

**AGREEMENT BETWEEN THE CITY OF MILPITAS
AND XO COMMUNICATIONS SERVICES, INC.,
FOR THE LEASE OF FIBER OPTIC CONDUIT**

This Agreement ("Agreement") dated this 1st day of July, 2011, is by and between the CITY OF MILPITAS (hereinafter "City") and XO COMMUNICATIONS SERVICES, INC., a Delaware Corporation (hereinafter "XO"). City and XO may hereinafter be referred to as "Party" or together as "Parties."

RECITALS

- A. XO has received Certificates of Public Convenience and Necessity to operate as a telephone corporation to provide local exchange services from the Public Utilities Commission of the State of California; and
- B. XO has entered into an encroachment agreement dated October 21, 1997 with City for the installation of Fiber Optic Network Facilities within the public right-of-way of City, and XO has entered into two previous lease agreements, the First Agreement and Second Agreement, both dated November 6, 1998, and a Letter Agreement dated May 27, 1999 for the lease of City owned conduit; and
- C. Pursuant to the First Agreement dated November 6, 1998, XO leased four (4) 1.25 inch high density polyethylene (HDPE) conduits, pull vaults, and splice vaults in two sections:
 - i. First section beginning at the intersection of Curtis Avenue and South Main Street, under the railroad tracks along Curtis Avenue to the intersection of Curtis Avenue and Hammond Way, approximately 344 feet per conduit, totaling 1,376 linear feet,
 - ii. Second section beginning at the end of Curtis Avenue, under the railroad tracks to the intersection of Gibraltar Drive and Gibraltar Court, approximately 764 feet per conduit, totaling 3,056 linear feet,both as described in Exhibit A; and
- D. Pursuant to the Second Agreement dated November 6, 1998, XO leased two (2) 1.25 inch PVC conduits from the intersection of Curtis Avenue and Abel Street, along Abel Street, Serra Way and Main Street to the intersection of Main Street and Carlo Street for a length of 4932 feet, for a total length of 9864 linear feet as described in Exhibit B; and
- E. Pursuant to the Letter Agreement Part 1 dated May 27, 1999, XO leased one (1) 4.0 inch conduit from the intersection of Thompson Street and Great Mall Parkway, over crossing Interstate 880 on the north side of the Tasman Bridge to a vault on the embankment immediately west of Interstate 880 at Barber Lane, for approximately 986 linear feet as described in Exhibit C; and
- F. Pursuant to the Letter Agreement Part 2 dated May 27, 1999, XO leased two (2) 1.25 inch PVC conduits beginning at the vault on the embankment on the north side of Tasman Drive at Barber Lane, along Tasman Drive to the intersection of McCarthy Boulevard and Tasman

Drive, of the approximate length of 2451 feet, totaling 4902 linear feet as described in Exhibit D; and

- G. XO intends to lease to City one (1) 1.25 inch HDPE conduit beginning at its box number SB 02-025 west of Gibraltar Dr. next to Gibraltar Ct., continuing for 150 linear feet to its box number SB 02-024 south of Yosemite Dr. at Gibraltar Ct., and continuing for 583 linear feet to its box number SB 02-023 west of S. Milpitas Blvd. at Yosemite Dr., totaling 733 linear feet, in order to provide a connection path between City boxes 53 and 54 as described in Exhibit F; and
- H. XO desires to renew and consolidate the lease Agreements referenced above and incorporate all work performed pursuant to the above-mentioned Agreements, the Letter Agreement referenced above and all previous work performed by either party in association with the Party's relationship (hereinafter collectively referred to as the "Lease") in order to facilitate the operation of its Fiber Optic Network Facilities.

NOW, THEREFORE, in consideration of the recitals and the mutual promises contained herein, City and XO agree as follows:

AGREEMENT

1 LEASE OF CITY CONDUIT TO XO

- a) Lease of Conduit. City hereby agrees to lease to XO the conduit described in Recitals C, D, E and F and further described in Exhibits A, B, C and D (hereinafter "Leased Conduit").
- b) Term. The term of this lease shall be thirty (30) years from the date of this Agreement ("Term").
- c) Rent. The combined value of accrued unpaid lease payments under existing agreements and present value of the Leased Conduit as described in Exhibit E, is calculated to be \$180,444.65 as per Exhibit E. In lieu of monetary rental payments, XO shall provide to the City the following:

- i) On or before September 30, 2011

(1) Gibraltar Reservoir and Pump Station:

(see Exhibit F "Gibraltar Reservoir and Pump Station" map and details)

- (a) Use of one (1) additional 1.25 inch (or larger) conduit between existing City pull box 53 at Gibraltar Drive and Gibraltar Court and pull box 54 at South Milpitas Boulevard and Gibraltar Drive. See lease provision in Recital C and credit given in Exhibit E.
- (b) Removal and return to the City of existing spare non-terminated 24 strand multi-mode fiber cable in City-owned conduit between box 57 at the Gibraltar

Reservoir and Pump Station and box 59 at Gibraltar Court and Gibraltar Drive as described in Exhibit F.

- (c) Installation of City-provided 24 strand single mode fiber cable from box 57 at the Gibraltar Pump Station to Box 54 at South Milpitas Boulevard and Gibraltar Drive through City-owned and vacant conduit between boxes 57, 58, 59 and 53 and then via the conduit described in paragraph 1(c)(i)(1)(a) to City pull box 54 at South Milpitas Boulevard and Gibraltar Drive.
 - (d) Terminate 24 stands of cable installed at Gibraltar Pump Station and splice 24 strands into existing 96 strand NextLink single mode fiber cable at box 54 at South Milpitas Boulevard and Gibraltar Drive
- (2) Communications Enhancement Project – Phase 2:**
(see Exhibit G “Communications Enhancement Project – Phase 2” maps and details)
- (a) **Removal of old cable:** Open splice enclosure in existing City box 1 and disconnect existing splices of 24 SM COMMSCOPE cable. Leave opposing strands open and re-seal enclosure. Disconnect terminations of 24 SM BICCGENERAL cable at City Hall and pull back/remove cable from City Hall premises. Remove entire remaining 24 SM COMMSCOPE/BICCGENERAL cable from existing City conduit between boxes 1 and 51 (17 boxes total).
 - (b) **Upgrade of existing pull boxes:** Box locations 3, 5, 7, 9, 22, 18, 15 and 51 (8 boxes total) are to be replaced with Christy N48 standard boxes with split Fibrelyte lids or equivalent.
 - (c) **New cable:** Provide and install new 144 SM cable of approximately 8,500 feet length between Police/Public Works Data Center and City Hall. Route cable through existing conduit from Data Center Police/Public Works Building through box 26 to box 30, then through existing vacant conduit via boxes 30, 31, 32, 33, 35, 1, 2, 3, 4, 5, 6, 7, 8, 9, 22, 18, 17, 16, 15, 45 and 51 to City Hall main telecommunications closet 1E.
 - (d) **Terminate new cable:** Provide parts and labor to install termination enclosures per City specifications. Terminate strands 1-120 at Police/Public Works Building. Terminate strands 1-96 at City Hall.
 - (e) **Splice new cable:** At Police/Public Works Building, splice strands 121-144 of new cable to strands 73-96 of existing 96 SM cable continuing to the City’s Traffic Management Center. At City Hall, splice strands 97-144 of new cable to strands 49-96 of existing 96 SM cable continuing to Fire Station 1.
 - (f) **Testing:** Provide complete OTDR test results for newly installed cable.
 - (g) **Drawings:** Provide as built drawing for all work done under this Agreement.

ii) Remaining Lease Value:

The Parties agree that the value of the work performed under Section 1 of this Agreement is \$107,750.00. Thus, the remaining lease value shall be \$72,694.65. In lieu of the remaining amount of lease value after completion of the work performed under Section 1 (c) (i) of this Agreement, XO will provide additional parts, labor, and/or services for projects to be specified by the City at a future date not later than December 31, 2012 and to be completed within 12 twelve months of such notification. After December 31, 2013, or when work equivalent to the total lease value has been provided, XO will have no further compensation obligations under this Section. All work performed to reduce the remaining lease value should be priced at or below fair market value. The City may either accept XO's engineering estimates or, at its own cost, determine such value using a public bid process. XO may then, at its own choice, either perform the work at the rate presented by the lowest responsive bidder, or reimburse the City for costs paid to the lowest responsive bidder for performing the work. If XO pays the City for the lowest responsive bidder to do the work, once the compensation required by this Section 1(c)(i) is paid, XO shall have no further obligations or responsibilities with respect to compensation under this Agreement under this Section. In no event and notwithstanding any provision to the contrary in this Agreement, XO shall not be responsible for any work done by any such lowest responsive bidder(s) or any entity other than XO and XO's contractors and subcontractors.

- d) Renewal of Lease. At the end of the Term, unless the City has otherwise provided 30 days written notice of termination to XO, the City shall renew this Agreement for subsequent one year terms ("Renewal Term") at the conduit lease rate of \$1 per foot per year, subject to the conditions set forth in Section I.
- e) Sublease. XO may sublease the Leased Conduit subject to the prior written approval of the City.
- f) Maintenance and Use. XO and its sublessees, if any, shall be responsible for all maintenance of the Leased Conduit. All installations and all maintenance work on the New Cable and Leased Conduit shall be performed in a workmanlike manner without unreasonably interfering with the City's use of its conduit and cable. The Leased Conduit is intended for fiber optic cabling and associated electronics. Each Party agrees it will use and maintain its conduit, fiber optics, and associated electronics in a manner that will not in any way interfere with the other Party's use of its fiber optic cable and associated electronics. XO is responsible to obtain the necessary property rights for any new construction and will retain ownership of any new conduit or facilities constructed as part of this Agreement, other than the fiber optic cabling and conduit upgrades in Section 1 (c), which shall become the property of the City and the City shall be responsible for their repair and maintenance.
- g) Damage or Destruction of Conduit. In the event of damage or destruction of the Leased Conduit, this lease may be terminated by either Party on written notice to the other without penalty.

- h) Liens. XO shall keep the Leased Conduit free and clear from any and all liens, claims, and demands for work performed, materials furnished, or operations conducted on said Leased Conduit at the instance and request of XO.
- i) Expiration and Termination. If XO terminates the Agreement at the expiration or earlier termination of the Term or Renewal Term, XO shall surrender to City possession of the Leased Conduit. If XO fails to surrender the Leased Conduit at the expiration or sooner termination of the Term as provided by Section 1 (d) to this Agreement, above, XO shall be liable to the City for all damages and expenses resulting from the delay or failure to surrender, including but not limited to fair market rental value of the Leased Conduit, attorney's fees, and costs.
- j) Right of Inspection. City shall have the right to inspect the Leased Conduit during the Term.

2 INSURANCE REQUIREMENTS XO shall procure and maintain for the duration of the Term "occurrence coverage" insurance against claims against XO, its agents, representatives, employees or subcontractors for injuries to persons or damages to property which may arise from or in connection with the Leased Conduit.

(1) Minimum Scope of Insurance. Coverage shall be at least as broad as:

- (a) Insurance Services Office Form CG 0001 covering Commercial General Liability on an "occurrence" basis.
- (b) Insurance Services Office Form Number CA 0001 covering Automobile Liability, Code 1 (any auto), or Code 8 (hired) and 9 (non-owned) if Contractor has no owned autos.
- (c) Workers' Compensation insurance as required by the State of California and Employer's Liability Insurance.

(2) Minimum Limits of Insurance. XO shall maintain limits no less than:

- (a) **General Liability:** (Including products-completed operations, personal & advertising injury)
- (b) **\$1,000,000** per occurrence for bodily injury, personal injury and property damage. If Commercial General Liability insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit.
- (c) **Automobile Liability: \$1,000,000** per accident for bodily injury and property damage.
- (d) **Employer's Liability: \$1,000,000** per accident for bodily injury or disease.

- (3) Deductibles and Self-Insured Retentions. Any deductibles or self-insured retentions must be declared to and approved by the City. At the option of the City, either the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the City, its officers, officials and employees; or XO shall procure a bond guaranteeing payment of losses and related investigations, claim administration and defense expenses.
- (4) Other Insurance Provisions. The policies are to contain, or be endorsed to contain, the following provisions:
- (a) General Liability and Automobile Liability Coverages.
- (i) The City, its officers, elected officials, employees and volunteers are to be covered as insureds as respects: liability arising out of activities performed by or on behalf of XO; products and completed operations of XO, premises owned, occupied or used by XO, or automobiles owned, leased, hired or borrowed by XO. The coverage shall contain no special limitations on the scope of the protection afforded to the City, its officers, officials, employees or volunteers.
- (ii) XO's insurance coverage shall be primary insurance as respects the City, its officers, officials, employees and volunteers. Any insurance or self-insurance maintained by the City, its officers, officials, employees or volunteers shall be excess of the XO's insurance and shall not contribute with it.
- (iii) Any failure to comply with reporting provisions of the policies shall not affect coverage provided to the City, its officers, officials, employees or volunteers.
- (iv) XO's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.
- (b) Employers Liability Coverage.
- (i) The insurer shall agree to waive all rights of subrogation against the City, its officers, officials, employees and volunteers for losses arising from this Agreement.
- (ii) Each insurance policy required by this clause shall be endorsed to state that coverage shall not be suspended, voided, canceled by either Party, or reduced in coverage or in limits except after thirty (30) days' prior written notice by certified mail, return receipt requested, has been given to the City.
- (5) All Coverages shall contain the following provisions:

- (a) The Insurance Company agrees to **waive all rights of subrogation** against the City, its elected or appointed officers, elected officials, agents and employees for losses paid under the terms of any policy which arise from this Lease Agreement. This provision also applies to the Contractor's Workers' Compensation policy.
- (b) Acceptability of Insurers. Insurance is to be placed with insurers with a current A.M. Best's rating of no less than A:VII, unless otherwise acceptable to the City.
- (c) Verification of Coverage. XO shall furnish City with certificates of insurance and with original endorsements effecting coverage required by this clause. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf. The certificates and endorsements are to be received and approved by the City before this lease commences. The City reserves the right to require complete, certified copies of all required insurance policies, at any time.
- (d) Subcontractors. XO shall include all subcontractors as insureds under its policies or shall furnish separate certificates and endorsements for each subcontractor. All coverages for subcontractor shall be subject to all of the requirements stated herein.
- (e) Waiver of Subrogation. XO hereby grants to City a waiver of any right to subrogation which any insurer of said Contractor may acquire against the City by virtue of the payment of any loss under such insurance. This provision applies regardless of whether or not the City has requested or received a waiver of subrogation endorsement from the insurer.

3 MISCELLANEOUS PROVISIONS

- a) Assignment. This Agreement shall not be assignable by XO, without the prior written approval of City, which approval shall not be unreasonably withheld, conditioned, or delayed; provided, however, that XO may assign the rights granted hereunder to a parent, affiliate, or successor of XO, now or hereafter existing, by only providing notice to City of such assignment.
- b) Integration. This Agreement contains the entire understanding between the Parties with respect to the subject matter herein. All previous agreements are superceded by this Agreement. There are no representations, agreements, or understandings (whether oral or written) between or among the Parties relating to the subject matter of this Agreement which are not fully expressed herein. This Agreement may not be amended except pursuant to a written instrument signed by all Parties.
- c) Third Party Modification. This Agreement shall be subject to such changes or modifications as may be required or authorized by a governmental regulatory commission in the exercise of its lawful jurisdiction.

- d) Notice. All notice given or which may be given pursuant to this Agreement shall be in writing and transmitted by United States mail or by private delivery systems or by facsimile if followed by United States mail or by private delivery systems, as follows:
- (a) To City at:
City Manager
City of Milpitas
1265 N. Milpitas Boulevard
Milpitas, CA 95035
 - (b) To XO at:
Director, Regulatory Contracts
XO Communications
13865 Sunrise Valley Drive
Herndon, VA 20171
 - (c) With a copy to:
Barbara Arron
XO Communications
1000 Denny Way, Suite 200
Seattle, WA 98109
- e) Indemnification and Hold Harmless. XO shall indemnify, defend, and hold harmless the City and its officials, officers, employees, agents, contractors, consultants, and volunteers from and against any and all losses, liability, claims, suits, actions, damages, and causes of action, including but not limited to those for personal injury, bodily injury, loss of life, or damage to property, or any violation of any federal, state, or municipal law or ordinance, arising from any acts or omissions of XO or its employees, subcontractors, or agents under this Lease Agreement. The foregoing obligation of XO shall not apply when the injury, loss of life, damage to property, or violation of law arises solely from the negligence or willful misconduct of the City or its officers, employees, agents, contractors, consultants, or volunteers. For purposes of Section 2782 of the Civil Code, the Parties hereto recognize and agree that this Agreement is not a construction contract. For purposes of Section 2782.8 of the Civil Code, the Parties hereto recognize and agree that this Agreement is not for design professional services. Notwithstanding any provision of this Agreement, neither Party shall be liable to the other Party for any special, indirect, incidental, punitive or consequential damages, or damages for lost revenue or lost profits, whether foreseeable or not, arising out of or in connection with this Agreement or the performance or breach hereof.
- f) No Joint Ventures. It is agreed that nothing contained in this Agreement shall be deemed or construed as creating a partnership or joint venture between City and XO or any other party. Neither City nor XO shall have authority to bind the other or to act as an agent for the other unless written authority, separate from this Agreement, is provided. The Parties do not intend this Agreement to create a partnership, joint venture, joint enterprise, or any

business relationship other than that of lessor and lessee as contemplated in Section 1 of this Agreement.

- g) Applicable Law. This Agreement shall be construed and interpreted in accordance with the laws of the State of California except as otherwise expressly provided herein, or as otherwise required by applicable law from time to time during the Term. Any legal action arising out of this Agreement shall be brought in Santa Clara County Superior Court or the United States District Court, Northern District of California.
- h) No Benefit to Third Parties. Nothing herein shall be construed to be for the benefit of third parties, unless otherwise approved in writing by both Parties.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed in duplicate on the date and year first written herein.

CITY OF MILPITAS

Date

Thomas C. Williams, City Manager

ATTEST:

APPROVED AS TO FORM:

Mary Lavelle, City Clerk

Michael J. Ogaz, City Attorney

XO COMMUNICATIONS SERVICES, INC.

Date

Joseph StClair, VP Operations