

AGREEMENT

A NON-EXCLUSIVE LICENSE AGREEMENT BETWEEN THE CITY OF SAN ANTONIO AND CENTRIC FIBER, LLC FOR USE OF PUBLIC RIGHTS-OF-WAY

This License Agreement ("Agreement") is made by and between the **CITY OF SAN ANTONIO, TEXAS** (hereafter referred to as "**City**" or "**Licensors**"), a Texas Municipal Corporation and Home-Rule Municipality, acting by and through its City Manager, or designee, pursuant to Ordinance No. _____, passed and approved by the City Council on _____, 2022; and **Centric Fiber, LLC**, a Delaware Limited Liability Company (hereafter referred to as "**Licensee**"). The City and Licensee may hereinafter be referred to individually as a "**Party**" and collectively as the "**Parties**".

RECITALS

WHEREAS, Licensee is in the business of providing broadband internet access services and owns, maintains, operates, and controls a communications Network to provide Service to Licensee's customers; and

WHEREAS, for purposes of operating its communications network, Licensee wishes to install, operate, and maintain certain of its communications Equipment in the City's public right-of-way, as more fully described herein; and

WHEREAS, the installation, maintenance, and repair of the Network including fiber optic cable, conduit, and related Equipment in the City's public right-of-way will be done in a manner consistent with all City of San Antonio regulations, including the City's Rights-of-Way Management Ordinance and Utility Excavation Criteria Manual; and

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree to the following terms and conditions:

1. **Definitions.** The following definitions shall apply to the provisions of this Agreement.

- (a) "**Equipment**" means any and all Licensee's ducts spaces, manholes, poles, conduits, fiber optic cables, repeaters, electronics equipment, transmission equipment, power sources, underground and overhead passageways, and other equipment, structures, plant, and appurtenances located within the public right-of-way.
- (b) "**Excavation Manual**" means the Utility Excavation Criteria Manual, adopted in accordance with Section 29 of the City Code.
- (c) "**Gross revenues**" (A) means all consideration of any kind or nature including without limitation cash, credits, property, and in-kind contributions (services or goods) derived by the Licensee from the operation of the Licensee's communications network to provide Service within the City. Gross revenue shall include all consideration paid to the Licensee and its affiliates (to the extent either is acting as a provider of a service as authorized by this Agreement), which shall include but not be limited to the following: (i) all fees charged to customers for any and all Service provided by the Licensee; (ii) any fee imposed on the Licensee by this Agreement that is passed through and paid by customers (including without limitation the gross revenue fee set forth in this Agreement); and (iii) compensation received by the Licensee or its affiliates that is derived from the operation

AGREEMENT

of the Licensee's communications network to provide Service with respect to commissions that are paid to the Licensee as compensation for promotion or exhibition of any products or services on the Licensee's communications network. Gross revenue includes a pro rata portion of all revenue derived by the Licensee or its affiliates pursuant to compensation arrangements for advertising derived from the operation of the Licensee's communications network to provide service within the City, subject to Paragraph (B)(iii). Advertising commissions paid to third parties shall not be netted against advertising revenue included in gross revenue. Revenue of an affiliate derived from the affiliate's provision of Service shall be gross revenue to the extent the treatment of such revenue as revenue of the affiliate and not of Licensee has the effect (whether intentional or unintentional) of evading the payment of fees which would otherwise be paid to the City. In no event shall revenue of an affiliate be gross revenue to the Licensee if such revenue is otherwise subject to fees to be paid to the City.

(B) For purposes of this section, "Gross revenues" does not include:

- (i) any revenue not actually received, even if billed, such as bad debt;
- (ii) non-services revenues received by any affiliate or any other person in exchange for supplying goods or services used by the Licensee to provide Service;
- (iii) refunds, rebates, or discounts made to customers, leased access providers, advertisers, or the City;
- (iv) the sale of services for resale in which the purchaser is required to collect the fees set out in the Agreement from the purchaser's customer;
- (v) the provision of Services to customers at no charge if required by state law;
- (vi) any tax of general applicability imposed upon the Licensee or upon customers by the City, state, federal, or any other governmental entity and required to be collected by the Licensee and remitted to the taxing entity (including, but not limited to, sales and use tax, gross receipts tax, excise tax, utility users tax, public service tax, communication taxes, and fees not imposed by this Agreement);
- (vii) any forgone revenue from the Licensee's provision of free or reduced cost Services to any person including without limitation employees of the Licensee; provided, however, that any forgone revenue which the Licensee chooses not to receive in exchange for trades, barter, services, or other items of value shall be included in Gross revenue; and
- (viii) sales of capital assets or sales of surplus equipment that is not used by the purchaser to receive services from the Licensee.

(d) **"Network"** means the communications systems operated by the Licensee to provide Service to its customers in the City.

(e) **"Right-of-way or public right-of-way"** means the surface of, and the space above and below, any street, road, highway, freeway, lane, path, drainage way, channel, fee interest, public way or place, sidewalk, alley, boulevard, parkway, drive, or other easement now or hereafter held by the City or over which the City exercises any rights of management or control and shall include but not be limited to all easements now held, or hereafter held, by the City but shall specifically exclude private property; as definition may be amended from time to time by the San Antonio City Council.

(f) **"Rights-of-Way Management Ordinance"** means the San Antonio Right-of-Way Management Ordinance passed by the San Antonio City Council on January 25, 2001 as Ordinance No. 93319,

AGREEMENT

codified in Chapter 29 of the City's Municipal Code, as amended from time to time by the San Antonio City Council.

(g) **"Service"** means broadband internet access service.

2. Term. (a) This Agreement shall be effective as of the Effective Date and shall continue for a term of twenty (20) years (the "Initial Term") unless it is earlier terminated in accordance with the provisions herein. Thereafter, this Agreement will automatically renew for successive five (5) year terms (each, a "Renewal Term") unless one party provides at least six (6) months prior written notice to the other Party of its intent not to renew.

(b) At least six (6) months prior to the expiration of the then-current term of the Agreement, the City may reappraise the gross revenue fee, and the Parties may re-negotiate the gross revenue fee and other terms of this Agreement.

(c) The "Effective Date" of this Agreement means the latest date on which this Agreement is signed by both Parties following approval of the Agreement by an ordinance of the San Antonio City Council.

(d) Should Licensee begin offering "Video Service," pursuant to a Texas State-Issued Certificate of Franchise Authority ("SICFA") and as defined in Section 66.002(10) of Chapter 66 of the Texas Utilities Code ("Chapter 66"), this Agreement will automatically terminate and the relationship between the parties will be governed by SICFA and Chapter 66.

3. Scope of Agreement. The City hereby grants Licensee, a non-exclusive license to use and occupy the right-of-way to erect, install, construct, replace, and maintain all necessary Equipment to provide Services to its Customers. Licensee's use of the right-of-way shall be subject to the laws of the State of Texas and the City's charter and laws as they exist now or may be amended from time to time, and subject to the conditions outlined in this Agreement. Licensee shall install its Equipment consistent with the City's Rights-of-Way Management Ordinance and Excavation Manual. Nothing in this Agreement shall be deemed to grant convey, create, or vest in Licensee a real property interest in land, including any fee, leasehold interest, or easement.

4. Termination. The City may terminate this Agreement if Licensee engages in an act or omission constituting a material breach of this Agreement. The City shall provide Licensee with written notice specifying the nature of the material breach. Licensee shall then have thirty (30) days from the date of the notice in which to remedy the breach and conform its conduct to the Agreement. If the breach is not remedied within thirty (30) days, the Agreement shall terminate one hundred and eighty (180) days from the date of the notice without further notice or demand. Licensee's joint trenching in, on or under the City's Right-of-Way with a third party who does not have lawful permission to excavate or use the City's Right-of-Way shall be considered a material breach.

5. License Fee. (a) The Licensee shall pay the City a license fee of three (3) percent of Gross revenues as set forth in this Agreement. That same license fee structure shall apply to any unincorporated areas that are annexed by the City after the effective date of this Agreement.

(b) The license fee payable under this section is to be paid quarterly, within forty-five (45) days after the end of the quarter for the preceding calendar quarter. Each payment shall be accompanied

AGREEMENT

by a summary explaining the basis for the calculation of the fee. The City may review the business records of the Licensee to the extent necessary to ensure compensation in accordance with Subsection (a), provided that the City may only review records that relate to the 48-month period preceding the date of the last license fee payment. The licensee's business records will be made available to the City for review electronically in a format acceptable to the City. If the City determines that Licensee is in violation of the above revenue requirements, the City shall have the right to hire auditors of its choosing to conduct the required audit and to have the Licensee pay for such audit. If, after the audit is conducted, it is determined that Licensee is in compliance with the Agreement, then the cost of the audit shall be borne by the City. Licensee may recommend the hiring of alternate auditors, but the final decision on the selection of auditors shall rest with the City.

- (c) Notwithstanding any other provision of this Agreement, the City shall have the right to audit the business records of the Licensee once every four (4) years; however, if the City discovers a discrepancy in an audit of the business records of the Licensee, the City may conduct annual audits until the discrepancy is resolved. Once the discrepancy is resolved, the City may audit the business records of the Licensee every four (4) years. The City may, in the event of a dispute concerning compensation under this section, bring an action in a court of competent jurisdiction.
- (d) The Licensee may recover from the Licensee's customers any fee imposed by this License Agreement, to the extent allowed by law.

6. Administration of License and Notices. (a) The Chief Information Officer or their designee is the principal City officer responsible for the administration of this License Agreement.

- (b) All notices shall be in writing and shall be delivered by certified mail return receipt requested or by overnight delivery that is capable of providing proof of delivery. Any such notice shall be deemed effective on the date of mailing. All notices shall be addressed to the Parties as specified below, or such other address as a Party may update in writing to the other Party from time to time. Until any such change is made, notices to the City shall be delivered as follows:

If to City: Director of Information Technology Services
 City of San Antonio
 P.O. Box 839966
 San Antonio, Texas 78283-3966
 (210) 207-6909

And

City Clerk's Office
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966
(210) 207-7253

Until any such change is made, notices to Licensee shall be delivered as follows:

AGREEMENT

Centric Fiber, LLC
Attention: General Counsel
61 Carlton Woods Dr., Building 1
Spring, Texas 77382

with a copy to: _____

7. **Waiver of Compliance.** Failure of a party to enforce or insist upon compliance with any term or condition of this Agreement or any breach thereof shall not constitute a waiver or relinquishment of such terms, conditions, or legal rights. None of the provisions of this Agreement may be waived or modified except in an amendment signed by Licensee and City.

8. **Assignment.** This Agreement shall not be assigned, transferred, sold, or disposed of, in whole or in part, by voluntary sale, merger, consolidation, or otherwise by force or involuntary sale, without the expressed written consent of the City, approved by passage of an ordinance. For the purposes of this Section, assignment, transfer, sale, disposal, merger, or consolidation shall exclude an assignment or transfer to entities that control, are controlled by, or are under common control with Licensee. Any such consent by the City shall not be unreasonably withheld, and City shall respond to any request for consent as promptly as reasonably possible.

9. **Severability.** In the event any term or provision of this Agreement is declared illegal, invalid, or unenforceable, then that provision shall be deemed to be deleted from this Agreement and have no force or effect and this Agreement shall thereafter continue in full force and effect, as so modified.

10. **Joint Work Product.** This Agreement is the joint work product of both Parties hereto, accordingly, in the event of ambiguity no presumption shall be imposed against any Party by reason of document preparation.

11. **Change in Law.** Notwithstanding anything contained in this Agreement to the contrary, in the event that this Agreement, in whole or in part, is declared or determined by a judicial, administrative or legislative authority exercising its jurisdiction to be excessive, unrecoverable, unenforceable, void, unlawful, or otherwise inapplicable, Licensee and the City shall meet and negotiate an amended Agreement that is in compliance with the authority's decision or enactment and, unless explicitly prohibited, the amended Agreement shall provide the City with a level of compensation comparable to that set forth in this Agreement. Should any new laws of general applicability be adopted that govern right-of-way use for the Services, such laws shall govern to the extent that they conflict with this Agreement.

12. **Governing Law.** (a) **VENUE OF ANY COURT ACTION BROUGHT DIRECTLY OR INDIRECTLY BY REASON OF THIS AGREEMENT SHALL BE IN BEXAR COUNTY, TEXAS. THE PROVISIONS OF THE AGREEMENT SHALL BE CONSTRUED UNDER, AND IN ACCORDANCE WITH, THE LAWS OF THE STATE OF TEXAS, AND ALL OBLIGATIONS OF THE PARTIES CREATED HEREUNDER SHALL BE PERFORMED IN BEXAR COUNTY, TEXAS.**

(b) This License Agreement shall be construed in accordance with the City Charter and Municipal Code(s) in effect on the date of passage of this License Agreement, and as may be subsequently amended, to the extent that such Charter and Code(s) are not in conflict with or in violation of the Constitution and laws of the United States or the State of Texas.

AGREEMENT

13. Amendment. Either Party shall have the right to request an amendment of this Agreement and this Agreement can be amended only by a writing signed by both Parties. In the event City requests amendments to the license fee, such license fee may be increased or decreased based on comparable licensing fees paid by Licensee in other Texas cities. The Parties may also agree to amend other substantive provisions of this Agreement. The City may determine, at its discretion, whether any contractual amendments must be approved by an ordinance of the City Council.

14. Non-Waiver of Rights. By entering this License Agreement, neither Licensor nor Licensee has waived any rights either Party may have under applicable state and federal law pertaining to municipal fees paid for use of the public right-of-way, or Licensor's management of the Licensee's activities in the right-of-way.

15. Entire Agreement. This Agreement contains the entire agreement between the Parties and supersedes all prior and contemporaneous communications, understandings, and agreements with respect to the subject matter hereof, whether written or oral, expressed, or implied. No other agreement, statement, promise or practice between the Parties relating to the Agreement shall be binding upon the Parties.

16. Counterparts. This Agreement may be executed in counterparts, each of which when executed and delivered shall be an original, but all of which shall constitute one and the same instrument. Electronic signatures shall be treated as originals.

17. Captions. The captions contained in this Agreement are for convenience of reference only and in no way limit or enlarge the terms and conditions of this Agreement.

Executed and Agreed to as of the dates indicated below.

THE CITY OF SAN ANTONIO

CENTRIC FIBER, LLC

By: _____

By: _____

Printed Name: _____

Printed Name: _____

Title: _____

Title: _____

Dated: _____

Dated: _____

APPROVED AS TO FORM:

City Attorney