

**CITY OF EL PASO, TEXAS
AGENDA ITEM
DEPARTMENT HEAD'S SUMMARY FORM**

DEPARTMENT: International Bridges

AGENDA DATE: November 14, 2017

CONTACT PERSON/PHONE: Monica Lombraña, Aviation and International Bridges Managing Director, 915-212-7501
Paul Stresow, International Bridges Assistant Director, 915-212-7502

DISTRICT(S) AFFECTED: 6

STRATEGIC GOAL: NO. 1: Create an Environment Conducive to Strong, Sustainable Economic Development

SUBJECT:

That the City Manager be authorized to sign a License Agreement between the City of El Paso (the "City") and McAllen Data Center, LLC (hereinafter the "Licensee"), to install, repair and maintain fiber optic conduit running across the Zaragoza Bridge, for a term of seven (7) years beginning November 1, 2017, with the option of three additional five year terms, for an Annual Fee and Bridge License Fee of \$35,126.00

BACKGROUND / DISCUSSION:

License propose to install, repair and maintain fiber optic conduit within an existing conduit pathway and existing innerduct on the Zaragoza and that the Agreement shall be conditional based upon ability of Licensee to access the Zaragoza Bridge fiber either through a separate agreement with the City or a third party.

COUNCIL REPRESENTATIVE BRIEFING:

Was a briefing provided? ☐ Yes or ☒ No

If yes, select the applicable districts.

- ☐ District 1
- ☐ District 2
- ☐ District 3
- ☐ District 4
- ☐ District 5
- ☐ District 6
- ☐ District 7
- ☐ District 8
- ☐ All Districts

PRIOR COUNCIL ACTION:

December 20th, 2011, an ordinance granting a license to Transtelco, Inc. was approved to construct, maintain and use a single conduit innerduct on the Stanton Street International Bridge.

BOARD / COMMISSION ACTION:

N/A

*****REQUIRED AUTHORIZATION*****

DEPARTMENT HEAD:



RESOLUTION

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF EL PASO:

That the City Manager be authorized to sign a License Agreement between the City of El Paso (the “City”) and McAllen Data Center, LLC (hereinafter the “Licensee”), to install, repair and maintain fiber optic conduit running across the Zaragoza Bridge, for a term of seven (7) years beginning November 15, 2017, with the option of three additional five year terms, for an Annual Fee and Bridge License Fee of \$35,126.00.

Dated this _____ day of _____ 2017.

CITY OF EL PASO

Dee Margo
Mayor

ATTEST:

Laura D. Prine
Interim City Clerk

APPROVED AS TO FORM

APPROVED AS TO CONTENT

Josette Flores
Assistant City Attorney

Monica Lombraña, Managing Director
Aviation and International Bridges

LICENSE AGREEMENT

WITNESSETH

way or fiber available through a third party, to the existing fiber at the Zaragoza Bridge is a condition precedent to the commencement of the rights granted to Licensee in this Agreement and most of the obligations. Once Licensee is able to connect to the fiber at the Zaragoza Bridge, either through a separate agreement with the City or a third party, the condition precedent shall be met and Licensee shall commence benefiting from all of the rights granted to it in this Agreement (the “Commencement Date”). Notwithstanding this paragraph, one or more of Licensee’s obligations in Section 5 and Section 7 to this Agreement shall be in effect as of the Effective Date.

B. The City acknowledges that prior to the commencement of this Agreement, the Licensee will install 144-strand fiber optic cable in an existing City-owned four-inch (4”) conduit facing West on the Zaragoza Bridge (the “Conduit”), connecting back to the existing pull box at the base of the Zaragoza Bridge (as defined below, and as depicted in the attached **Exhibit “A”**), to the International Boundary Line (the “**City Improvements**”). The route may not include the area five (5) feet from the sidewalk in front of the bridge toll office facilities located within the City Property (described below). The recommended route is to pass the bridge toll office facilities on the west side along the existing parking area and driveway facilities.

The City hereby grants to Licensee, a non-exclusive license (hereinafter referred to as “**Agreement**”) to install, use, operate, repair, replace and maintain across and along a portion of the City-owned Zaragoza International Bridge, bridge administration building, bridge approach, one (1) of the ¾ inch innerducts installed in the Conduit, and all other City-owned related real property (hereinafter referred to as “**Zaragoza Bridge**” or “**City Property**”) all necessary or desirable wires, cables, junction boxes, communication vaults or other structures or appurtenances necessary, in connection with a fiber optic telecommunications network, **not including cable television or local exchange telephone service**, to provide fiber optic telecommunications service, between the City of El Paso and Cd. Juarez including, but not limited to, a single four-inch conduit innerduct in a shared duct system, and an on-site connection with the Licensee’s fiber hereinafter collectively referred to as the “**Infrastructure**”. This Agreement shall not permit or be construed to permit any other private use of the City Property, which impairs its function as an international bridge, or the right-of-way, bridge management or any other use that otherwise interferes with the City’s use of the City Property. Other than maintenance and repair, Licensee shall not install or construct any additional improvements or make any additions or alterations on, below or over the City Property

following the City's execution of this Agreement ("**Additional Improvements**"), without the prior written consent of the City. Nothing herein shall grant any real property interest to Licensee except as provided herein.

The Licensee's use of any public right-of-way within the City of El Paso permitted under state law shall not be subject to this Agreement.

All parties acknowledge that this license is not a franchise pursuant to Texas law nor is it a permit to string or bury telecommunications lines in the public right of way. Any such franchise or permit shall be obtained separately from the appropriate local or state authority.

SECTION 2. REGULATION OF CONSTRUCTION

A. Prior to the City's execution of this Agreement, Licensee has submitted to the Director for review and approval, and the City has approved, the plans for the Infrastructure and City Improvements.

B. Licensee shall notify the Director, and, if necessary, the Chief Traffic Engineer or the Department of Engineering a minimum of forty-eight (48) hours in advance prior to the commencement of any construction of Additional Improvements by the Licensee, their contractor or representative. All construction shall be in conformance with City codes and applicable local, state and federal laws and regulations. Licensee is responsible for the workmanship and any damages by a contractor or subcontractor, regardless if the contractor or subcontractor is an independent contractor. A responsible representative of the Licensee will be available at all times during construction.

The work completed by Licensee in placing, replacing, repairing or maintaining the Infrastructure (including Additional Improvements) shall be performed in accordance with all applicable laws, rules and regulations ("**Laws**") of the City, State of Texas, and the United States government and since the Infrastructure will interconnect at mid-bridge structure, with Mexican, local, state and federal laws, as applicable. Licensee's work shall be performed in a manner that does not unreasonably inconvenience the City's or the public's use of City Property. Licensee shall make every effort to minimize the impact to the City Property and shall follow the reasonable direction of the Director to ensure the impact is minimized. The Director shall have the right to order all work to cease immediately if he reasonably believes that the work constitutes a danger to the public, City-owned property or City operations. The City shall not be subject to any damages because of such

stoppage.

In the event that Licensee desires to reconstruct, repair, maintain, or replace any Infrastructure and such work will involve excavation or any surface disturbance, Licensee shall provide written notice and submit the plans and specifications that pertain to the rebuilding or repairs of the Infrastructure fourteen (14) days in advance of commencing such work to the Director for approval. Approval of such plans will not be unreasonably delayed, withheld, or denied. In the event that emergency repairs are necessary, Licensee shall immediately notify the Director in writing prior to commencing such work. If Licensee is unable to notify the Director prior to the commencement of work due to emergency conditions, Licensee shall notify the City no later than twenty-four (24) hours after the work is commenced (at such emergency numbers that City shall provide from time to time) and such notice will include details of the repair work and a copy of any revised plans.

Upon approval of the Plans for Additional Improvements, the Director will issue a Notice to Proceed for the construction.

The City shall have the power at any time to order and require Licensee to remove and abate all or any portion of the any Infrastructure (including Additional Improvements) that is dangerous to life or property. Should Licensee, after notice, fail or refuse to comply within a reasonable time, the City shall have the power to remove or abate same, at the expense of Licensee, all without compensation or liability for damages to Licensee. Work done in connection with the construction, repair and maintenance of such Infrastructure is subject to the continuing police power of the City.

C. After installation of any Additional Improvements, Licensee shall restore all City Property to a condition that is substantially the same or better as existed prior to Licensee's disturbance of the area pursuant to applicable City requirements and to the reasonable satisfaction of the Director. Restoration must be made in accordance with the approved construction schedule to the reasonable satisfaction of the Director or his designee. If restoration is not satisfactory and not performed in a timely manner, all work in progress, except the pending restoration work, will be halted until all restoration is complete. Licensee shall submit to the City a complete set of AS-BUILT plans of any Additional Improvements containing the information reasonably required by the City.

SECTION 3. TERM

A. The term of this Agreement shall be seven (7) years beginning November 15, 2017

("Effective Date"), unless terminated earlier as provided herein ("Initial Term"). At the end of the Initial Term, Licensee shall have the option ("Option") to extend this Agreement for three (3) additional five (5) year terms (each an "Option Term"). Licensee shall notify the City of its intent to exercise its Option in writing to the City no later than ninety (90) days prior to the expiration date of the Initial Term or the applicable Option Term. Should Licensee fail to submit its notice of its intent to exercise its Option, the Agreement shall expire by its own terms.

SECTION 4. CITY'S USE OF CITY PROPERTY

Nothing herein contained shall be construed as granting an exclusive use or right to the Licensee to the City Property, and the City may grant an additional license or other interest to any other applicant in its discretion for the same City Property described herein; provided however, that such additional grant of use does not interfere with the Licensee's use of the City Property. The City reserves the right to use the surface or subsurface or airspace above the City Property covered by this Agreement for any public purposes allowed by law and deemed necessary by the City and to do or permit to be done any work in connection therewith which may be deemed necessary or proper by the City on, across, along, under or over said City Property. Further, the City expressly reserves the right to install, repair, or reconstruct the City Property used or occupied by Licensee; provided however, that such work will not interfere with Licensee's use of the City Property.

The City reserves the right, subject to further conditions described in this Section, to lay and permit to be laid, utility lines including, but not limited to, storm and sanitary sewer, gas, water, and other pipelines or cables and conduits, and to do and permit to be done, any underground and overhead installation or improvement that may be deemed necessary or proper by the governing body of the City in, across, along, over or under any City Property occupied by Licensee. The City shall not be liable to Licensee for any damage resulting thereof, nor shall the City be liable to Licensee for any damages arising out of the performance of any work by the City, or its contractors or subcontractors, not willfully and unnecessarily occasioned; provided, however, nothing herein shall relieve any other persons or entities from liability for damage to Licensee's Infrastructure.

If the City requires Licensee to remove, alter, change, adapt, or conform its Infrastructure because of changes in the grade of the City Property or in the location or manner of constructing a water pipe, sewer pipe or other underground or aboveground structure or any other infrastructure to be owned by the City, Licensee shall make the alterations or changes as soon as practicable when

ordered in writing by the Director without claim for reimbursement or damages against the City. Notwithstanding anything contained to the contrary in this Agreement, the Total Fee (as defined below in Section 5) shall be abated for the time period for which the Licensee does not have use of its communication system. Additionally, the term of the Agreement shall be extended equal to the time that Licensee's communication system is inoperable due to the alterations or changes required by the City.

SECTION 5. CONSIDERATION

A. Annual Fee: As consideration for this Agreement, for the year 2017, the combined annual license fee and bridge fee is THIRTY FIVE THOUSAND ONE HUNDRED TWENTY-SIX AND NO/100 DOLLARS (\$35,126.00). Beginning on January 1, 2018, Licensee shall pay to the City an annual fee in the sum of TWENTY FIVE THOUSAND FIVE HUNDRED TWENTY-SIX and No/100 Dollars (\$25,526.00.00) ("**Annual Fee**") for 2018. No later than January 1st of each year, the Licensee shall remit the Annual Fee to the City in full. In addition, beginning on January 1, 2018, the Licensee shall also pay an annual Bridge License Fee based on 1600 lineal feet at \$6.00/lineal foot for an additional amount of \$9,600.

The Annual Fee and Bridge License Fee are collectively referred to herein as the "**Total Fee**."

B. Within seven (7) days of the Effective Date of this Agreement, Licensee shall pay to the City a Security Deposit in the amount of TWO THOUSAND FIVE HUNDRED DOLLARS and No/100 (\$2,500.00) to secure the performance of the Licensee under this Agreement. Failure to pay the Security Deposit is an event of monetary default and shall be addressed through the notice process set forth in Section 5.C. to this Agreement.

C. Failure to remit payment of Total Fee as provided in this Section is an event of monetary default and shall be cause for termination after the following notice. Licensee's failure to make the payment of the Total Fee within seven days (7) after the payment is due shall constitute a late payment and in order to cure the default, Licensee shall pay the City a late charge of ten percent (10%) in addition to the late payment. After the City provides written notice of default, Licensee shall have seven (7) days to cure such default. If the Licensee fails to cure such default within seven (7) days from delivery of the notice to the Licensee pursuant to Section 11 below, the City may terminate this Agreement and retain the Security Deposit as liquidated damages. In the

event that Licensee is in default of this Agreement for failing to timely pay the Total Fee three (3) times within the Term or three (3) times within any Option Term, the City may at its sole option terminate this Agreement and Licensee shall have no right to cure the default.

D. The Total Fee is subject to escalation in the amount of the percentage increase in the Consumer Price Index for all Urban Consumers (CPI-U) on January 1st of each year (“**License Year**”) beginning January 1, 2019. The parties further agree that for the purposes of computing such percentage increase during the Initial Term, the Base Year CPI-U shall be established as the CPI-U rate in place ninety (90) calendar days prior to the Effective Date of this Agreement. The Total Fee shall be adjusted pursuant to the percentage increase in the CPI-U from the Base Year CPI-U to the rate in place ninety (90) days prior to the applicable date of readjustment.

All readjustments shall be effective each as of the anniversary date, without regard to the date the actual adjustment is made; provided, however, that in no event shall the readjusted Total Fee be less than the amount in place immediately prior to such readjustment nor more than five percent (5%) more than the Total Fee established at the beginning of the immediately preceding year.

E. In addition to the Total Fee, Licensee shall pay all general municipal taxes of whatever nature, including, but not limited to, the ad valorem taxes and special taxes and assessments for private improvements except as hereinafter provided as may be enacted during the term of this Agreement or any extension, subject to any appeal or challenge of any taxes or assessments pertinent to this Agreement by Licensee.

F. The Total Fee shall be exclusive of and in addition to all costs of obtaining required permits, plans and other approvals as necessary to conform to all other applicable City, state or federal ordinances and regulations.

G. In the event the Licensee continues use of the Infrastructure after the expiration or termination of this Agreement so that the fiber has not gone dark, the amount of the Total Fee due and payable to the City shall be double and paid monthly until Licensee ceases all use of the Infrastructure, or another agreement is executed.

SECTION 6. INDEMNIFICATION AND INSURANCE

LICENSEE AGREES TO INDEMNIFY, DEFEND AND HOLD HARMLESS THE CITY, ITS OFFICERS, AGENTS, SERVANTS AND EMPLOYEES FROM ANY AND ALL CLAIMS, LOSS, DAMAGES, CAUSES OF ACTION, SUITS, AND LIABILITY OF ANY KIND OR CHARACTER, INCLUDING ALL EXPENSES OF LITIGATION FOR INJURY OR DEATH TO ANY PERSON, OR FOR DAMAGE TO ANY PROPERTY, ARISING OUT OF OR IN CONNECTION WITH LICENSEE'S, LICENSEE'S AGENTS, SERVANTS OR EMPLOYEES OR ANY ORGANIZATION'S USE OF THE CITY PROPERTY, REGARDLESS OF WHETHER SUCH INJURIES, DEATH, OR DAMAGES ARE CAUSED IN WHOLE OR IN PART BY THE NEGLIGENCE OF THE CITY.

Prior to the approval of this Agreement by City Council, Licensee shall provide the City with a certificate of liability insurance and shall maintain such insurance in effect during the term of this Agreement, in the amount of One Million Dollars (\$1,000,000) primary coverage with a Five Million Dollars (\$5,000,000.00) umbrella policy. These amounts are not a limitation upon Licensee's agreement to indemnify and hold the City harmless.

Licensee shall procure said insurance with a solvent insurance company authorized to do business in Texas. The policy shall provide in substance that the insurer will defend against all claims and lawsuits which arise and will pay any final judgment of a court of competent jurisdiction against the City, its officers, agents, servants or employees and the licensee, its agents, servants or employees. The coverage must be on an "occurrence" basis and must include coverage for personal injury, contractual liability, premises liability, medical damages, underground, and explosion and collapse hazards. Each policy must include a cancellation provision in which the insurance company is required to notify the City in writing not fewer than thirty (30) days before canceling, failing to renew, or reducing policy limits. The certificate shall state the policy number; name of insurance company; name and address of the agent or authorized representative of the insurance company; name, address and telephone number of insured; policy expiration date; and specific coverage amounts.

All policies shall name the City of El Paso, its officers, agents, servants and employees as an additional insured. Licensee shall file an original of the policy or certificate of insurance with the City Clerk, the International Bridges Department, and the Financial Services Department. The policy shall contain a provision that the policy will not be terminated without providing the City with thirty

(30) days prior written notice of termination.

In the event that Licensee undertakes any construction work for Additional Improvements that exceeds \$25,000 in materials and labor, Licensee shall file a payment and performance bond in the estimated cost of the work with an effective date prior to the commencement of construction of Additional Improvements for a period of thirty (30) days after the City's final inspection and approval of the work. Such bond shall guarantee the restoration of the City Property in accordance with this Agreement. The surety shall be authorized to do business in the State of Texas. Contractor agrees that it may not split a single project into several contracts for the purpose of circumventing this requirement and state law.

SECTION 7. RIGHTS IN THE EVENT OF ABANDONMENT

As an express condition of this Agreement, and not as a mere covenant, in the event Licensee abandons the Infrastructure or any portion thereof to be installed hereunder or the Infrastructure placed in the City Property hereby ceases to be used by Licensee for the purposes enumerated herein for any period of six (6) consecutive months or longer, other than the time elapsing between the Effective Date and the installation of the Infrastructure which shall be no greater than twelve (12) months unless otherwise authorized in writing by the Director, the Infrastructure shall be deemed abandoned and, as applicable, at the City's option, the City may require Licensee to remove the Infrastructure or the abandoned property shall automatically become the property of the City, free and clear of any right, title, or interest in Licensee, without the necessity of any notice to Licensee or any re-entry by the City.

SECTION 8. EARLY TERMINATION OR EXPIRATION

The City shall have the right to terminate this Agreement due to requirements by the Federal Government outside the City's control, provided however, in this event the City will reimburse Licensee the prorated amount of the Total Fee paid to the City. In addition, commencing in the year 2019, either party shall have the option to terminate this Agreement effective as of the end of the calendar year upon giving the other party written notice of termination at least six (6) months in advance of such termination, and there shall be no proration or refund of the Total Fee paid for the year of termination.

Upon expiration or early termination of this Agreement, Licensee shall no longer use the Infrastructure together with any improvements thereto, made or erected during the term of this

Agreement located within the City Property and such property shall become the property of the City with no encumbrances of any sort. Grantee shall provide and transfer any proof of title and ownership reflecting same, regardless of the cause of the termination. The Infrastructure shall not be encumbered by any lien or other security interest when transferred to City. In the City's discretion, the Director may require the removal of such Infrastructure from said City Property and restoration of all pavement or base, damaged or removed during this Agreement, as determined by the City, at Licensee's own cost and expense. Any such restoration shall be subject to the reasonable approval of the Director.

SECTION 9. NON-MONETARY EVENTS OF DEFAULT

A. A default by Licensee of any material provision or requirement contained in this Agreement other than the requirement that Licensee timely pay the Total Fee constitutes a non-monetary default. The City shall give Licensee thirty (30) days written notice to cure any non-monetary default. If the default is such that it cannot be cured in thirty (30) days, Licensee shall not be deemed in default, provided that Licensee has commenced and is diligently pursuing the cure. The time for curing the default shall be extended for such period of time as is reasonably necessary to complete the cure.

B. Subject to the notice and cure provisions in A above, it shall constitute a non-monetary default under this License if Licensee:

1. Files in any court a petition in bankruptcy or insolvency or for the appointment of a receiver or trustee of all or a portion of Licensee's property;
2. Makes any general assignment for the benefit of creditors;
3. Is adjudged a bankrupt in involuntary bankruptcy proceedings that are not dismissed or vacated within sixty (60) days;
4. Is made a party to any receivership proceeding in which a receiver is appointed for the property or affairs of Licensee where such receivership is not vacated within sixty (60) days after the appointment of such receiver;
5. Violates any local, state, or federal laws, rules or regulations that relate to the performance of this License;
6. Fails to be in good standing with the applicable regulatory authorities.

C. Failure of City to declare this License canceled upon the default of Licensee for any

of the reasons set out shall not operate to bar or destroy the right of City to cancel this License by reason of any subsequent violation of the terms of this License.

D. No receipt or acceptance of money by City from Licensee after the expiration or cancellation of this License, after the commencement of any suit, or after final judgment for possession of the Infrastructure, shall reinstate, continue, or extend the terms of this License, or affect any such notice, demand or suit or imply consent for any action for which City's consent is required or operate as a waiver of any right of the City to retake and resume possession of the Infrastructure.

E. Failure of Licensee to cure a monetary or non-monetary default within the cure period in any other agreement that Licensee has, now or in the future, with the City shall be an event of default under this Agreement, provided that the City shall simultaneously give written notice to Licensee of the City's intention to assert the cross-default, with specific reference to this Agreement, in the notice of default sent by the City under such other agreements. Furthermore, a non-monetary default in any other agreement that Licensee has with the City shall not trigger a default under this Agreement so long as the following occurs: (i) prior to the expiration of the cure period of the applicable agreement, Licensee gives the City written notice of the factual basis for its position that a non-monetary default in the applicable agreement did not occur, has been adequately cured or that Licensee was not responsible to cure the default under the terms of the applicable agreement; (ii) within 30 days from an City written response that the City disagrees with Licensee's position, Licensee submits the dispute to mediation before a mutually-agreed upon mediator and diligently pursues a mediated resolution of the dispute; and (iii) thereafter, the mediator determines that a default did not occur, any default has been cured, or that the default was not the responsibility of the Licensee under the terms of the applicable agreement.

SECTION 10. RECORDS

The Director shall be kept fully informed by Licensee as to matters pertaining in any way to Licensee's exercise of its rights under this Agreement, including the installation of any Additional Improvements, and the replacement, maintenance, upgrade and repair of the Infrastructure on the City Property. Licensee shall keep complete and accurate maps, construction drawings and specifications describing the location of Infrastructure within the City Property. The City shall have the right, at reasonable times to inspect such maps, construction drawings and specifications.

SECTION 11. NOTICE

Any notice or communication required in the administration of this Agreement shall be sent as follows:

City of El Paso
ATTN: City Manager
P.O Box 1890
El Paso, Texas 79950-1890

with copies to: City of El Paso
ATTN: International Bridges Director
P.O. Box 1890
El Paso, Texas 79950-1890

City of El Paso
ATTN: City Clerk
P.O. Box 1890
El Paso, Texas 79950-1890

and: McAllen Data Center, LLC
Attn: Legal Department
200 South 10th, Suite 706
McAllen, Texas 789501

with copy to: Quarles & Brady LLP
300 North LaSalle Street
Suite 4000
Chicago, Illinois 60654

or to such other addresses as the parties designate from time to time by written notice.

SECTION 12. ASSIGNMENT

A. The rights granted by this Agreement inure to the benefit of Licensee, and any parent, subsidiary, or successor entity now or hereafter existing. The rights shall not be assigned without the express written consent of the El Paso City Council, which consent shall not be unreasonably delayed or withheld. A written copy of any such assignment must be filed with the City. Any required consent shall be evidenced in writing by the City Manager that fully recites the terms and conditions, if any, upon which consent is given.

B. If any such Transferee(s) shall obtain possession and use of all or any part of the Infrastructure (the "***Affected Portion***"), then, so long as all of the obligations of Licensee under this Agreement with respect to the Affected Portion are being performed, (i) such Transferee(s)

shall agree to be bound by and to observe and perform the obligations of Licensee under this Agreement with respect to the Affected Portion and (ii) City shall not disturb the possession or use of the Affected Portion by such Transferee(s) and shall recognize such Transferee(s)'s right to possession and use thereof, subject, nevertheless, to the terms of this Agreement and the respective rights of the parties herein.

SECTION 13. LEASE, SALE OR DEDICATION OF OR SECURITY INTEREST OR LIENS UPON INFRASTRUCTURE

Licensee, without the consent of the El Paso City Council, shall not lease, license, sublicense, sell or dedicate or in any manner permit the use of all or a portion of the Infrastructure, to any non-Licensee person or entity. Notwithstanding the foregoing, Licensee shall be allowed, without the consent of the City or the El Paso City Council, (i) to lease, license, sublicense, and permit the use of Licensee's fiber optic cable installed within the Infrastructure to Licensee's customers, provided that Licensee retains sole ownership of such fiber optic cable at all times; and (ii) Licensee shall be allowed to provide services to its customers through Licensee's fiber optic cable installed within the Infrastructure. Licensee shall not allow the placement of any additional cable without the written consent of the Director.

Licensee has no legal right to grant a third party creditor any security interest in the Conduit. In the event that Licensee intends to grant a third party creditor a security interest in the Licensee's fiber located within the Conduit, Licensee shall ensure that the security interest in the fiber is subject to all of the terms and conditions of this Agreement. Licensee shall promptly provide the City evidence of the name of any third party creditor.

SECTION 14. LICENSEE'S ACCESS AND SECURITY

Licensee shall have twenty-four (24) hour access to the Infrastructure for purposes of maintenance, upgrades and repair, subject to any Federal requirements or regulations. The City may coordinate with the Licensee and designate specific access points and establish the times of access, with at least one point having twenty-four hour access. The City agrees that access shall not be provided to any third party to the Infrastructure without providing seventy-two (72) hours advance notice to Licensee. City shall have the right to supervise the Licensee's and any third party's access to the Infrastructure for security purposes.

SECTION 15. CONFIDENTIALITY

No party or any of its affiliates (the “**Receiving Party**”), without the prior written consent in each instance of the other party (the “**Disclosing Party**”), shall disclose to any third party any confidential information supplied to the Receiving Party by the Disclosing Party or any affiliates of the Disclosing Party which has been marked as CONFIDENTIAL or is reasonably believed to be confidential information of the other party and which is not otherwise generally available to the public, has not been independently developed by the Receiving Party, and has not previously been known by or disclosed to the Receiving Party by a third party not bound by confidentiality restrictions (collectively, “**Confidential Information**”). Each party shall protect the Confidential Information of the Disclosing Party or its affiliates from both unauthorized use and unauthorized disclosure. Prior to disclosing Confidential Information to its employees, affiliates, consultants, agents and/or representatives, the Receiving Party shall notify such employees, affiliates, and representatives of their obligation to comply with this Section 15. If a Receiving Party is required by any tribunal, governmental authority or by applicable law to disclose any Confidential Information, then such Receiving Party may disclose such Confidential Information. Unless prohibited from doing so by such governmental authority or applicable law, the Receiving Party shall provide the Disclosing Party with written notice of such requirement as soon as possible and, unless required by law, prior to such disclosure. The Parties hereby designate the terms, conditions, exhibits and schedules of this Agreement to be Confidential Information. Unless required by applicable law or consented to by the Disclosing Party, no party without the written consent of the other party shall provide a copy of this Agreement in whole or in part to any third person or entity not employed or retained by Licensee or the City. The provisions of this Section 13 shall survive beyond termination or expiration of this Agreement.

SECTION 16. MISCELLANEOUS

A. Remedies: This Agreement shall be enforceable in any court of competent jurisdiction by any of the parties or by an appropriate action at law or in equity to secure the performance of the restrictions, conditions and covenants herein contained.

B. City’s Default: In the event the City commits a breach of this Agreement, prior to bringing suit or pursuing any other remedy, Licensee shall provide written notice of such breach to the City. Following receipt of such notice, the City shall have thirty (30) days within which to cure the breach. If the breach cannot be cured within such thirty (30) day period, the City shall

commence to cure such breach within said period and thereafter diligently perform such action as may be required to cure such breach.

B. Force Majeure: In the event any Party is rendered unable, wholly or in part, by force majeure to carry out any of its obligations under this Agreement, it is agreed that on such Party's giving of notice and the full particulars of such force majeure in writing to the other Party as soon as possible after the occurrence of the cause relied upon, then the obligations of the Party giving such notice, to the extent it is affected by force majeure and to the extent that due diligence is being used to resume performance at the earliest practicable time, shall be suspended during the continuance of any inability but for no longer period.

The term "force majeure" as used herein, shall include, but not be limited to, acts of God, strikes, lockouts or other industrial disturbances, acts of the public enemy, war, terrorism, blockades, insurrections, riots, epidemics, landslides, lightening, earthquakes, fires, storms, floods, washouts, droughts, tornadoes, hurricanes, arrests and restraints of governments and people, explosions, breakage or damage to machines or pipelines and any other inability of either Party, whether similar to those enumerated or otherwise, and not within the reasonable control of the Party claiming such inability.

C. Severability: Every provision of this Agreement is intended to be severable. If any term or provision hereof is illegal or invalid for any reason whatsoever, such illegality shall not affect the validity of the remainder of this Agreement.

D. Entire Agreement: This Agreement contains the entire agreement of the Parties, and there are no other agreements or promises, oral or written, between the Parties regarding the subject matter of this Agreement. This Agreement may be amended only by written agreement signed by the Parties.

E. Governing Law, Jurisdiction & Venue: This Agreement shall be governed by and construed in accordance with the laws of the State of Texas, as it applies to contracts performed within the State of Texas and without regard to any choice of law rules or principles to the contrary. The Parties acknowledge that this Agreement is performable in El Paso County, Texas and hereby submit to the jurisdiction of the courts of that County, and hereby agree that any such Court shall be a proper forum for the determination of any dispute arising hereunder.

F. No Third Party Beneficiary: This Agreement is not intended, nor will it be

construed, to create any third-party beneficiary rights in any person or entity who is not a Party, unless expressly otherwise provided.

G. **Waiver:** Any failure by a Party hereto to insist upon strict performance by the other Party of any material provision of this Agreement shall not be deemed a waiver thereof or of any provision hereof, and such Party shall have the right at any time thereafter to insist upon strict performance of any and all of the provisions of this Agreement.

H. **Incorporation of Exhibits and Other Documents by Reference:** All exhibits and other documents attached to or referred to in this Agreement are incorporated herein by reference for the purposes set forth in this Agreement.

I. **Headings:** The headings as to contents of particular articles or sections herein are inserted only for convenience, and they are in no way to be construed as a limitation on the scope of the particular articles or sections to which they refer.

J. **Ambiguities:** In the event of any ambiguity in any of the terms of this Agreement, it shall not be construed for or against any Party on the basis that such Party did or did not author the same.

K. **Counterparts:** It is understood and agreed that this Agreement may be executed in any number of counterparts; each shall be deemed an original for all purposes.

L. **Authority for Execution:** Each Party hereby certifies, represents, and warrants that the execution of this Agreement has been duly authorized.

M. **Administration:** The Director is the principal City official responsible for the administration of this Agreement and Licensee recognizes that questions regarding the interpretation or application of this Agreement shall be referred to the Director or his designee.

(Signature Page to follow)

THE STATE OF TEXAS)
)
COUNTY OF EL PASO)

LICENSE AGREEMENT

Signature Page

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals and have caused this instrument to be executed by their duly authorized officials and the corporate seal affixed hereto, all on the day and year first above written.

THE CITY OF EL PASO

Tomás González
City Manager

APPROVED AS TO FORM:

Josette Flores
Assistant City Attorney

APPROVED AS TO CONTENT:

Monica Lombraña, Managing Director
Aviation and International Bridges

ACKNOWLEDGEMENT

THE STATE OF TEXAS)

COUNTY OF EL PASO)

 This instrument is acknowledged before me on this ____ day of _____, 2017, by
Tomás González as City Manager on behalf of the **CITY OF EL PASO.**

Notary Public, State of Texas

Notary's Printed or Typed Name:

My Commission Expires:

ACCEPTANCE

The attached Agreement, with all conditions thereof, is hereby accepted this _____ day
of _____, 2017.

LICENSEE: MCALLEN DATA CENTER, LLC.

By: _____

(Printed Name and Title)

ACKNOWLEDGEMENT

THE STATE OF TEXAS)

COUNTY OF EL PASO)

This instrument is acknowledged before me on this ____ day of _____, 2017, by
_____ as _____ on behalf of
MCALLEN DATA CENTER, LLC, as Licensee.

Notary Public, State of Texas

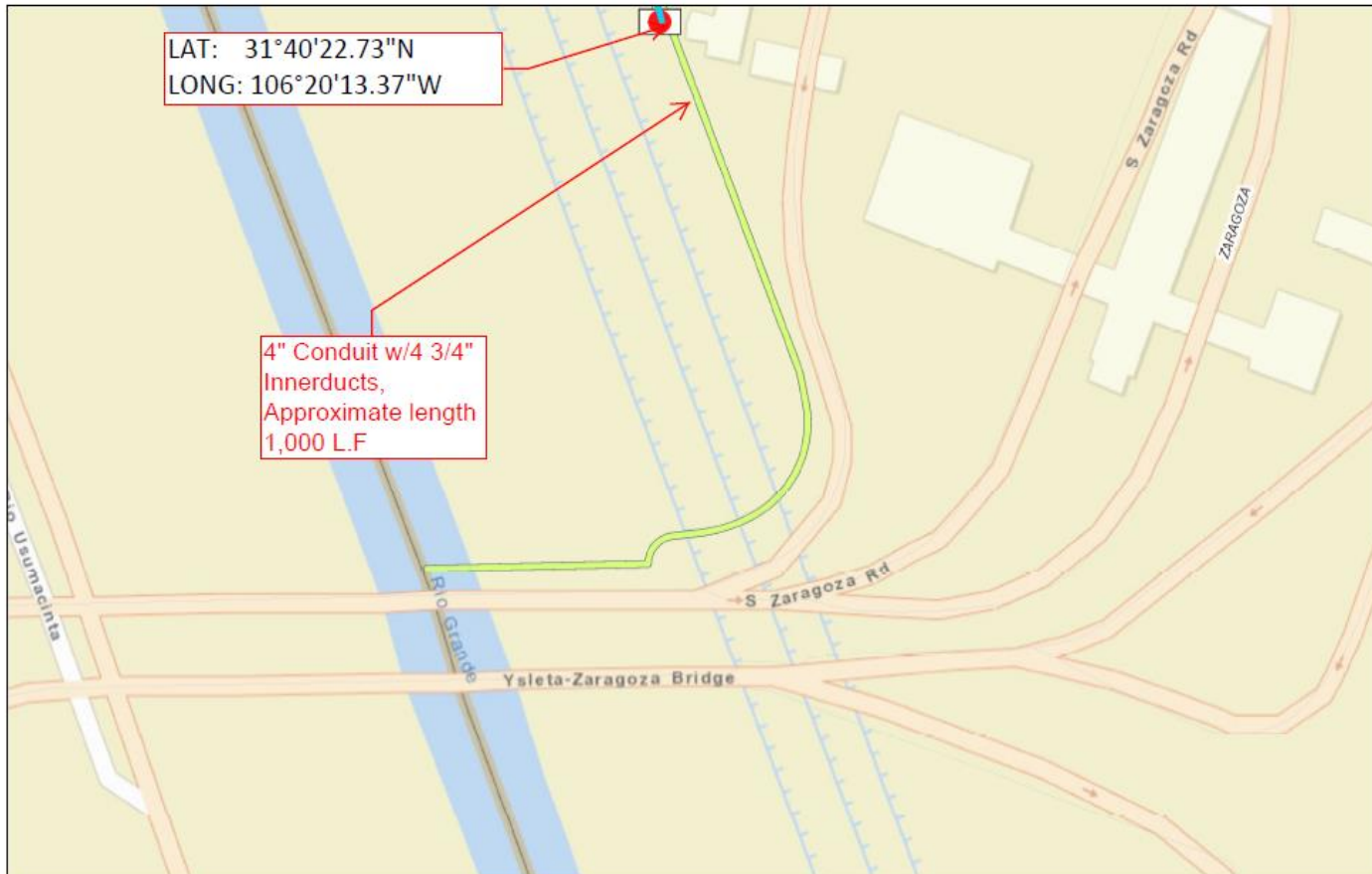
Notary's Printed or Typed Name:

My Commission Expires:

My Commission Expires:

EXHIBIT “A”

Viewer Map



October 24, 2017

Me
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