



# Naperville

## JOINT USE POLE ATTACHMENT AGREEMENT DRAFT

This Agreement, dated \_\_\_\_\_, 20\_\_\_\_ (“**Agreement**”) is made and entered into by and between the CITY OF NAPERVILLE, a municipal corporation (the “**City**”), and \_\_\_\_\_ a \_\_\_\_\_ Corporation authorized to transact business in the State of Illinois, (“**Licensee**”).

### RECITALS

1. **WHEREAS**, the City owns, operates, and maintains electric utility poles and other related equipment (hereinafter “**Poles**”) located on public property within the corporate limits of the City.
2. **WHEREAS**, the City and other entities (hereinafter “**Co-Owners**”) co-own, operate, and maintain certain electric utility poles located on public property within the corporate limits of the City (hereinafter “**City Co-Owned Poles**”).
3. **WHEREAS**, for the purposes of this Agreement: (i) the Poles; (ii) the City Co-Owned Poles; and (iii) electric utility poles erected by or on behalf of the City in the future, or which are purchased by the City from the Licensee as provided herein, shall be referenced hereinafter as “**City Poles**”.
4. **WHEREAS**, the City may, from time to time, determine that certain electric utility poles or City Co-Owned Poles, are necessary for its sole use; subject to the provisions set forth herein, such poles (hereinafter “**Exempt Poles**”) shall be deemed not to be City Poles and shall not be covered by this Agreement.
5. **WHEREAS**, subject to approval by the Co-Owner of City Co-Owned Poles, the City has the ability to control the conditions under which third parties are allowed to attach facilities to City Poles.
6. **WHEREAS**, the Licensee desires to attach its radio, wire, cable, fiber, amplifiers, switching, processing, transmission and/or distribution components to certain City Poles (hereinafter “**Joint Use Poles**” as defined herein).
7. **WHEREAS**, in consideration of the terms and conditions contained below, the City is willing to grant a revocable license to the Licensee to place its radio, wire, cable fiber, amplifiers, switching, processing, transmission and/or distribution components on or about specified Joint Use Poles subject to the terms and conditions of this Agreement.
8. **WHEREAS**, Licensee hereby acknowledges that in the event the City deems it useful or necessary, in its sole discretion, to utilize or remove the City Poles licensed hereunder, Licensee shall vacate its use of the Joint Use Poles as set forth herein. Such poles shall be considered “**Exempt Poles**” as defined herein.

**NOW, THEREFORE**, in consideration of the following covenants, terms, conditions, and provisions, the parties hereto, do hereby agree as follows:

### **Section 1. Recitals Incorporated.**

The foregoing Recitals are a material part of this Agreement, and are incorporated in this Section 1 as though fully set forth herein.

### **Section 2. Scope of Agreement.**

This Agreement covers all City Poles. For City Co-Owned Poles, the Licensee is required to obtain written permission to place radio, wire, cable, fiber, amplifiers, switching, processing, transmission and/or distribution components on City Co-Owned Poles from the Co-Owner. A copy of said permission from the Co-Owner shall be provided within five (5) days of a request from the Director of DPU-E.

### **Section 3. Definitions.**

**Definitions.** In addition to those terms defined above, the following terms will have the meaning in this Agreement

3.1 **“Application”** shall have the meaning set forth in Section 5.1 hereof.

3.2 **“Attachment”** or **“Attachments”** as used in this Agreement means, as context indicates: (1) Licensee’s placement of certain facilities on Joint Use Poles which may include, subject to DPU-E approval and Co-Owner approval (if needed), and subject to the terms and conditions of this Agreement: radio, wire, cable fiber, amplifiers, switching, processing, transmission and/or distribution components; or (2) City’s placement of facilities and other equipment and/or items on Joint Use Poles, including but not limited to radio, wire, cable fiber, amplifiers, switching, processing, transmission, distribution components, streetlights and street banners.

3.3 **“Attachment Point”** as used in this Agreement (see Section 5.7 hereof) means the point on City Pole at which Licensee’s facilities are physically attached.

3.4 **Compliance Requirements** shall have the meaning set forth in Section 4 hereof.

3.5 **Communication Space** shall have the meaning set forth and referenced in Section 6.1 hereof.

3.6 **“Co-Owned Poles”** shall have the meaning set forth in Recital 2 hereof.

3.7 **“Director of DPU-E”** means the Director of the City’s Department of Public Utilities-Electric or her or his designee.

3.8 **“DPU-E”** as used in this Agreement means the City’s Department of Public Utilities-Electric.

3.9 **“Exempt Poles”** shall have the meaning set forth in Recital 4 and Section 5.9 hereof.

3.10 **“Joint Use Poles”** as used in this Agreement means those City Poles identified in Licensee’s Application upon which Licensee Attachments are permitted under this Agreement or which are reserved for joint use by the Licensee.

3.11 **"Make Ready Costs"** as used in this Agreement means the just and reasonable actual costs incurred in performing work necessary to provide adequate space and pole strength for Licensee’s proposed Attachment per the Compliance Requirements, directly associated with accommodating Licensee’s Attachments. The City shall provide, within ninety (90) days of Licensee’s written request, a detail of such costs.

3.12 **"Make Ready Estimate"** as used in this Agreement means City’s estimate of Make Ready Costs prepared for City pursuant to Section 5 below.

3.13 **Make Ready Work”** means all work, as determined by City, required to accommodate Licensee’s Attachments and to meet the Compliance Requirements and other reasonable requirements of City, including rearrangements and/or transfer of existing facilities.

3.14 **“Overlash”** as used in this Agreement means any operation whereby new or additional wire or cable is physically tied to other wires or wire guys already existing and physically secured to Joint Use Poles. (See Section 5.5 hereof).

3.15 **“Service Drops”** as used in this Agreement means the final span of wire or cable providing service to a customer. (See Section 5.6 hereof).

3.16 **“Standard Space”** as used in this Agreement has the meaning set forth in Section 6.2 (Licensee’s Standard Space) and Section; 6.3 (City’s Standard Space) hereof.

#### **Section 4. Code Specifications.**

4.1 The joint use, construction and maintenance of Joint Use Poles covered by this Agreement, and Licensee’s Attachments thereon, shall be in conformity with the National Electrical Safety Code (**“NESC”**), the National Electrical Code (**“NEC”**), the Naperville Municipal Code, and the regulations of the Occupational Safety and Health Administration (**“OSHA”**), as each may be amended from time to time, each of which is incorporated by reference in this Agreement, and/or other reasonable safety and engineering requirements of City or other federal, state, or local authority with jurisdiction over the City’s Poles (hereinafter cumulatively referenced as **“Compliance Requirements”**).

4.2 Any use of a Joint Use Pole which does not conform to the most stringent standards as set forth above shall be immediately brought to the attention of City by Licensee, or vice versa, as the case may be, and corrected not later than ninety (90) days after notice of discovery of such non-conformity (or such other timeframe as may be agreed upon in writing by the Licensee and the Department of Public Utilities – Electric (**“DPU-E”**)) unless a lesser time is required by the DPU-E in order to protect public safety.

If Licensee’s use of a Joint Use Pole creates non-conformity with the standards referenced in Section 4.1 above, Licensee shall be responsible for 100% of the cost to bring its Attachments into

conformance with the Compliance Standards. The City shall only be responsible for costs related to conformance with the Compliance Standards as if the Licensee's Attachments were not attached to the pole. If the Licensee fails to correct the non-conformity within the ninety (90) days specified above, or such other timeframe as described above, a standard penalty as defined in Section 11.3 of this Agreement shall be assessed by the City to the Licensee. If the Parties cannot resolve, through good faith negotiations, any disputes related to the costs of work related to the Compliance Standards, the City may require the Licensee to remove the disputed Attachments from the Joint Use Pole and restore the Joint Use Pole to a condition reasonably satisfactory to the City.

**Section 5. Placing, Transferring or Rearranging of Pole Attachments.**

5.1 Whenever the Licensee desires to reserve space on any City Pole which Licensee is not already using, Licensee shall make written Application, to the City providing: (1) a clear and specific indication of the location of the City Pole(s) which Licensee desires to use (herein "Joint Use Poles"), (2) the specific number and kind of Attachments which Licensee desires to place on each such Joint Use Pole, (3) engineering calculations supporting the adequacy of each Joint Use Pole in question to support the Attachments, or the requirements for proposed changes to achieve structural adequacy, and (4) any Make Ready Work proposed to complete such Attachments on each Joint Use Pole in conformance with all Compliance Requirements.

Licensee shall submit such Application consistent with the submittal requirements of the City's Transportation, Engineering and Development Department.

Within ninety (90) days after receipt of such Application, the City shall notify the Licensee, in writing, of its Make Ready Estimate. The Licensee agrees to pay, in advance, the estimated Cost of all Make Ready Work.

5.2 Upon payment of the Make Ready Estimate by Licensee, the City shall proceed with the Make Ready Work covered by the Make Ready Estimate. Licensee shall manage and perform Make Ready Work not covered by the Make Ready Estimate. The City shall undertake commercially reasonable efforts to complete its Make Ready Work within (90) days from receipt of payment. Nothing shall preclude the Parties from making other mutually agreeable arrangements for contracting for or otherwise accomplishing the necessary Make Ready Work. Upon completion of its Make Ready Work, the City shall advise Licensee that such poles are available for attachment.

5.3 If the City determines that any proposed Joint Use Pole has inadequate capacity to accommodate Licensee's Attachments and must be replaced in order to make capacity for Licensee's Attachments, Licensee agrees to reimburse City for the: (1) actual cost of the new pole; (2) the actual cost of transferring City's facilities to the new pole; and (3) any other actual costs incurred by City related to (1) and (2) above, including but not limited to the expense of removing the old pole and labor costs associated therewith.

5.4 Except as otherwise provided herein, the City and Licensee shall each place, rearrange, transfer, remove and maintain at their sole cost their respective Attachments, and shall timely perform any necessary tree trimming or cutting, at their own expense and shall perform such work within ninety (90) days of notice by the other Party (or such other timeframe as may be agreed

upon in writing by the Parties) unless a lesser time is required by DPU-E in order to protect public safety.

Licensee shall be responsible for the costs of pole replacements related to pole breakage due to foreign object contact with their facilities. If such contact and breakage is due to third-party negligence, the City shall replace the poles, Licensee shall reimburse City for costs, and Licensee shall be responsible for recovering from the third party. The Licensee shall be responsible for the entire cost the City incurs to restore the pole, including but not limited to labor costs, with no depreciation credited.

5.5 Licensee may Overlash facilities on its own active Attachments but may not Overlash on the Attachments of the City or any third party. Licensee may not allow any third party to Overlash onto their attachments. Overlashing of cable will not be considered an additional attachment to the City Pole for end of year billing but any proposal for Overlashing of cable shall be submitted to the City through the procedure outlined in Section 5.1 prior to start of construction.

5.6 Licensee may place Service Drops from Joint Use Poles covered by this Agreement without the City's prior written approval so long as Compliance Requirements are met and continue to be met. The City agrees that Service Drops are not considered compensable additional Attachments after Licensee is already paying to be attached to said Joint Use Pole.

5.7 Licensee shall place a marker/indicator identifying ownership near their Attachment Point at each pole, clearly visible from the ground, for the purpose of positively identifying ownership during audits or emergencies. The marker must have an emergency contact phone number on it.

5.8 Licensee accepts all Joint Use Poles on an "AS-IS" basis and Licensee and its officers, agents, employees, and subcontractors are completely at risk with respect to all attributes and conditions, latent or otherwise, of said Joint Use Poles and the property on which they are located.

5.9 Licensee shall be solely responsible for all damages caused by any act or omission of Licensee or its officers, agents, employees, and subcontractors with respect to this Agreement. The provisions of this Section 5.9 shall survive any suspension, termination, or expiration of this Agreement.

5.10 DPU-E may determine certain City Poles are necessary for the sole use of the City, or for the use of the City and an existing Co-Owner, and that additional Attachments would not be either feasible, practical, or safe. Such poles qualify as Exempt Poles and shall not be covered by this Agreement.

5.11 Licensee and its employees, agents, representatives, and sub-contractors accept all City Poles, Joint Use Poles, City Co-Owned Poles, and all right of way or other property on which such poles are located, on an "AS-IS" basis, and Licensee and its employees, agents, representatives, and sub-contractors are completely at risk with respect to all attributes and conditions, latent or otherwise, thereof. The provisions of this Section 5.11 shall survive any suspension, termination, or expiration of this Agreement.

## **Section 6. Standard Space.**

6.1 Licensee's Attachments shall be made within the Communication Space as defined by DPUE Specification E20-3010 (**Attachment A**) and the latest edition of the NESC. Note that third party attachments may already exist within the Communication Space. If there is inadequate space within the Communication Space due to existing Attachments, as determined by the City at its sole discretion, the City Pole will not be eligible for additional Attachments.

6.2 For the purposes of this Agreement, the Licensee's Standard Space shall be defined as the space one foot (1') above and one foot (1') below the Licensee's Attachment Point.

6.3 For the purposes of this Agreement, all space upon any pole other than the Licensee's Standard Space shall be deemed City's Standard Space.

6.4 Where existing equipment (as of the date of this Agreement) of either the City or the Licensee is located in the other's Standard Space, it shall so remain until the opportunity arises to relocate it without undue burden or expense. In the interim, any new or additional equipment shall be installed by the City or the Licensee to conform with the location of their existing equipment. When either Party requires full use of its Standard Space for installation of new or replacement equipment, the other Party will cooperate with the requesting Party to relocate its equipment within ninety (90) days after the request. Notwithstanding the foregoing, in emergency service situations, the Party whose equipment must be relocated will complete such relocation as soon as practicable.

6.5 The City retains the unrestricted right to use or license the City's Standard Space, provided such use complies with the provisions of Section 4 herein.

6.6 In the event of third party attachments to poles covered by this Agreement, communication attachments shall be required to be made one foot (1') above or below the Licensee Attachments and such Attachments shall maintain a minimum one foot (1') clearance from other licensee's facilities and shall be on the same side of pole as other licensee's facilities, unless specifically authorized by City.

6.7 From and after the date of this Agreement, any subsequent third party attaching to a City Pole which is used by Licensee shall reimburse City or Licensee their respective costs for changing the location of their facilities, erecting or replacing poles, or relocating or readjusting their facilities in order to accommodate said third party's facilities. Provided, however, where either City or Licensee are then in violation of any Code or Order under Section 4 herein at the time of said third party attachment, City or Licensee shall relocate that portion of their non-conforming facility without charge.

## **Section 7. Erecting, Replacing or Relocating Poles.**

7.1 Licensee shall not erect new poles within the territory covered by this Agreement. The City is not required to erect additional poles or extend pole lines.

7.2 The cost of erecting new or replacement Joint Use Poles related to normal maintenance, relocation, or end of life, shall be borne by the City. However, each Party shall place, at its sole

expense, its own Attachments on the new or replacement Joint Use Pole(s) and any necessary supports to sustain any unbalanced loads caused by their respective Attachments. In cases of replacement of existing Joint Use Poles, Licensee shall, within ninety (90) days after receipt of written notice from City, transfer its Attachments the new or replacement Joint Use Pole. In case of emergency or immediate need, Licensee may be required to transfer its Attachments on shorter notice. If the Licensee fails to transfer its Attachments within ninety (90) days, or such shorter timeframe as may be required in the event of an emergency, the City shall have the right, but not the obligation, to transfer Licensee's Attachments and to charge Licensee its costs, including but not limited to costs of labor, to do so. Whether or not the City performs the relocation of Licensee's Attachments, the City shall be entitled to assess the penalties against the Licensee as set forth in Section 11.3 hereof for failure of Licensee to timely transfer its Attachments.

7.3 Whenever it is necessary to change the location of a Joint Use Pole for any reason, including but not limited to any State, Municipal, or other governmental requirement, or whenever the Director of DPU-E determines that such relocation is appropriate, the City shall give written notice thereof to Licensee, specifying when the substitute pole is available for attachment. The Licensee, at its expense, shall transfer its Attachments to the substitute pole within ninety (90) days of notice. Should the Licensee fail to transfer its facilities within the ninety (90) days, the City shall have the right, but not the obligation, to transfer Licensee's Attachments to a substitute pole and to charge Licensee its costs, including but not limited to costs of labor, to do so. Whether or not the City performs the relocation of Licensee's Attachments, the City shall be entitled to assess the penalties against the Licensee as set forth in Section 11.3 hereof for failure of Licensee to timely transfer facilities.

7.4 If Licensee seeks a change in location of a Joint Use Pole, Licensee shall give written notice to the City specifying the requested timeframe for the proposed relocation. The City shall, if it does not wish to discontinue the existing City Pole from joint use as herein provided, relocate such pole by the date proposed, or within one hundred and eighty (180) days after the date of the submission of the request. The cost of relocating such pole by the City and the transfer of City's Attachments thereon shall be at the sole expense of Licensee. In the event of emergency situations, the provisions calling for written notification may be waived by the Director of Public Utilities - Electric or his or her designee provided prior verbal notice is given to the Director of Public Utilities -Electric to be followed by a written communication to DPU-E summarizing the relocation and the reasons therefor.

If Licensee seeks a change in location of a Joint Use Pole, and the City wishes to discontinue the City Pole from joint use, the provisions of Section 10.2 hereof shall apply.

7.5 Whenever it is necessary to replace a defective Joint Use Pole, the procedures set forth in Section 7.1 shall be employed.

7.6 A replacement Joint Use Pole shall be set by the City in its original position, within a reasonable distance of the original pole position, or in a position agreed upon by the City and the Licensee.

7.7 Whenever it is necessary to change a location of a Joint Use Pole, or to erect a new Joint Use Pole, or to relocate or readjust City's or Licensee's facilities upon such poles due to the requirements of a subsequent Licensee's needs or other third-party needs, the City and Licensee shall bill their respective costs therefor (such as rearrangement costs, plant loss, net removal costs, transfer costs) to said new Licensee or other third party. The City shall give Licensee ninety (90) days' notice of such relocation.

#### **Section 8. Right-of-Way for Licensee's Attachments.**

8.1 Licensee acknowledges and agrees that the City has tendered no assurance, guarantee or warranty as to Licensee's legal right, title or interest to be located within any easement or right-of-way area upon which Joint Use Poles are located. In the event objections are made by any third party or entity to Licensee's use of said poles, easement, or right-of-way, and Licensee is unable to resolve said objections within a reasonable time, the City may, require Licensee to remove its Attachments from the subject poles at Licensee's sole expense. Such removal shall occur not more than thirty (30) days after Licensee's receipt of notice, or in the event of an emergency as determined by the Director of DPU-E, on shorter written or verbal notice followed by written notice.

#### **Section 9. Maintenance of Poles and Attachments.**

9.1 Licensee shall, at its sole expense, maintain, repair and operate its Attachments upon Joint Use Poles in a safe and serviceable condition at all times, and in compliance with the Compliance Requirements. Licensee further agrees that it shall maintain, repair, and operate its Attachments so as not to interfere with City's use or maintenance of said poles. Moreover, if the City determines that any of Licensee's Attachments are in an unsafe condition and notifies Licensee to that effect, Licensee shall, at its sole expense, relocate or replace said Attachments, or transfer them to substitute poles, or perform such other work in connection with said Attachments that may be required to place them in a safe condition in a timeframe specified by the Director of DPU-E. However, in an emergency, the City may temporarily relocate Licensee's facilities to substitute poles, and the cost of such relocation shall be reimbursed by the Licensee to City within sixty (60) days of receipt of an invoice therefor.

#### **Section 10. Abandonment and Termination of Rights in Joint Use Poles.**

10.1 Licensee may abandon the use of a Joint Use Pole at any time by first submitting written notice thereof to the City as provided in Section 14, on a form provided by the City, removing Licensee's Attachments within ninety (90) days after issuance of said written notice, and restoring the Joint Use Pole to a condition reasonably satisfactory to the Director of DPU-E. Until Licensee removes all Licensee Attachments from said Joint Use Pole and restores the pole to a condition reasonably satisfactory to the Director of DPU-E, the City shall continue to bill Licensee for use of said pole and Licensee shall be obligated to make such payments. Alternatively, if the Licensee fails to remove its Attachments from such pole, the City shall have the right, but not the obligation, to remove Licensee's Attachments and to charge Licensee its costs, including but not limited to costs of labor, to do so. The provisions of this Section 10.1 shall survive any suspension, termination, or expiration of this Agreement.



10.2 If the City intends to remove a Joint Use Pole, the City may terminate Licensee's right to use said pole upon not less than ninety (90) days written notice. Licensee shall remove its Attachments from the Joint Use Pole in question and restore said pole to a condition reasonably satisfactory to the Director of DPU-E within said ninety (90) day timeframe. If Licensee fails to remove its Attachments within said timeframe, the City shall have the right, but not the obligation, to remove Licensee's Attachments and to charge Licensee its costs, including but not limited to costs of labor, to do so. Whether or not the City performs such removal, the City shall be entitled to assess the penalties against the Licensee as set forth in Section 11.3 hereof for failure of Licensee to timely remove Licensee's facilities. The provisions of this Section 10.2 shall survive any suspension, termination, or expiration of this Agreement.

10.3 If the City gives notice to Licensee of termination of Licensee's rights to use a City Co-Owned Pole, and the co-owner of such City Co-Owned Poles also gives notice of termination, within ninety (90) days of issuance of the later of such termination notices, Licensee shall remove its Attachments therefrom and restore said pole to a condition reasonably satisfactory to the City. If Licensee fails to remove its Attachments from a City Co-Owned Pole within said timeframe, the City shall have the right, but not the obligation, to remove Licensee's Attachments and to charge Licensee its costs, including but not limited to costs of labor, to do so. Whether or not the City performs such removal, the City shall be entitled to assess the penalties against the Licensee as set forth in Section 11.3 hereof for failure of Licensee to timely remove Licensee's facilities. The provisions of this Section 10.3 shall survive any suspension, termination, or expiration of this Agreement.

### **Section 11. Rentals and Other Payments.**

11.1 There shall be an annual rental fee for each City Pole attached to or reserved by the Licensee. The rental period for Joint Use Poles shall be one (1) year. The City shall, before January 10th each year, issue a report showing the number of poles to which Licensee has made Attachments or reserved therefore as of January 1st of the existing year. Payment shall be due forty-five (45) days following the issuance of the statement by the City. In the event of a dispute regarding the number of poles, Licensee shall specifically designate, in writing, within twenty (20) calendar days from the date of issuance of such report, the locations under dispute. The disputed pole quantities will be exempt from rental payment until resolved; once resolved, payment shall be processed immediately. Notwithstanding the foregoing, failure to give the report prior to the date mentioned shall not deprive City of rental fees. Licensee shall promptly pay the annual fee for all poles not in dispute.

11.2 The amount of the annual rental fee for Joint Use Pole Attachments shall be \$18 per pole in the first year of this Agreement. For each subsequent year of this Agreement, the annual fee per Joint Use Pole will increase by 2.5% over the fee per pole of the previous year.

11.3 A standard penalty of fifty dollars (\$50) per pole per day shall be effective during the first year of this Agreement for noncompliance by Licensee with the provisions set forth herein. For each subsequent year this Agreement is in effect, the penalties will increase by 2.5% over the previous year.

11.3.1 Payments of penalties due under this Agreement shall be payable by the Licensee within forty-five (45) days of the date of the invoice and shall accrue a late payment penalty of 1.5% per month on the unpaid balance from the billing date for any late payment. The provisions of this Section 11.3.1 shall survive any suspension, termination, or expiration of this Agreement.

11.4 Failure of Licensee to pay fees provided for herein or penalties assessed against Licensee shall be a basis upon which the City may suspend or terminate this Agreement as provided herein.

11.5 Payment of the annual fees to City shall not in any way affect Licensee's obligations or duties to pay monies, whether in the form of fees, charges, or otherwise, to any co-owner of a City Pole.

### **Section 12. Suspension and Termination.**

12.1 If Licensee fails to timely pay fees or penalties due hereunder or otherwise defaults in any of its obligations under this Agreement and such default continues thirty (30) days after notice thereof in writing from the City, all rights of Licensee hereunder may be suspended by the City, including but not limited to Licensee's right to occupy or in any way use the Joint Use Poles. If such default continues for a period of thirty (30) days after such suspension, the City may terminate this Agreement.

12.2 This Agreement may also be terminated, at any time, upon one hundred eighty (180) days' notice in writing to the other Party. Within ninety (90) days of issuance of such notice, the Licensee shall remove its Attachments from the Joint Use Poles and restore said poles to a condition reasonably satisfactory to the Director of DPU-E. If Licensee fails to remove its Attachments within ninety (90) days, or such shorter timeframe as may be required in the event of an emergency, the City shall have the right, but not the obligation, to remove Licensee's Attachments and to charge Licensee its costs, including but not limited to costs of labor, to do so. Whether or not the City performs the removal of Licensee's Attachments, the City shall be entitled to assess the penalties against the Licensee as set forth in Section 11.3 hereof for failure of Licensee to timely transfer its Attachments.

12.3 Licensee shall be obligated to reimburse the City for all reasonable costs and expenses, including but not limited to attorneys' fees (in-house or outside counsel), incurred by the City in enforcing the terms and provisions of this Agreement within sixty (60) days of a bill therefor issued by DPU-E. A late payment penalty of 1.5% per month shall accrue on any unpaid balance after said sixty (60) day period. The provisions of this Section 12.3 shall survive any suspension, termination, or expiration of this Agreement.

### **Section 13. Defense, Indemnification, and Hold Harmless.**

13.1. The Licensee shall, at its own expense, defend (with legal counsel approved by the City, which approval shall not be unreasonably withheld), indemnify, and hold the City and its officers, agents, and employees, harmless against any demand, claim, cause of action, losses, damages, cause of action, suit, or judgment of any kind arising out of, related to, or in connection with Licensee's, or Licensee's employees, agents, representatives, or subcontractors', negligent or intentional acts or omissions under this Agreement, and shall pay all damages, judgments, costs,

losses, and expenses in connection therewith. The City may assist in the defense of a claim, cause of action, or suit, but solely under direction of the Licensee or its attorneys and the Licensee shall not be required to reimburse the City for expenses incurred by the City in case of its election so to assist. The provisions of this Section 13.1 shall survive any suspension, termination, or expiration of this Agreement.

**Section 14. Service of Notices.**

14.1 All written notices required under this Agreement shall be given by posting the same in first class mail to City as follows:

Director of Public Utilities- Electric  
City of Naperville  
1392 Aurora Ave, Suite 100  
Naperville, Illinois 60540

**WITH COPY TO:**

City Attorney  
City of Naperville  
400 Eagle St.  
Naperville, Illinois 60540

and to Licensee as follows:

or to such address as the parties hereto may from time to time specify.

**Section 15. Term of Agreement.**

15.1 This Agreement shall be in effect for twelve (12) months following its Effective Date. Thereafter, this Agreement shall automatically renew for successive one year terms unless this Agreement is terminated as provided herein.

**Section 16. Assignment of Rights.**

16.1 Except as otherwise provided in this Agreement, Licensee shall not assign any of its rights or interests hereunder, or in any of the jointly used poles or Attachments covered by this Agreement, to any firm, corporation, or individual, without the prior written consent of the Director of DPU-E. However, nothing herein shall prevent or limit the right of Licensee to mortgage any or all of its property, rights, privileges, and franchises, or lease or transfer any of them to another corporation organized for the purpose of conducting a business of the same general character as that of Licensee, or enter any merger or consolidation and, in the case of the foreclosing of such mortgage or in the case of such lease, transfer, merger, or consolidation, its rights and obligations hereunder shall pass to, and be acquired and assumed by the purchaser on foreclosure, the transferee, lessee, assignee, merging or consolidating company, as the case may be. Notwithstanding any other provision in this Agreement, upon assignment, lease, or transfer of

its rights herein as provided above, Licensee shall remain jointly and severally liable for the obligations hereunder.

### **Section 17. Scope of Right of Licensee.**

17.1 No use by Licensee of Joint Use Poles under the terms of this Agreement shall create or vest in Licensee any ownership or property rights in said poles, but Licensee's rights herein shall be and remain a mere license. For Joint Use Poles upon which Licensee has reserved space, nothing herein contained shall be construed to compel City to maintain any of such poles for any period longer than demanded by City's own service requirements. The terms and conditions of the provisions in this Section 17.1 shall not apply to any pole solely owned and used by Licensee.

### **Section 18. General Provisions.**

18.1. Severability. It is mutually understood and agreed that all agreements and covenants herein are severable and that in the event any of them shall be held to be invalid by any court of competent jurisdiction, this Agreement shall be interpreted as if such invalid agreement or covenant were not contained herein.

18.2. Amendment. The agreements, covenants, terms and conditions herein contained may be modified only through the written mutual consent of the Parties hereto.

18.3. Assignment. This Agreement may not be assigned by either Party without the written consent of the other party.

18.4. Choice of Law and Venue. This Agreement shall in all respects be subject to and construed in accordance with and governed by the laws of the State of Illinois. Venue for any action arising out of the terms or conditions of this Agreement shall be proper only in the Circuit Court for the Eighteenth Judicial Circuit, DuPage County, Illinois. The provisions of this Section 18.4 shall survive any suspension, termination, or expiration of this Agreement.

18.5 Survival. In addition to any survival provision specifically noted in this Agreement, the obligations of the Parties under this Agreement, to the extent that they arose while the Agreement was in effect and remained unfulfilled at the time of suspension, termination, or expiration shall survive the suspension, termination, or expiration of this Agreement and/or the suspension, termination, or expiration of any permit or license granted hereunder. Any such suspension, termination or expiration shall not release either Party from any liabilities, claims, or obligations arising hereunder, including but not limited to indemnities and financial obligations which may have accrued or prior to such suspension, termination or expiration.

18.6 Ambiguity. If any term of this Agreement is ambiguous, it shall not be construed for or against any Party on the basis that the party did or did not write it. The provisions of this Section 18.6 shall survive any suspension, termination, or expiration of this Agreement.

18.7 Entire Agreement. This Agreement constitutes the entire agreement between the Parties and supersedes all previous understandings, commitments and representations concerning the subject matter hereof. This Agreement may not be amended, modified or waived in any way

except when signed by an individual authorized to do so by the party against whom the amendment, modification or waiver is sought to be enforced. No provision of this Agreement shall be interpreted against either Party solely because the party or its legal representative drafted the provision.

18.8 Binding Effect. This Agreement shall be binding upon and inure to the benefit of the Parties and their successors, transferees, and assigns and upon any subsidiary, affiliate or parent of Licensee or any corporation or other business entity that has a controlling interest in Licensee either now or in the future.

18.9 Days. Unless otherwise provided, whenever the word “days” is used herein, days shall refer to calendar days.

18.10 Waiver. The failure of either party to enforce or insist upon compliance with any of the terms or conditions of this Agreement shall not constitute a general waiver or relinquishment of any such terms or conditions, and the same shall be and remain at all times in full force and effect.

18.11 Subrogation. Licensee agrees to waive subrogation which any insurer of Licensee may by virtue of the payment of any loss or claim to the City pursuant to this Agreement. Licensee shall obtain any endorsement that may be necessary to effectuate this requirement of waiver of subrogation.

18.12 Tort Immunity Act. No provision set forth herein shall be construed to waive, eliminate, abrogate, or otherwise affect any claim, immunity or defense the City of Naperville may have with respect to any individual, entity, contractor or subcontractor, including but not limited to any claims, defenses, and immunities under federal or state statute, or federal or state common law, including but not limited to the provisions of the Illinois Local Governmental and Governmental Employees Tort Immunity Act, 745 ILCS 10/1-101 *et seq.* as amended from time to time. The provisions of this Section 18.12 shall survive any suspension, termination, or expiration of this Agreement.

### **Section 19. Effective Date.**

19.1 The effective date (“**Effective Date**”) of this Agreement shall be the date upon which it is fully executed by the Parties hereto.

IN WITNESS WHEREOF, each Party has caused this Agreement to be duly executed as of the Effective Date set forth in Section 19.1 of this Agreement.

/SIGNATURES ON FOLLOWING PAGES/

**THE CITY OF NAPERVILLE**

By: \_\_\_\_\_  
Name: Douglas A. Krieger  
Its: City Manager

**ATTEST**

By: \_\_\_\_\_  
Name: Dawn Portner  
Its: City Clerk

Date: \_\_\_\_\_

LICENSEE/ \_\_\_\_\_

By: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Its: \_\_\_\_\_

State of Illinois )  
 )SS  
County of \_\_\_\_\_)

The foregoing instrument was acknowledged before me by \_\_\_\_\_ and  
\_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_, 2020

\_\_\_\_\_  
Notary Public

\_\_\_\_\_  
Print Name