

CONDUIT LEASE AGREEMENT

THIS CONDUIT LEASE AGREEMENT (“Agreement”) is entered into on _____,
2010

Between

Great Lakes Comnet, Inc., (Lessee) a Michigan Corporation whose address is
1515 Turf Lane Ste 100, East Lansing, MI 48823.

And

City of Battle Creek, (Lessor) a Michigan municipal corporation, whose address is
10 N. Division St., Battle Creek, MI 49017

RECITALS:

- I. The City of Battle Creek possesses a certain amount of conduit facility capacity, a portion of which is currently available to be leased; and,
- II. Lessee desires to lease a portion of such currently available conduit facility capacity.
- III. Both Parties desire to make an “in kind” exchange to accomplish this Lease of conduit facility capacity whereby Lessor makes certain conduit space available to Lessee in exchange for Lessee giving six optical fibers to Lessor under the terms and conditions as set forth below.

AGREEMENT:

NOW, THEREFORE, in consideration of the foregoing and the mutual promises contained herein, the Lessor and Lessee agree as follows:

1. FACILITIES TO BE LEASED

- 1.1 General. The Lessor leases to Lessee one of four 3” city owned conduits (the “Leased Facilities” or “Facilities”) along what is commonly known as the Emmett Street Overpass in exchange for Lessee providing an “in kind” lease for 6 fiber optic strands in a route approximating 3.7 miles and which is more particularly described in Exhibit A.
- 1.2 Non-Exclusive Lease of Leased Facilities. The Lessor reserves the right to offer the remaining 3 conduits space not leased to Lessee to other persons on such terms and conditions as Lessor, in its sole discretion, may deem appropriate. Either party may discontinue, upon reasonable notice to the other party, the other party’s use of their respective Leased Facilities if the continuance the other

party's use would cause a likelihood of damage to other party's respective facilities, create hazards to other party's employees or the public, or impair the privacy or security of party's services.

- 1.3 Connection Facilities. Lessee shall not connect to or with Lessor's network unless otherwise agreed to in writing by Lessor.

2. TERM OF LEASE

The term of this Lease shall be 10 years, except as provided below, commencing on the date of the last signature. In addition, either party shall have the right to extend this Lease for two (2) additional 10 year periods with the commencement date for such renewal term being the same as the expiration date for the initial term. Notwithstanding the forgoing, the Lease shall terminate when one or more of the six optic fibers provided to Lessor under this Lease Agreement are no longer functional, as determined by Lessor. It is the intent of the parties that this Lease last only so long as the Lessor has the benefit of six (6) working strands of fiber optic cable, or an equivalent agreed to by Lessor. When Lessor no longer has the benefit of six working strands of fiber optic cables, then this lease agreement shall terminate, after notice and an opportunity to cure as provided in paragraph 7.

3. USE OF LEASED FACILITIES BY LESSEE.

- 3.1 Lessee shall use the Leased Conduit in accordance with applicable federal, state, and local laws and solely for the purpose of installing telecommunications fiber optic cable and undertaking any maintenance, repair and replacement of such fiber optic cable.
- 3.2 Lessee represents and warrants that it has all consents and authorizations necessary for Lessee to enter into this Agreement and use the Leased Conduit as provided herein.
- 3.3 Lessee of Conduit may contract with qualified subcontractors for the performance of any installation, maintenance, and repair services contemplated by this Lease Agreement, but shall remain ultimately responsible for the performance of such services in accordance with the requirements of this Lease Agreement regardless of whether such services were by Lessee or its designated subcontractors.

4. DISCLAIMER OF WARRANTIES.

- 4.1 The Facilities are leased in an "as is" condition. The Lessor is not aware of any damage to the Leased Facilities; however, under no circumstances whatsoever shall the Lessor be held liable for the repair or replacement of any damage discovered by Lessee during its preparation of, or use of, the Leased Facilities. If Lessee in any way damages the conduit or any equipment belonging to or

managed by the Lessor, Lessee shall be responsible for causing any such damage to be repaired at Lessee's cost and at no cost to the Lessor.

4.2 EXCEPT AS SET FORTH IN THIS AGREEMENT, LESSOR MAKES NO WARRANTY OR REPRESENTATION, EXPRESS OR IMPLIED, WITH RESPECT TO ANY MATTER WHATSOEVER, INCLUDING, WITHOUT LIMITATION, THE LEASED FACILITIES OR THE CAPABILITIES, CHARACTERISTICS, AVAILABILITY OR USE THEREOF, OR ANY SERVICES PERFORMED BY LESSOR OR ITS AGENTS IN CONNECTION THEREWITH. LESSOR SPECIFICALLY DISCLAIMS, AND LESSEE HEREBY WAIVES, ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND ANY WARRANTY ARISING FROM USAGE OF TRADE OR COURSE OF DEALING.

5. CONSIDERATION FOR LEASED FACILITIES

In consideration of Lessor leasing to Lessee and Lessee leasing from Lessor:

5.1 Lessee shall, without charge to Lessor:

5.1.1 Provide to Lessor, exclusive use of six (6) strands of fiber optic filaments within the cable located in Conduit and on the aerial strand and placed along the route shown in Exhibit B. Even if Lessee has discontinued its use of the Conduits, it shall not remove the aforementioned six (6) strands of fiber optic filaments nor shall Lessee interfere with Lessor's use of such fiber optic filaments, provided City has not breached the terms of the Lease Agreement.

5.1.2 Install (3) 1¼" HDPE High Density Polyethylene conduit in one of the spare 4: city owned conduits (Leased Facilities), in accordance with industry standards.

5.1.3 Install Lessor's six strands of optical fiber within the HDPE High Density Polyethylene conduit installed by Lessee as provided above, in accordance with industry standards and in a manner that it is easily identifiable and distinguishable from Lessee's other installed fiber.

5.1.4 Provide maintenance and repair of the Lessor's optical fibers and the innerduct as determined to be necessary by Lessor. Maintenance of the Lessor's optical fibers includes the same required movement or relocation as for Lessee's other installed fiber.

5.1.5 Provide at least seventy-two hours notice of any repairs, maintenance, or other work that may interrupt functionality of Lessor's network, except where such repairs or other work are necessitated by an emergency due to acts of nature.

5.1.6 Provide Lessor reasonable technical assistance in furtherance of efforts to light the optical fibers provided to Lessor.

5.1.7 Provide Lessor with at least two access points to Lessor's optic fibers, such access points to be at locations specified by Lessor and indicated by the black dots on attached Exhibit B.. An access point shall consist, at a minimum, of a vault separated from Lessee's other installed fiber containing the Lessor's terminated fibers and an adequate splice case for all fibers.

5.1.8 Provide such assistance to Lessor in obtaining access to the Lessor's fibers for any purpose the Lessor needs access, after notice to Lessee.

5.1.9 Comply with all applicable local, state, and federal laws and regulations in the installation, maintenance and operation Lessor's and Lessee's fiber as provided in this Agreement.

5.1.10 Not later than 30 days after construction and installation of the fiber optic cables, provide Lessor a contact person for access, repairs, and maintenance as provided in this Agreement.

5.2 Lessor shall, without charge to Lessee:

5.2.1 Provide routine maintenance and repair of the Conduit unless such need for repair is caused by Lessee or its subcontractors.

5.2.2 Accept and take control of the Lessor-owned optic fiber and access points provided to Lessor by Lessee.

5.2.3 Provide Lessee a contact person for access, repairs and maintenance as provided in this Agreement.

6. USE OF FIBER OPTIC BY LESSOR

The parties acknowledge and agree that once placed, the Lessor may use the optic fiber and innerducts it owns under this agreement for any lawful purpose.

7. TERMINATION; BREACH; AND ABANDONMENT.

7.1 Termination.

In addition to the termination of this Lease in accordance with Section 2, either party may terminate this Lease in the event of a breach of the Lease by giving thirty (30) days written notice to the other party, unless such breach has been cured within a commercially reasonable time as specified in the notice. Obligations of the breaching party under this Lease shall survive termination of this Lease. In any case, Lessor shall retain ownership of the conduit.

7.2 Breach.

7.2.1 A party shall deliver to the other party a written “Notice of Breach” for: (i) the breach by either party or its agents, assigns or affiliates of any provision of the Lease; or (ii) the filing or initiating of proceedings by or against a party seeking liquidation, reorganization or other such relief under any federal or state bankruptcy or insolvency law (“a Bankruptcy Proceeding”).

7.2.2 A party that has received a Notice of Breach arising out of an alleged breach of the Lease shall have 30 days to cure the alleged breach. If the breaching party shall have commenced actions in good faith to cure the breach which are not capable of being cured during such 30-day period, then such period shall be extended while such party continues such actions to cure; however, in no event shall such period be extended beyond an additional ninety days unless mutually agreed in writing by both parties. If such party fails to cure the breach within the applicable cure period, and as long as such breach shall be continuing, then the non-breaching party shall have the right to do any one or more of the following: (a) suspend its performance under this Agreement; (b) seek an order of specific performance; (c) seek the award of compensatory damages; (d) terminate this Agreement. Any event of breach by either party may be waived under the terms of this Agreement at the other party’s option. Such waiver shall not be deemed to have waived any future breaches of the same Material Provision or of any other provision.

7.3 Abandonment.

Should Lessee, for any reason, abandon all or part of its use of capacity or facilities installed pursuant to this Lease Agreement, then the below provisions shall apply. “Abandon” shall be defined for the purposes of this Agreement as failure to use the Leased Conduit for more than three years or at such time that notice is provided by Lessee.

7.3.1 If the Lessor rejects all or a portion of the proposed transfer of abandoned facilities from Lessee, then Lessee shall remove any facilities it proposed to abandon which were rejected by Lessor within ninety (90) days of Lessor’s rejection. If the Lessee fails to so remove the abandoned rejected facilities, then Lessor may remove them at Lessee’s expense, which shall be paid within thirty (30) days of receipt of the invoice.

7.3.2 At the time of any accepted abandonment, Lessee shall have no further rights with respect to the abandoned capacity or facilities. At such time, Lessor shall have the authority to remove, reuse, or resell the abandoned capacity and/or facilities.

7.3.3 Unless expressly rejected by the Lessor in writing within 60 days of a written abandonment notification, Lessee's abandoned facilities shall be transferred to the ownership of the Lessor.

8. LESSOR DATA AND INFORMATION.

No interest of any nature whatsoever in any Lessor property (other than the leasehold interest in the Leased Facilities provided by this Agreement) shall be acquired by Lessee as a result of the execution and performance of this Agreement.

9. NO THIRD PARTY BENEFICIARIES.

No provision of this Agreement shall in any way inure to the benefit of any third person (including without limitation the public at large) so as to constitute any such third person being deemed a third party beneficiary of the Agreement or of any one or more of the terms hereof, or otherwise give rise to any cause of action in any person other than the Lessor and Lessee. For the purposes of this Section 9, the term "third person" shall not include any person or entity to be indemnified, defended, and held harmless by Lessee pursuant to Section 10.

10. INSURANCE, INDEMNIFICATION, AND INTELLECTUAL PROPERTY.

10.1 INSURANCE. Lessee shall not occupy the Leased Facilities until it has obtained the insurance required under this paragraph. All coverage shall be with insurance companies licensed and admitted to do business in the State of Michigan. All coverage shall be with insurance carriers acceptable to the Risk Manager for the City of Battle Creek. All insurance required pursuant to this agreement shall remain in force and effect for the entire life of this Agreement. Lessee must provide proof that the required insurance is in effect at any time during the life of this agreement upon request of Lessor. Lessee is responsible for insuring that any subcontractor has the same insurance as required by this provision. The following insurance shall be required under the terms of this agreement:

10.1.1 Workers; Compensation Insurance: Lessee shall procure and maintain during the life of this Agreement, Worker's Compensation Insurance, including Employers Liability Coverage, in accordance with all applicable statutes of the State of Michigan.

10.1.2 Commercial General Liability Insurance: Lessee shall procure and maintain during the life of this Agreement, Commercial General Liability insurance on an "Occurrence Basis" with limits of liability not less than \$1,000,000.00 (One Million Dollars) per occurrence and/or aggregate combined single limit, Personal Injury, Bodily Injury and Property Damage. Coverage shall include the following extensions: (A) Contractual Liability; (b) Products and Completed Operations; (c) Independent Contractors Coverage; (d) Broad Form General Liability Extensions or equivalent.

10.1.3 Motor Vehicle Liability: Lessee shall procure and maintain during the life of the agreement Motor Vehicle liability Insurance, including Michigan No-Fault Coverage, with limits of liability of not less than \$5000,000.00 (Five Hundred Thousand Dollars) per occurrence combined single limit Bodily injury and property Damage. Coverage shall include all owned vehicles, all non-owned vehicles, and all hired vehicles.

10.1.4 Additional Insured: Commercial General Liability and Motor Vehicle Liability Insurance as described above shall include an endorsement stating the following shall be Additional Insureds: The City of Battle Creek, all elected and appointed officials, all employees and volunteers, all boards, commissions and/or authorities and board members, including employee volunteers thereof.

10.1.5 Cancellation Notice: Workers' Compensation Insurance, commercial General Liability Insurance and Motor Vehicle Liability Insurance, as described above, shall include an endorsement stating the following: "It is understood and agreed that Thirty (30) days Advance Written Notice of Cancellation, Non-Renewal, Reduction and/or Material Change shall be sent to: Risk Manager, City of Battle Creek, 10 N. Division, Ste 217, Battle Creek, MI 49014.

10.1.6 Proof of Insurance Coverage: Lessee shall provide the City of Battle Creek at the time the Agreement is returned for execution, certificated of insurance naming the City of Battle Creek as an additional insured.

10.2 INDEMNIFICATION.

10.2.1 Parties shall defend, indemnify and save harmless the other party, and its respective officers, directors and employees, from and against any suits, claims, losses, damages and/or liabilities, including without limitation any attorney fees and court costs, arising out of installation and use and/or occupancy of the Leased Facilities, including, without limitation: (a) actions for infringement of patent or copyright and/or unauthorized use of program material, or through such claims arising out of the combining or using services or equipment furnished by others; (b) actions based on the content of communications that Lessee transmits over the Leased Facilities; (c) actions arising from any failure, breakdown, interruption or deterioration of service components provided by the other party; (d) actions for damages to real or tangible personal property or for bodily injury or death negligently caused by the other party; and (e) proceedings to recover taxes, fines, or penalties for any failure of the other party to obtain or maintain in effect any necessary certificate, permit, license or other authorization to use the Leased Facilities.

10.2.2 RESERVED RIGHTS. Notwithstanding the foregoing indemnity obligations and commitments of the City Lessor, in the event Lessee makes a claim for indemnification as permitted herein, the City Lessor reserves the right to challenge the validity of the indemnification provisions of this Agreement solely

on the argument that the City Lessor's indemnification obligations are not enforceable under the Michigan Constitution as the improper providing insurance by a municipality. The parties agree that to the extent a Michigan court rejects such position, all of the indemnifications of the City Lessor set forth herein shall be fully and completely enforceable against City in accordance with their terms. Further, nothing contained within the indemnification provision shall be construed of the City Lessor's right to raise the affirmative defense of Governmental Immunity.

10.2.3 Nothing contained herein shall operate as a limitation on the right of either party to bring an action for damages against any third party, including indirect, special or consequential damages, based on any acts or omissions of such third party, provided, however, that each party shall assign such rights of claims, execute such documents, and do whatever else may be reasonably necessary to enable the other party to pursue any such action against such third party.

10.3 INTELLECTUAL PROPERTY: Fiber cables placed in the conduit by Lessee shall bear a mark or other identification indicating the fiber belongs to Lessee. Neither party shall conduct business in such a manner as to in any way indicate or suggest an affiliation with the other party, nor shall either party use any corporate or trade name, trademark, service mark, logo, trade device, indicia of origin or other symbol that serves to identify and distinguish the other party from its competitors, or under any confusingly similar corporate or trade name, trademark, service mark, logo, trade dress, trade device, indicia of origin or other symbol, that would in any way imply or suggest an affiliation with the other party.

11. COMPLIANCE WITH LAW.

The performance by the parties Lessee under this Agreement and any use by the parties of the Leased Facilities shall comply in all respects with all applicable state, federal and local law and regulation.

12. STATUS OF THE LESSOR AND LESSEE.

The relationship of the Lessor and Lessee is that of independent contractors, and nothing in this Agreement shall be construed to create a partnership, employment, joint venture or agency relationship between the Lessor and Lessee.

13. CONFLICTS; REGULATORY JURISDICTION.

This Agreement shall also be subject to such modifications as may be required or authorized by any regulatory agency in the exercise of its lawful jurisdiction.

14. FORCE MAJEURE.

In the event that either party's performance is delayed, prevented, obstructed, or inhibited because of any Act of God, fire, casualty, delay or disruption in transportation, flood, war, strike, lockout, epidemic, destruction or shut-down of production facilities, shortage or curtailment, riot, insurrection, governmental acts or directives, any full or partial failure of any telecommunications or computer network, or any other cause beyond the reasonable control of either party, including financial requirements or manufacturing limitations imposed by third-party manufacturers, suppliers, or vendors, the performance shall be excused and the time for the performance shall be extended for the period of delay or inability to perform resulting from such occurrence.

15. LIMITATION OF LIABILITY

15.1 LESSOR SHALL NOT BE LIABLE TO LESSEE FOR ANY CLAIM OR CAUSE OF ACTION REQUESTING OR CLAIMING SPECIAL, INCIDENTAL, INDIRECT, STATUTORY, PUNITIVE, RELIANCE OR CONSEQUENTIAL DAMAGES (WHETHER OR NOT THE SAME ARE FORESEEABLE). ANY CLAIM OR CAUSE OF ACTION REQUESTING OR CLAIMING SUCH DAMAGES IS SPECIFICALLY WAIVED AND BARRED, WHETHER OR NOT SUCH DAMAGES WERE FORESEEABLE OR A PARTY WAS NOTIFIED IN ADVANCE OF THE POSSIBILITY OF SUCH DAMAGES. EXAMPLES OF SUCH DAMAGES PROHIBITED UNDER THIS AGREEMENT, INCLUDE, BUT ARE NOT LIMITED TO, THOSE ARISING OUT OF CLAIMS BASED ON BREACH OF CONTRACT, BREACH OF WARRANTY, NEGLIGENCE, AND/OR STRICT LIABILITY.

15.2 Pursuant to this section, no party shall be prevented from making a claim or filing suit against an independent contractor for special, incidental, indirect, punitive, reliance or consequential damages arising out of such independent contractor's performance or repair services, but the party making the claim or filing suit agrees that it will not seek recovery of such damages to the extent such independent contractor has a contractual or common law right of recovery against or an indemnity from the other party.

16. MISCELLANEOUS.

16.1 Lessee shall not assign or sell this Agreement, or any of the 6 fiber optic cables of which Lessor has been given the exclusive use without the prior written consent of the Lessor which consent shall be in the Lessor's sole discretion.

16.2 Any notice required or permitted to be given under this Agreement shall be effective upon receipt and shall be sufficient if in writing and sent by certified mail, postage prepaid, return receipt requested, to the parties at the addresses shown on Exhibit A, or at such other addresses as may in the future be advised in accordance with this subsection 15.2.

16.3 The rights, obligations and remedies of the parties as specified under this Agreement shall be interpreted and governed in all respects by the laws of the

State of Michigan. Any provision of this Agreement which is invalid or unenforceable in any jurisdiction shall be ineffective to the extent of such invalidity or unenforceability without invalidating or rendering unenforceable the remaining provisions hereof, and any such invalidity or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction. Any party bringing a legal action or proceeding against any other party arising out of or relating to this Agreement shall bring the legal action or proceeding in the United States District Court for the Western District of Michigan or in any court of the State of Michigan sitting in Calhoun County.

- 16.4 This Agreement may not be changed orally, but only by an agreement in writing signed by the Lessor and Lessee. Any waiver of any term or condition of this Agreement shall not operate as a waiver of any other such term or condition or as any continuing waiver, nor shall any failure to enforce any provision hereof operate as a waiver of such provision or of any other provision hereof.
- 16.5 This Agreement may be executed in counterparts, each of which when so executed shall be deemed to be an original, and such counterparts shall together constitute but one and the same instrument. The Section headings contained in this Agreement are for convenience only and shall not affect in any way the meaning or interpretation of this Agreement. Words used in this Agreement, regardless of the number and gender specifically, shall be deemed and construed to include any other number, singular or plural, and any other gender, masculine, feminine or neuter, as the context requires. Any reference to a “person” in this Agreement shall include an individual, firm, corporation, limited liability company, partnership, limited partnership, limited liability partnership, trust, governmental authority or body, association, unincorporated organizational or any other entity.
- 16.6 Each party represents and warrants to the other party that it has full power and authority to enter into this Agreement and perform its obligations described in this Agreement, without the consent or approval of any other person or entity. Without limiting the generality of the foregoing, each party represents and warrants to the other party that in the event any approval of either party’s board of directors or other management is necessary for the applicable party to enter into this Agreement or perform as contemplated under this Agreement, then the applicable party has obtained such approval prior to the execution of this Agreement. Each party further represents and warrants to the other party that the person signing this Agreement as a representative has full power and authority to sign this Agreement.
- 16.7 This Agreement, which includes Exhibits A, B and C, constitutes the entire agreement between the parties with respect to the Leased Facilities. It supersedes all prior and contemporaneous communications, representations or agreements whether oral or written with respect to the subject matter thereof and has been induced by no representations, statements or agreements other than those herein

expressed. No agreement hereafter made between the parties shall be binding on either party unless reduced to writing and signed by the party sought to be bound thereby.

16.8 Severability Clause. If any provision of this Agreement is determined to be invalid, unenforceable or illegal, then the remaining provisions of this Agreement remain in full force, if the essential terms and conditions of this Agreement for each party remain valid, binding and enforceable.

IN WITNESS WHEREOF, the Lessor and Lessee have executed this Agreement as of the date first written above.

CITY OF BATTLE CREEK

Great Lakes Comnet, Inc.

Kenneth H. Tsuchiyama

William Goodfellow

Date

Date

Title: City Manager

Title: Director of Network Development

Drafted by:
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