereunder by the COMPANY, its agents, representatives, employees or contractors.

F-1 Minimum Scope of Insurance

Coverage shall be at least as broad as:

1. The coverage provided by Insurance Services Office Commercial General Liability coverage "occurrence" form CG 0001 including Fire Legal Liability ; and

2. The coverage provided by Insurance Services Office form number CA 0001 covering Automobile Liability. Coverage shall be included for all owned, non-owned and hired automobiles; and

3. Workers' Compensation insurance as required by the Labor Code of the State of California and Employers Liability insurance; and

4. Property insurance against all risks of loss to any COMPANY improvements or betterments, COMPANY stock, equipment, furniture and fixtures.

There shall be no endorsement reducing the scope of coverage required above unless approved by the City's Risk Manager.

F-2 Minimum Limits of Insurance

COMPANY shall maintain limits no less than:

1. Commercial General Liability: $1,000,000 per occurrence for bodily injury, personal injury and property damage. If Commercial General Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit; Fire Legal Liability $100,000; and

2. Automobile Liability: $1,000,000 combined single limit per accident for bodily injury and property damage; and

3. Workers' Compensation and Employers Liability: Workers' Compensation limits as required by the Labor Code of the State of California and Employers Liability limits of $1,000,000 per accident: and

4. Property insurance against all risks of loss including but not limited to fire, vandalism and malicious mischief, and other perils at the CITY's discretion, in an amount equal to 100% of the replacement cost of all COMPANY owned furniture, fixtures, stock and equipment, including fixtures, improvements and betterments installed by COMPANY, on the Licensed Areas.

F-3 Deductibles and Self-Insured Retentions

Any deductibles or self-insured retentions must be declared to, and approved by, the City. At the option of the City, either: the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the City, its officials, employees, agents and contractors; or the COMPANY shall procure a bond guaranteeing payment of losses and related investigations, claim administration and defense expenses in an amount specified by the City.

F-4 Other Insurance Provisions

The policies are to contain, or be endorsed to contain, the following provisions:

1. General Liability and Automobile Liability Coverages

a. The City, its officials, employees, agents and contractors are to be covered as additional insureds as respects: liability arising out of activities performed by, or on behalf of, the COMPANY; products and completed operations of the COMPANY; premises owned, leased or used by the COMPANY; or automobiles owned, leased, hired or borrowed by the COMPANY. The coverage shall contain no special limitations on the scope of protection afforded to the City, its officials, employees, agents and contractors.

b. The COMPANY 's insurance coverage shall be primary insurance as respects the City, its officials, employees, agents and contractors. Any insurance or self-insurance maintained by the City, its officials, employees, agents or contractors shall be excess of the COMPANY's insurance and shall not contribute with it.

c. Any failure to comply with reporting provisions of the policies shall not affect coverage provided to the City, its officials, employees, agents, or contractors.

d. Coverage shall state that the COMPANY's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

e. Coverage shall contain a waiver of subrogation in favor of the City, its officials, employees, agents and contractors.

2. Workers' Compensation, Employers' Liability and Property Insurance

Coverage shall contain a waiver of subrogation in favor of the City, its officials employees, agents and contractors.

3. All Coverages

Each insurance policy required by this clause shall be endorsed to state that coverage shall not be suspended, voided, canceled, reduced in coverage or in limits except after thirty (30) days' prior written notice has been given to the City, except that ten (10) days' prior written notice shall apply in the event of cancellation for non-payment of premium.

F-5 Acceptability of Insurance

Insurance is to be placed with insurers acceptable to the City's Risk Manager.

F-6 Verification of Coverage

COMPANY shall furnish the City with certificates of insurance and with original endorsements affecting coverage required by this clause. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf.

Copies of all the required endorsements shall be attached to the certificate of insurance which shall be provided by the COMPANY's insurance COMPANY as evidence of the stipulated coverages. This proof of insurance shall then be delivered as follows:

Proof of insurance shall be either emailed in pdf format to: Riskmgmt@sanjoseca.gov, or mailed to the following postal address (or any subsequent email or postal address as may be directed in writing by the Risk Manager):

City of San Jose – Human Resources
Risk Management
200 East Santa Clara St., 2nd Floor Wing
San Jose, CA 95113-1905

F-7 Contractors

COMPANY shall include all of its contractors as insureds under its policies or shall obtain separate certificates and endorsements for each of their contractors.