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RD:EK
6/13/2018

**FIRST AMENDMENT TO
MASTER NON-EXCLUSIVE INSTALLATION AND PROPERTY USE AGREEMENT
BETWEEN
THE CITY OF SAN JOSE
AND**

This FIRST AMENDMENT TO MASTER NON-EXCLUSIVE INSTALLATION AND PROPERTY USE AGREEMENT (“FIRST AMENDMENT”) is entered into this ____ day of _____, 2018 (“FIRST AMENDMENT EFFECTIVE DATE”), by the CITY OF SAN JOSE (“CITY”), a municipal corporation, and (“COMPANY”).

RECITALS

WHEREAS, on September 27, 2016, CITY and COMPANY entered into an agreement entitled “Master Non-Exclusive Installation and Property Use Agreement” (“MASTER AGREEMENT”) to install small cell equipment on CITY-owned property; and

WHEREAS, by separate agreement, the CITY and COMPANY desire to enter into a “Funding and Reimbursement Agreement” to streamline CITY’s permitting processes for approximately 140 small cells, to further the CITY’s goals for broadband deployment equity, digital inclusion, and to provide for payments to be made by COMPANY in connection therewith; and

WHEREAS, in conjunction with execution of a “Funding and Reimbursement Agreement,” CITY and COMPANY desire to amend the MASTER AGREEMENT to modify and update certain sections and exhibits of the MASTER AGREEMENT pertaining to USAGE FEES, termination, notice addresses, and the Form Site License Agreement (“SLA”).

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NOW, THEREFORE, the parties agree to amend the MASTER AGREEMENT as follows:

SECTION 1. RECITAL B of the MASTER AGREEMENT is deleted and replaced in its entirety as follows:

B. **WHEREAS**, COMPANY desires to construct and install, at no cost to CITY, certain small-scale wireless equipment and appurtenant structures of an aesthetic design approved by CITY on a PROPERTY for the purpose of enabling COMPANY's third party wireless carrier customers to provide services consisting of radio and wireless transmission for use by handheld wireless telephones, tablets, mobile computers, global positioning devices and other devices that use a wireless signal for the public (collectively, "SERVICES"), and CITY desires to allow the SERVICES in accordance with the terms and conditions contained herein; and

SECTION 2. RECITAL E of the MASTER AGREEMENT is deleted and replaced in its entirety as follows:

E. **WHEREAS**, this MASTER AGREEMENT and any SLA entered into in connection with MASTER AGREEMENT shall only be used for and apply to small-scale antenna facility configurations of an aesthetic design as approved by CITY; and

SECTION 3. RECITAL F of the MASTER AGREEMENT is deleted and replaced in its entirety as follows:

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F. **WHEREAS**, this MASTER AGREEMENT and any SLA entered into in connection with MASTER AGREEMENT shall not be used for antenna facility configurations and aesthetic designs not approved by CITY; and

SECTION 4. RECITAL G of the MASTER AGREEMENT is deleted and replaced in its entirety as follows:

G. **WHEREAS**, prior to entering into an SLA for an agreed upon LICENSED AREA, CITY and COMPANY shall agree upon the aesthetic design of the antenna facility configurations and associated equipment used within any given LICENSED AREA; and

SECTION 5. SECTION 1.A of the MASTER AGREEMENT is deleted and replaced in its entirety as follows:

A. Right to Use.

CITY hereby grants company the non-exclusive right to use the LICENSED AREA described in each separate SLA executed by the CITY and COMPANY, for the purpose of installing, maintaining and operating an ANTENNA FACILITY for the sole purpose of allowing COMPANY to provide SERVICES approved in each SLA and for no other purpose. Any ANTENNA FACILITY installed and operated in any LICENSED AREA licensed to COMPANY pursuant to this MASTER AGREEMENT shall be in an aesthetic design as approved by the CITY.

SECTION 6. SECTION 3 of the MASTER AGREEMENT is deleted and replaced in its entirety as follows:

SECTION 3. USAGE FEE

A. Charge and Payment.

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COMPANY shall pay an annual fee (“USAGE FEE”) in the amount of \$1,500.00 for each LICENSED AREA at which COMPANY installs ANTENNA FACILITIES, subject to adjustment as provided below. Where CITY approves COMPANY’s plans for a particular small cell site showing the use of CITY’s infrastructure and/or electrical circuits, the USAGE FEE shall include such use.

The initial payment of the USAGE FEE shall be due and payable within 30 days following SLA Effective Date and shall be prorated for the number of months remaining until June 30 of the year. Thereafter, the USAGE FEE for each LICENSED AREA shall be due and payable in full, without offset, and in advance on July 1st of each year to coincide with the CITY’s fiscal year. COMPANY shall make all payments to CITY at the address below or such other address as CITY may designate upon no less than ten (10) business days advance notice:

City of San José
Office of Economic Development
200 E. Santa Clara Street, 17th Floor
San José, CA 95113

B. Adjustment of USAGE FEE.

Following the fifth year of each individual SLA INITIAL TERM, the USAGE FEE for the ANTENNA FACILITY at the LICENSED AREA shall automatically increase by three percent (3%) annually as set forth in **EXHIBIT “B.”**

CITY hereby represents and warrants that as of the date hereof, that no USAGE FEES have been or are currently offered to any other entity with respect to ANTENNA FACILITIES that is or will be more favorable to such

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entity than those contained herein. If the CITY agrees to a USAGE FEE that is more favorable than those imposed on COMPANY under this MASTER AGREEMENT, then the CITY shall make the more favorable USAGE FEE available to COMPANY pursuant to an amendment to this MASTER AGREEMENT or for any future agreement under the same terms and conditions that were used to derive the more favorable USAGE FEE.

SECTION 7. A new subsection is added to the end of SECTION 7 of the MASTER AGREEMENT as follows:

E. COMPANY Termination of Individual SLA.

COMPANY shall have the right to terminate any SLA upon ninety (90) days' prior written notice to CITY. In the event of the early termination of any individual SLA by COMPANY, COMPANY shall not be entitled to any reimbursement of the applicable USAGE FEE. Removal of the applicable ANTENNA FACILITY following termination of an SLA by COMPANY shall be completed pursuant to **SECTION 7.C** above.

SECTION 8. A new subsection is added to SECTION 9 of the MASTER AGREEMENT as follows:

F. Upon CITY's approval of a reservation for a proposed LICENSED AREA, COMPANY shall submit an applicable permit application for such proposed LICENSED AREA within one hundred twenty (120) days of the date the reservation was approved. If COMPANY fails to submit an applicable permit application for such proposed LICENSED AREA within one hundred twenty (120) days of the date the reservation was approved, CITY may automatically terminate COMPANY's reservation of the proposed LICENSED AREA upon written notice to COMPANY.

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SECTION 9. COMPANY's notice information in SECTION 16 of the MASTER AGREEMENT is updated and modified as follows:

To COMPANY:

With a copy to:

SECTION 10. A new section, SECTION 29, Change of Law, is added to the MASTER AGREEMENT as follows:

SECTION 29. CHANGE OF LAW

During the initial term of the MASTER AGREEMENT and any SLA, the enactment or modification of any applicable state or federal statute or the promulgation of rules or regulations thereunder will not preempt or impact any terms of said MASTER AGREEMENT and any SLA unless otherwise agreed to in writing by the parties.

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SECTION 11. EXHIBIT A, “FORM SITE LICENSE AGREEMENT” in the MASTER AGREEMENT is amended to read as shown in a REVISED EXHIBIT A, attached and incorporated into this FIRST AMENDMENT.

SECTION 12. EXHIBIT B, “USAGE FEE SCHEDULE” in the MASTER AGREEMENT is amended to read as shown in a REVISED EXHIBIT B, attached and incorporated into this FIRST AMENDMENT.

SECTION 13. Any SLAs issued by the CITY before the FIRST AMENDMENT EFFECTIVE DATE shall be modified to conform with this FIRST AMENDMENT.

SECTION 14. CITY intends and shall use good faith efforts to evaluate and consider modifying the MASTER AGREEMENT in a subsequent amendment beyond this FIRST AMENDMENT to include annual small cell USAGE FEE discounts for volume batching of permits and commitments for substantial progress on an equitable and inclusive broadband deployment. These discounts may result in ongoing annual small cell USAGE FEES of approximately \$1,500.00 or lower.

SECTION 15. Capitalized words and phrases in this FIRST AMENDMENT not otherwise defined shall have the meaning given to those terms in the MASTER AGREEMENT.

SECTION 16. All of the terms and conditions of the MASTER AGREEMENT not specifically modified by this FIRST AMENDMENT shall remain in full force and effect. In the event of a conflict between the terms of the MASTER AGREEMENT and the terms of this FIRST AGREEMENT, the terms of this FIRST AGREEMENT shall govern and control.

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SECTION 17. This FIRST AMENDMENT shall be governed by and construed in accordance with the laws of the State of California, without regard to its conflict-of-laws principles.

SECTION 18. If any provision of this FIRST AMENDMENT shall be determined to be invalid by any court of competent jurisdiction, the remaining portions of this FIRST AMENDMENT shall remain in full force and effect.

SECTION 19. This FIRST AMENDMENT may be executed in any number of counterparts, each of which shall be deemed an original, but all of which when taken together shall constitute one and the same instrument. The persons executing this FIRST AMENDMENT are duly authorized to execute this FIRST AMENDMENT in their individual or representative capacity as indicated.

[Remainder of page intentionally left blank; signature page to follow.]

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WITNESS THE EXECUTION HEREOF on the day and year first written above.

“CITY”

APPROVED AS TO FORM:

CITY OF SAN JOSE, a municipal corporation

Elizabeth Klotz
Senior Deputy City Attorney

By _____
LELAND WILCOX
Chief of Staff, Office of the City
Manager

“COMPANY”

By: _____
Print Name: _____
Title: _____
Date: _____, 2018

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REVISED EXHIBIT A

FORM SITE LICENSE AGREEMENT

This Site License Agreement (the "SLA") is made this _____ day of _____, 20____ by and between the CITY OF SAN JOSE, a municipal corporation ("CITY"), and _____, a _____, ("COMPANY") pursuant to that certain MASTER AGREEMENT dated _____ 20____ between the parties (the "MASTER AGREEMENT").

All of the terms and conditions of the Master Agreement are incorporated herein by reference and made a part hereof without the necessity of repeating or attaching the Master Agreement. In the event of any contradiction, modification or inconsistency between the terms of the Master Agreement and this SLA, the terms of this SLA shall prevail. Capitalized terms used in this SLA shall have the same meaning described for them in the Master Agreement unless otherwise indicated herein.

Company Name: _____

Company Site ID: _____

Site Location (Address or Intersection): _____

APN: _____

Location Description and Maps: See Attachment A-1 _____

Construction Drawing: See Attachment A-2 _____

Equipment List for ANTENNA FACILITY: See Attachment A-3 _____

Equipment Category: _____

CITY Contact Information:

City of San José
200 E. Santa Clara Street 17th Floor
San José, CA 95113
(408) 973-5508
cityownedproperties@sanjoseca.gov

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COMPANY Contact Information: _____

Certificate of Insurance: See Attachment A-4

CITY

COMPANY

By: _____

By: _____

Name: _____

Name: _____

Title: _____

Title: _____

Date: _____

Date: _____

For City Use Only

SLA Effective Date: _____ Initial Payment Amount Due: _____

Additional Provisions: _____

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Attachment A-1

LOCATION DESCRIPTION AND MAPS

[Insert location description, parcel map, and aerial map here]

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Attachment A-2

CONSTRUCTION DRAWING

[Insert construction drawing here]

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Attachment A-3

EQUIPMENT LIST FOR ANTENNA FACILITY

[Insert equipment for antenna facility list here]

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Attachment A-4

CERTIFICATE OF INSURANCE

[attach copy]

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REVISED EXHIBIT B

USAGE FEE SCHEDULE

Pursuant to Section 3 of this MASTER AGREEMENT and consistent with City's Usage Fee Schedule, the USAGE FEE for the first 15 years of each SLA shall be as follows:

Year 1:	\$1,500.00
Year 2:	\$1,500.00
Year 3:	\$1,500.00
Year 4:	\$1,500.00
Year 5:	\$1,500.00
Year 6:	\$1,545.00
Year 7:	\$1,591.35
Year 8:	\$1,639.09
Year 9:	\$1,688.26
Year 10:	\$1,738.91
Year 11:	\$1,791.08
Year 12:	\$1,844.81
Year 13:	\$1,900.15
Year 14:	\$1,957.15
Year 15:	\$2,015.86