

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

**DEPARTMENT:** International Bridges

**AGENDA DATE:** Introduction: December 16, 2008  
Public Hearing: December 23, 2008

**CONTACT PERSON/PHONE:** Said Larbi-Cherif, P.E. - 858-3842

**DISTRICT(S) AFFECTED:** All

**SUBJECT:**

An ordinance granting a License to BORDERCOMM PARTNERS, LP to construct, maintain and use a single conduit interduct on the Zaragoza International Bridge property for the purpose of installing Fiber Optic cable for its telecommunication network.

**BACKGROUND / DISCUSSION:**

The license will allow BORDERCOMM PARTNERS, LP to install, operate, repair, replace and maintain a fiber optic cable within an existing interduct on the Zaragoza International Bridge property to connect underground communication conduits owned by the Licensee in El Paso and Ciudad Juarez. The communication conduit will be used to transport telecommunication information not including cable television or local exchange telephone service.

This agreement is for a term of 7 years and may be extended for a one five (5) year term. An initial annual license fee of \$20,000.00 and an initial annual Bridge Fee of \$9,600.00 will be paid to the City. Both fees are subject to a 5% annual escalation fee.

The International Bridges Department is to approve all construction plans prior to the beginning work with the Zaragoza International Bridge property and all work must comply with all applicable laws, rules and regulations of the City, State of Texas, and the United States government.

**PRIOR COUNCIL ACTION:**

None

**AMOUNT AND SOURCE OF FUNDING:**

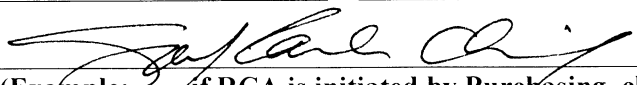
N/A

**BOARD / COMMISSION ACTION:**

N/A

\*\*\*\*\*REQUIRED AUTHORIZATION\*\*\*\*\*

**LEGAL:** (if required) \_\_\_\_\_ **FINANCE:** (if required) \_\_\_\_\_

**DEPARTMENT HEAD:**   
(Example: if RCA is initiated by Purchasing, client department should sign also)  
Information copy to appropriate Deputy City Manager

**APPROVED FOR AGENDA:**

**CITY MANAGER:** \_\_\_\_\_

**DATE:** \_\_\_\_\_

**AN ORDINANCE GRANTING A LICENSE TO BORDERCOMM PARTNERS, LP TO CONSTRUCT, MAINTAIN AND USE A SINGLE CONDUIT INTERDUCT ON THE ZARAGOZA INTERNATIONAL BRIDGE PROPERTY FOR THE PURPOSE OF INSTALLING FIBER OPTIC CABLE FOR ITS TELECOMMUNICATIONS NETWORK; THE FOLLOWING CONSIDERATION IS TO BE PAID TO THE CITY: ANNUAL LICENSE FEE (\$20,000.00), AND ANNUAL BRIDGE FEE (\$9,600.00), WHICH FEES SHALL BE SUBJECT TO A 5% ANNUAL ESCALATION**

**WHEREAS**, Bordercomm Partners, LP (hereinafter called "Licensee") desires the use of the international bridge known as the Zaragoza International Bridge and related real property used for bridge operations (hereinafter called "Zaragoza Bridge") owned by the City of El Paso (hereinafter called "City") for the purpose of installing a fiber optic cable for its telecommunications network, connecting the underground conduit owned by Licensee between the City of El Paso and Ciudad Juarez solely to transport electronic telecommunications information; and,

**WHEREAS**, Licensee proposes to install the fiber optic cable within a single one-inch conduit interduct on the Zaragoza Bridge; and,

**WHEREAS**, the City is willing to grant this license according to the terms in the attached agreement without waiving any of its rights under applicable law.

**NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF EL PASO:**

That the City Manager be authorized to execute a License Agreement upon the following terms, to Bordercomm Partners, LP, hereinafter called "Licensee":

1. This Agreement shall be in a form that is attached and incorporated as Exhibit "A"; and,
2. The Agreement is to permit Licensee the construction, maintenance and use of a single one-inch conduit interduct in a shared duct system on the Zaragoza International Bridge solely for the installation of fiber optic cable for its telecommunications business purposes; and,
3. As consideration for this Agreement, Licensee shall pay to the City the sum set forth in Paragraph Five of Exhibit "A," subject to the terms and conditions of this Ordinance and Agreement; and,
4. This Agreement shall be for a term of seven (7) years from the date the Agreement is executed and may be extended by a one five (5) year term from the expiration date of the initial term as provided in the Agreement.

PASSED AND APPROVED this 23rd day of DECEMBER, 2008.

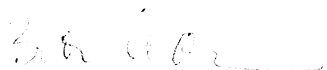
THE CITY OF EL PASO

\_\_\_\_\_  
John F. Cook  
Mayor

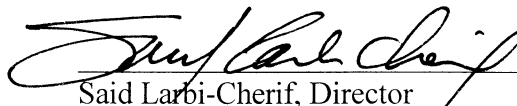
ATTEST:

\_\_\_\_\_  
Richarda Momsen  
City Clerk

APPROVED AS TO FORM:

  
\_\_\_\_\_  
Bertha A. Ontiveros  
Assistant City Attorney

APPROVED AS TO CONTENT:

  
\_\_\_\_\_  
Said Larbi-Cherif, Director  
International Bridges

## EXHIBIT "A"

THE STATE OF TEXAS     )  
  )  
COUNTY OF EL PASO     )                   **LICENSE AGREEMENT**

**THIS LICENSE AGREEMENT** is made and entered into this \_\_\_\_ day of \_\_\_\_\_ 2008, by and between the CITY OF EL PASO, Texas, a Municipal Corporation, of the County of El Paso in the State of Texas (hereinafter referred to as "**City**"), and BORDERCOMM PARTNERS, LP (hereinafter called "**Licensee**").

### WITNESSETH

**WHEREAS**, Licensee proposes to install fiber optic conduit within a single conduit interduct on the Zaragoza Bridge; and,

**WHEREAS**, the City and the Licensee desire to enter into this Agreement to set forth the duties and responsibilities of the parties; and,

**NOW THEREFORE**, in consideration of these promises and of the mutual covenants and agreements of the parties, it is agreed as follows:

### **SECTION 1. SCOPE AND PURPOSE**

The City hereby grants to Licensee, a non-exclusive license (hereinafter referred to as "**Agreement**") to install, operate, repair, replace and maintain across and along a portion of the City-owned Zaragoza International Bridge, bridge administration building, bridge approach 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 one-inch conduit interduct in a shared duct system and an on-site connection with the Licensee's fiber located in the City's right-of-way at a splice box to be located at the Zaragoza Bridge administration building on the bridge approach, all as to be further shown on the approved Plans, hereinafter referred to as the "**Infrastructure**".

In the event that the Licensee shall determine that for unforeseen circumstances a deviation with regard to the planned route designated in the approved Plans is required, Licensee shall promptly notify the International Bridges Director (“**Director**”) and request his approval prior to taking a deviation in the route. 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. Licensee shall not install or construct any additional improvements, or make any additions or alterations on, below or over the City Property, 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**

No less than fourteen (14) days prior to the installation of the Infrastructure, Licensee shall submit to the Director for review and approval the following information:

- a. Five complete sets of sealed engineering drawings (design and construction) for the Infrastructure on a scale in which one inch (1") equals fifty feet (50'); and,
- b. A sealed engineering shoring plan indicating calculations and analysis for soil stabilization for any trenching/excavation of five (5) feet depth or greater, as required by OSHA, if applicable; and,
- c. Detail of all existing utility facilities, horizontally and vertically, in relationship to the proposed route; and,
- d. Detail of the Infrastructure the Licensee proposes to install, such as pipe size, type of interducts, valves, conduits, junction boxes, communication vaults, type of construction material, et cetera, and location of each; and,
- e. Detail of plans to remove and replace asphalt, concrete in street in accordance with City standards; and,

f. Drawings of any bores, trenches, handholes, manholes, switch gear, transformers, pedestals, et cetera including depth notation; and,

g. Handhole and/or manhole typical of type of manholes and/or handholes Licensee intends to use or access; and,

h. The name, address and phone numbers of the contractor or subcontractor who will perform the actual construction, including the name and telephone number of an individual with the contractor who will be available at all times during construction; and,

i. The construction and installation methods and materials to be employed for the protection of existing structures, fixtures, and facilities within or adjacent to the City Property, and the dates and times work will occur, all of which (methods, dates, times, etc.) are subject to approval of the Director; and,

j. The proposed schedule of construction showing commencement and completion dates; and,

k. A detailed traffic control plan for the control of traffic in and around any construction site, approved by the Traffic Division of the Engineering Department, if appropriate; and,

l. Letters of clearance from all utility companies which may be affected by the construction of the installation of the Infrastructure; and,

m. Letters of clearance from affected federal, state or applicable local entities, including, but not limited to, evidence that Licensee has agreement to connect fiber on Zaragoza Bridge with authorized Mexican telecommunications provider. Notwithstanding the foregoing requirement, the letters of clearance will not delay the review and the approval of the Plans; however, no construction, including preparatory work, shall commence on the City Property until the Director receives any and all applicable letters at least twenty-four hours prior to the scheduled start date of construction; and,

n. Any additional information and documentation reasonably required by the Director needed to review the plans.

Collectively, these submission items shall be referred to as the “*Plans*”.

Upon approval of the Plans by the Director, based on his reasonable discretion, Licensee shall coordinate with the Director a preconstruction meeting with Licensee’s contractor. Licensee may begin the installation of the Infrastructure after the pre-construction meeting has been held.

subject to any reasonable changes requested by the Director at the meeting and subject to the timelines set forth in this Agreement. All construction and installation of the Infrastructure shall be completed in accordance with the approved Plans. The Director or his/her designee shall be provided access to the work and to such information as he or she may reasonably require to ensure compliance with the terms of this Agreement. A copy of the Plans shall be maintained at the construction site and made available for inspection by the Director or City staff at all times when construction or installation work is occurring. All construction or installation work must be completed in the time specified in the submitted construction schedule. If the work cannot be completed in the specified construction schedule, the Licensee may request, in writing, an extension from the Director. A copy of any permit or approval issued by federal or state authorities shall be posted at work site.

Licensee shall notify the Director, and, if necessary, the Chief Traffic Engineer of the Department of Engineering a minimum of forty-eight (48) hours in advance prior to the commencement of construction or installation 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. In addition the Licensee shall comply with the following:

- a. A three by three feet (3' x 3') information sign shall be posted stating the identity of the person doing the work, telephone number and Licensee's identity and telephone number shall be placed at the location where construction is to occur not less than forty-eight (48) hours prior to the beginning of work in the City Property and shall continue to be posted at the location during the entire time the work is occurring.

- b. Provider must show proof of Texas Commission on Environmental Quality (“*TCEQ*”) and/or Environmental Protection Agency (“*EPA*”) approved plans relating to storm water and erosion when applicable or a letter from the governmental agency stating they are not required to obtain such plans.

- c. Lane closures on major thoroughfares are permitted between 8:30 a.m. and 4:00 p.m. only, unless the Director grants prior approval. Arrow boards will be required on lane closures, with all barricades, advance warning signs and 36-inch reflector cones placed according to the specifications of the Traffic Engineering Division of the Engineering Department.





Dollars (\$50.00) an hour, as well as any overtime costs if time spent outside of the City's normal business working hours, provided that at the time of the initial installation, the parties agree that the City staff costs will be due only for City staff time that cumulatively exceeds four (4) hours.

j. Licensee and Licensee's contractors are responsible for obtaining line locates from all affected utilities (including other telecommunications facilities) prior to any excavation.

k. If applicable, Licensee will be responsible for verifying the location both horizontal and vertical of all affected facilities whether by potholing or hand digging prior to any excavation or boring with the exception of work involving lane closures, as discussed above.

l. Placement of all manholes and/or handholes must be approved in advance by the Director.

The work completed by Licensee in placing, replacing, repairing, or maintaining the Infrastructure 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 incurred because of such stoppage.

In the event that Licensee desires to reconstruct, repair, maintain, or replace the 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, the Director will issue a Notice to Proceed for the installation of the Infrastructure. A new Notice to Proceed shall be required at any time there is additional construction after the Infrastructure has been installed.

Simultaneous with the submission of the Plans to the Director, if applicable, Licensee shall submit a detailed traffic control plan to the Director of Engineering for review and approval by the Chief Traffic Engineer of the Department of Engineering. Traffic control signs shall not be removed, altered or damaged for any reason by Licensee. All construction barricading, warning signs, and other construction control devices shall be put in place by Licensee and shall be in accordance with the latest edition of the "Texas Manual on Uniform Traffic Control Devices" before traffic signs can be removed. Licensee shall notify the Chief Traffic Engineer of the Department of Engineering at least seventy-two (72) hours, not including weekends or City holidays, before scheduled removal of construction barricades, warning signs, and traffic control devices. In all cases, Licensee shall not remove said barricades, warning signs, and traffic control devices until the Licensee has replaced any removed stop signs, yield signs and other official traffic control devices in their proper location.

Licensee covenants and agrees that Licensee shall, at its own expense, repair all water lines, storm and sanitary sewer lines, service lines, water meters and any other infrastructure located within the City Property owned by the City that Licensee, its employees, its agents or contractors damage. The repair of the water lines, storm and sanitary sewer lines and water meters shall comply with the El Paso Water Utilities regulations and must be approved by of the El Paso Water Utilities, and such approval shall not be unreasonably delayed, withheld or denied.

The City shall have the power at any time to order and require Licensee to remove and abate all or any portion of the Infrastructure 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.

After installation of the Infrastructure, 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 and to the reasonable satisfaction of the Director. The restoration shall include, but not be limited to:

- a. Replacing all ground cover with equal to the type of ground cover damaged during work or better, as directed by Director;
- b. Installation of all manholes and handholes, as required;
- c. Backfilling all bore pits, potholes, trenches or any other holes shall be done daily, unless other safety requirements are approved by the Director;
- d. Leveling of all trenches and backhoe lines, and providing soils test results as needed;
- e. Restoration of excavation site to City specifications;
- f. Restoration of all landscaping, ground cover, and sprinkler systems, if any.
- g. All locate flags shall be removed during the clean up process by the Licensee or his/her contractor at the completion of the work.

Restoration must be made in accordance with the approved construction schedule to the reasonable satisfaction of the Director or his/her 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.

No less than fourteen (14) days after: (1) the completion of the installation of the Infrastructure and any repair thereafter; and, (2) the completion of the final inspection by the City, Licensee shall submit to the Director, three (3) complete sets of as-built plans and an electronic copy of the plans, sealed by an engineer depicting the work completed by Licensee. The as-built plans will provide sufficient information so that the City may update their Geographic Information System's (GIS) street and asset inventories. The project digital file format shall be in compliance with the following requirements:

1. Categorize features into individual layers (ex: streets, street names, lots, lot numbers, etc.); and,
2. Provide projection in State Plane Coordinate System, NAD 83, Texas Central Zone and units in feet; and,
3. Remove/explode all proxy graphics; and,

4. Provide or convert all text styles on digital file submitted to Standard text using font symbolset.txt.shx; and,
5. Provide digital file using either dxf or dwg format; and,
6. Provide one set of mylars.

The as-built plans shall be provide as much detail and accuracy as reasonably required by the Director. All the criteria specified for the Plans shall be included in the final as built plans.

### **SECTION 3. TERM**

The term of this Agreement shall be seven (7) years from the date of the City's approval and Licensee provides evidence that Licensee has agreement to connect fiber on Zaragoza Bridge with authorized Mexican telecommunications provider ("***Effective Date***"), unless terminated earlier as provided herein ("***Initial Term***"). At the end of the Initial Term, Licensee shall have the option to extend this Agreement for one (1) additional five (5) year term ("***Option***"), upon the renegotiation of the Total Fee, as well as any other provision of this Agreement. 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. 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, Licensee shall pay to the City an annual fee in the sum of Twenty Thousand and No/100 Dollars (\$20,000.00) ("***Annual Fee***"). Each year no later than the first day of the month following the date this Agreement was approved by City Council, the Licensee shall remit the Annual Fee to the City in full. In addition, the Licensee shall also pay an amount of Six Dollars and No/100 (\$6.00) per lineal foot per year as follows:

City Property, estimate: 1,600 lineal feet, to be determined from approved plans

Additional Bridge Fee: \$9,600.00

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

B. The Licensee shall also pay to the City a Security Deposit in the amount of Two Thousand Five Hundred and No/100 (\$2,500) to secure the performance of the Licensee under this Agreement.

C. Failure to remit payment of Total Fee as provided in this Section shall be cause for termination. Licensee's failure to make the payment within seven days (7) after the payment is due shall constitute a late payment and Licensee shall pay the City a late charge of ten percent (10%). In the event that the City terminates the Agreement for non-payment of Total Fee, the City will provide written notice of default and the Licensee shall have seven (7) days to cure such default. If the Licensee fails to cure, 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 pay the Total Fee three (3) times within the 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 shall remain the same for a period of one year from the Effective Date; however, the Total Fee is subject to escalation of five percent (5%) on the anniversary date each year after the Effective Date ("*License 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.

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, 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.

H. Reciprocal Most Favored Fee. Licensee agrees to pay annually, in advance, per duct, the greater amount established in this Paragraph or that amount that Licensee, or a corporate subsidiary or affiliate, pays for the use of a single duct to cross an international bridge located anywhere in Texas.

## **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 ORGANIZATIONS 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 six million dollars; one million dollars (\$1,000,000.00) primary plus five million dollars (\$5,000,000.00) umbrella or other securities as acceptable to the Director. 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 Capital Assets Management Division prior to any commencement of the installation of the Infrastructure. The policy shall contain a provision that the policy will not be terminated without providing the City with thirty (30) prior written notice of termination.

Licensee shall file a performance bond in the estimated cost of the work with an effective date prior to the commencement of construction of the Infrastructure 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.

#### **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, 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.

In the event that the City closes or abandons any portion of the City Property, which contains any existing Infrastructure of Licensee, any conveyance of land containing, such closed or abandoned City Property may be subject to the rights of Licensee under this Agreement.

#### **SECTION 8. TERMINATION**

Either party shall have the option to terminate this Agreement at any time upon giving the other party written notice six (6) months in advance of such termination. In addition, the City shall have the right to terminate this Agreement at any time if necessary to secure efficiency of public service at reasonable rates, or to assure that the City Property is maintained in good order



throughout the life of the grant; provided however, if City elects to terminate the Agreement, the City will reimburse Licensee, the prorated amount of the Total Fee paid to the City. However, notwithstanding the foregoing, if the City terminates the Agreement due to reasons outside of the City's control, such as but not limited to, requirements by the Federal Government, then the City shall not be required to reimburse the Licensee for any portion of the Total Fee, and Licensee may remove the Infrastructure at their own cost. The City shall give Licensee thirty (30) days written notice to cure any default by Licensee of any material provision or requirement contained in this Agreement. 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. If the Agreement is terminated early, the Total Fee shall be prorated to the date of termination.

Upon termination of this Agreement, prior to the expiration of the Initial Term, Licensee shall abandon 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. 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.

The Infrastructure shall be considered to be improperly installed, repaired, upgraded or maintained if:

- a. The installation, repairs, upgrade or maintenance endangers people;
- b. The Infrastructure does not meet applicable City, state or federal laws or regulations;
- c. The Infrastructure is not capable of being located using standard industry practices;
- d. The Infrastructure is not located in the proper place in accordance with the approved Plans; or
- e. The Infrastructure is placed in an area that interferes with City owned facilities and infrastructure.

## **SECTION 9. 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, replacement, maintenance 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 10. NOTICE**

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

City of El Paso  
ATTN: City Manager  
2 Civic Center Plaza  
El Paso, Texas 79901-1196

with copies to: City of El Paso  
ATTN: International Bridges Director  
791 S. Zaragoza Road  
El Paso, Texas 79907

City of El Paso  
ATTN: City Clerk  
2 Civic Center Plaza  
El Paso, Texas 79901-1196

and: Bordercomm Partners LP  
Attn: Real Estate Manager  
6842 Industrial Avenue  
El Paso, Texas 79915

With copies to: Thomas J. Spackman  
4316 Bryan St.  
Dallas, Texas 75214

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

**SECTION 11. 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, provided that the assignment is not to a certificated telecommunications provider or to an entity that will provide local service. 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 12. LEASE, SALE OR DEDICATION OF 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 to provide services to its customers through Licensee's fiber optic cable installed within Infrastructure. Licensee shall not allow the placement of any additional cable without the written consent of the Director.

#### **SECTION 13. LICENSEE'S ACCESS AND SECURITY**

Licensee shall have twenty-four (24) hour access to the Infrastructure for purposes of maintenance 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 14. 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.

In the event a Party (the “*Defaulting Party*”) commits a breach of this Agreement, the other Party (the “*Non-Defaulting Party*”), shall, prior to bringing suit or pursuing any other remedy, provide written notice of such breach to the Defaulting Party. Following receipt of such notice, the Defaulting Party shall have thirty (30) days within which to cure the breach. If the breach cannot be cured within such thirty (30) day period, the Defaulting Party shall commence to cure such breach within said period and thereafter diligently continue such cure to completion. In the event the Defaulting Party fails to cure the breach within said period, then the Non-Defaulting Party may pursue any remedy provided at law or in equity.

**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:** If any provision of this Agreement is held invalid by a court of competent jurisdiction, such provision shall be deemed to be excised herefrom and the invalidity thereof shall not affect any of the other provisions contained herein, provided that any invalid provisions are not deemed by the City or the Licensee to be material to the overall purpose and operation of this Agreement. If the City or Licensee determines that the invalid provision is

material, then, if the City has made such determination, the City shall have the option to terminate this Agreement. If the Licensee has made such determination, the Licensee shall have the option to terminate this Agreement. Such judgment or decree shall relieve the City and the Licensee from performance under such invalid provision 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.

**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**

\_\_\_\_\_  
Joyce Wilson  
City Manager

**ACKNOWLEDGEMENT**

**THE STATE OF TEXAS    )**  
**COUNTY OF EL PASO    )**

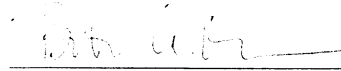
This instrument is acknowledged before me on this \_\_\_\_ day of \_\_\_\_\_, 2008,  
by Joyce Wilson as City Manager on behalf of the **CITY OF EL PASO.**

\_\_\_\_\_  
Notary Public, State of Texas

\_\_\_\_\_  
Notary's Printed or Typed Name:

\_\_\_\_\_  
My Commission Expires:

**APPROVED AS TO FORM:**



Bertha A. Ontiveros  
Assistant City Attorney

**APPROVED AS TO CONTENT:**



Said Larbi-Cherif, Director  
International Bridges

**ACCEPTANCE**

The attached Agreement, with all conditions thereof, is hereby accepted this 28<sup>th</sup> day of November, 2008.

**LICENSEE: BORDERCOMM PARTNERS, LP**

By: 

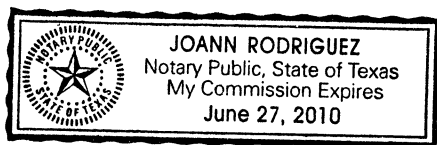
Thomas J. Spackman, CEO  
(Printed Name and Title)

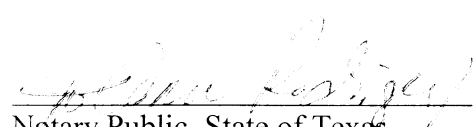
**ACKNOWLEDGEMENT**

**THE STATE OF TEXAS    )**

**COUNTY OF EL PASO    )**

This instrument is acknowledged before me on this 28<sup>th</sup> day of November, 2008, by Thomas J. Spackman as CEO on behalf of BORDERCOMM PARTNERS, LP, as Licensee.



  
Notary Public, State of Texas

Joann Rodriguez  
Notary's Printed or Typed Name:

June 27, 2010  
My Commission Expires:

My Commission Expires: