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6/13/2018

**FUNDING AND REIMBURSEMENT AGREEMENT
BY AND BETWEEN
THE CITY OF SAN JOSE
AND
FOR PERMITTING AND PROCESS IMPROVEMENT COSTS
RELATED TO THE PERMITTING OF SMALL CELLS ON CITY OWNED
ASSETS IN THE PUBLIC RIGHT OF WAY**

This FUNDING AND REIMBURSEMENT AGREEMENT (“AGREEMENT”) is made and entered into this _____ day of _____ 2018 (“EFFECTIVE DATE”), by and between the CITY OF SAN JOSE, a municipal corporation of the State of California (“CITY”), and _____ (“COMPANY”).

RECITALS

WHEREAS, COMPANY and CITY entered into a Master Non-Exclusive Installation and Property Use Agreement (“MASTER AGREEMENT”) for small cells dated September 27, 2016; and

WHEREAS, by separate agreement, COMPANY and CITY desire to enter into a First Amendment to Master Non-Exclusive Installation and Property Use Agreement (“FIRST AMENDMENT”) to modify and update certain sections and exhibits of the MASTER AGREEMENT pertaining to small cell usage fees, termination, notice addresses, and the Form Site License Agreement (“SLA”); and

WHEREAS, in conjunction with execution of that FIRST AMENDMENT, COMPANY AND CITY wish to enter into this 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 certain payments to be made by COMPANY in connection therewith; and

WHEREAS, COMPANY’s deployment of the approximately 140 small cells is on behalf of its wireless carrier customer _____.

NOW, THEREFORE, subject to the terms, provisions and conditions hereinafter set forth, the parties hereto agree as follows:

DEFINITIONS

“SMALL CELL SCOPE” means the proposed installation of approximately 140 small cell sites, or such lesser number as determined by COMPANY to enable COMPANY to provide sufficient signal coverage and operational capacity for COMPANY’s proprietary

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coverage area plan for the CITY, as determined by COMPANY in its sole discretion, for the term of this AGREEMENT.

CITY may request that COMPANY consider building in certain areas of the CITY as part of the SMALL CELL SCOPE. COMPANY will consider each request in good faith and may in its sole discretion decide to amend its build plan to accommodate such request.

In the event of redevelopment or other activity impacting a licensed site and the parties cannot agree upon an appropriate alternate site, COMPANY may select another location within the CITY under this AGREEMENT as a part of the SMALL CELL SCOPE.

1. Payment of Funds.

1.1 Payment of CITY's Costs. COMPANY shall advance funds to pay for CITY permitting costs as provided herein for the proposed SMALL CELL SCOPE (referred to herein as the "WORK"), including WORK performed by CITY's consultants and staff.

1.2 Payment Schedule.

1.2.1 Payment. COMPANY shall make an initial payment to CITY in the amount of Seven Hundred Thousand and No/100 Dollars (\$700,000.00) ("Permitting Fee Payment") to pay for CITY's costs related to the WORK, including engineering, permitting and inspecting pole attachments and other work necessary to accelerate broadband deployment and in furtherance of CITY's commitment to hire more CITY staff to provide the permitting services required to process COMPANY's small cell applications. The Permitting Fee Payment shall be made within thirty (30) days following full execution and delivery of this AGREEMENT by CITY and COMPANY. CITY will provide COMPANY notice within ten (10) calendar days when COMPANY's funds in the Account are depleted below twenty percent (20%) of the initial Permitting Fee Payment or any replenishment Permitting Fee Payment and additional permitting fee funds will be required. The Permitting Fee Payment shall be in lieu of individual permit fees for the SMALL CELL SCOPE.

1.2.2 Additional Payments. COMPANY shall make additional payments to CITY in an amount not to exceed One Million and No/100 Dollars (\$1,000,000.00) ("SMALL CELL SCOPE Completion Fee Payment") as set forth below: (a) within forty five (45) days of the EFFECTIVE DATE, an amount of \$250,000.00; (b) within thirty (30) days after issuance of a total of 85 permits, an additional \$250,000.00, (c) within thirty (30) days after issuance of a total 125 permits, an additional, \$250,000.00, and (d) within thirty (30) days after the issuance of all remaining permits in the

SMALL CELL SCOPE in excess of the 125 permits, an additional \$250,000.00 payment.

The Permitting Fee Payment and SMALL CELL SCOPE Completion Fee Payment shall be hereinafter collectively referred to as the "Payment." CITY and COMPANY agree that in the event of expiration or any early termination of this AGREEMENT, any such amount of the Permitting Fee Payment not actually expended by CITY for the SMALL CELL SCOPE shall be reimbursed to COMPANY in accordance with the terms and conditions of this AGREEMENT.

1.3 LED Retrofit.

- 1.3.1 In accordance with CITY's small cell guidelines, where COMPANY is required to replace an existing CITY streetlight pole because such streetlight pole is structurally insufficient for the installation of small cell equipment, COMPANY must also install an LED luminaire and complete electrical remediation, pursuant to CITY specifications for LED luminaires and any applicable electrical requirements, if an LED luminaire was not previously installed on that streetlight pole.
- 1.3.2 At locations where CITY's streetlight pole is structurally sufficient for the installation of small cell equipment, CITY and COMPANY agree to discuss value trade opportunities for LED retrofitting pursuant to the CITY's small cell guidelines, the CITY specifications for LED luminaires, and any applicable electrical requirements. City Manager shall have the authority to evaluate and approve value trade agreements for LED retrofits.
- 1.3.3 All LED retrofits pursuant to Section 1.3.1 and Section 1.3.2 are subject to review and approval by the CITY prior to the commencement of any work.

1.4 Accounting.

- 1.4.1 The CITY will establish a Billing Account ("Account") to which costs incurred pursuant to this AGREEMENT will be charged. CITY will bill work against the Account at hourly rates based on CITY's direct costs for the work, including, but not limited to salaries, benefits, overhead and other administrative expenses, as reflected in the applicable CITY department's schedule of fees and charges approved by City Council resolution and in effect at the time of billing. Costs of any consultants hired by CITY in connection with the scope of the WORK shall be billed at the rate actually incurred by CITY, without any markups. In no event shall any such cost or expense exceed the Permitting Fee Payment

agreed to hereunder without the prior written consent of COMPANY which consent may be withheld in COMPANY's sole discretion.

- 1.4.2 The CITY will keep records of all funds advanced by COMPANY pursuant to this AGREEMENT and of all expenditures of such funds. CITY will provide such records to COMPANY at no additional cost to COMPANY in the form of a quarterly computer printout summarizing the deposits and charges to the Account, or if requested by COMPANY, CITY will provide such records to COMPANY at no additional cost to COMPANY within fifteen (15) business days of such request, such request not to be made more often than once per month. Within thirty (30) calendar days following the date of expiration or earlier termination of this AGREEMENT pursuant to Section 4 (Termination and Expiration) below, CITY will submit to COMPANY a final written accounting of the Account and promptly refund to COMPANY any unused amounts at that time pursuant to Section 1.5 (Refunds) below. The foregoing CITY covenant will survive the expiration or earlier termination of this AGREEMENT.

1.5 Refunds.

- 1.5.1 If this AGREEMENT expires or is terminated as provided herein, the balance of the Permitting Fee Payment made by COMPANY that is not required to pay for costs already incurred by CITY in accordance with this AGREEMENT prior to the expiration date or the date of the termination notice, shall be refunded to COMPANY within thirty (30) calendar days of the final accounting pursuant to Section 1.4.2 of this AGREEMENT.

1.6 Interest.

- 1.6.1 Interest shall not accrue on any Payment and shall not be paid by CITY in refunding a Payment or any portion thereof.

2. Commitment by CITY.

- 2.1 COMPANY acknowledges and understands that this AGREEMENT is only for the purpose of providing a funding mechanism to allow CITY staff and CITY consultants to perform necessary tasks connected with expedited permitting of the SMALL CELL SCOPE and to allow progressing the CITY's digital inclusion program through the Digital Inclusion Fund. COMPANY agrees and acknowledges that this AGREEMENT in no way commits CITY to approving non-compliant encroachment permit requests. CITY agrees and acknowledges that it will process the SMALL CELL SCOPE in an efficient manner and to make good faith efforts to achieve an average processing time of sixty (60)

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business days. The average processing time of sixty (60) business days does not include any days taken by COMPANY to respond to any reasonable request for information concerning a permit. CITY shall also use all reasonable efforts to issue final permits for each of the sites identified by COMPANY for the SMALL CELL SCOPE.

- 2.2** CITY shall work in good faith with COMPANY in the efficient processing of any small cell permits submitted by COMPANY in connection with the use and lease of CITY facility or property consistent with this AGREEMENT and all applicable laws, regulations, policies and processes of the CITY.

3. Procurement of Consultants.

- 3.1** CITY may select and retain the services of a consultant or consultants ("Selected Consultant") to conduct the WORK. The Selected Consultant may engage sub consultants as approved and deemed appropriate by CITY. CITY shall direct and control the Selected Consultant's services and determine the scope of the WORK to be performed by CITY staff and the Selected Consultant. CITY shall work together with COMPANY to utilize COMPANY expertise and consulting to create technical solutions that efficiently minimize costs and expenses contemplated hereunder.

4. Termination and Expiration.

- 4.1** This AGREEMENT shall expire upon the date of the completion of the SMALL CELL SCOPE, as such SMALL CELL SCOPE may be revised from time to time pursuant to the terms and conditions this AGREEMENT, but in no event later than the expiration or earlier termination of the MASTER AGREEMENT.
- 4.2** Either COMPANY or CITY may terminate this AGREEMENT after 70 SLAs and permits are issued by delivering to the other party twenty (20) calendar days' advance written notice of election to terminate. COMPANY's obligations to reimburse CITY for any outstanding amounts due, however, shall survive, and remain enforceable after, the termination or expiration of this AGREEMENT. In the event of termination or expiration of this AGREEMENT, CITY shall refund to COMPANY a pro rata portion of the Permitting Fee Payment pursuant to Section 1.5 (Refunds) above.

- 5. Indemnification.** COMPANY shall protect, defend, indemnify, and hold harmless CITY, its officers, employees and agents against any claim, loss or liability arising from or related to any damage, injury or loss caused by, or resulting from this AGREEMENT, including, without limitation, that which is due, in whole or in part, to the willful misconduct or negligent acts (active or passive) or omissions by COMPANY, its officers, employees, consultants or agents. COMPANY's obligation to indemnify and hold harmless excludes only such claim, loss or liability that is due to the sole

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negligence or willful misconduct of CITY and/or its employees. All of COMPANY's obligations under this Section 5 are intended to apply to the fullest extent permitted by law and shall survive the expiration or sooner termination of this AGREEMENT. In an action or claim against CITY in which COMPANY is defending CITY, COMPANY shall defend CITY at the expense of COMPANY by counsel approved in writing by CITY. This Section 5 shall survive the expiration or termination of this AGREEMENT.

- 6. Default.** Except as otherwise specifically set forth in this AGREEMENT, if: (i) COMPANY shall fail to pay the Payment or other monies due under this AGREEMENT after the same are due, and such failure shall continue for fifteen (15) days after receipt of written notice thereof to COMPANY, or (ii) COMPANY shall fail to perform any other term, covenant, or condition contained herein, and such failure shall continue for thirty (30) days after receipt of written notice thereof, unless COMPANY shall have taken steps in good faith within such period to remedy such failure and is continuing to so act with diligence and continuity, or (iii) COMPANY's interest in this AGREEMENT or any part of this AGREEMENT is assigned or transferred, either voluntarily or by operation of law, without permission of CITY when such permission is required by the terms of this AGREEMENT, whether by judgment, statute, operation of law, execution, death or any other means, or (iv) COMPANY shall file any petition or institute any proceedings under any bankruptcy act, state or federal, or if such petition or proceeding be filed or be instituted or taken against COMPANY and such petition remains undischarged for a period of ninety (90) days; or if any receiver of the business or of the property or assets of COMPANY shall be appointed by any court (except a receiver appointed at the instance or request of CITY) and COMPANY fails to obtain dissolution of the receiver within ninety (90) days after appointment of the receiver; or (v) COMPANY shall make a general or any assignment for the benefit of its creditors; then in any of such events CITY shall have the following options, in addition to any other remedies available to CITY at law or in equity:
- (a) Continue this AGREEMENT and recover the Payment or any other monies from COMPANY as it may become due.
 - (b) To terminate this AGREEMENT, and all rights of COMPANY hereunder by giving written notice to COMPANY of such intention to terminate, in which event CITY may recover from COMPANY:
 - (1) Any unpaid Payment or other monies due to CITY that had been due and payable at the time of such termination; plus
 - (2) Any other amount necessary to compensate CITY for all the detriment directly and/or proximately caused by COMPANY's failure to perform its obligations under this AGREEMENT, or which in the ordinary course of events would be likely to result therefrom; plus

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- (3) Such other amounts in addition to or in lieu of the foregoing as may be permitted from time to time by applicable law.

Notwithstanding anything to the contrary contained in this Section 6 and in addition to any late fee that becomes due as provided above, COMPANY shall be charged a late charge equal to the greater of \$100 per occurrence or 5% of the amount that is past due (the "LATE CHARGE") for any monetary default of COMPANY under this AGREEMENT.

7. **Miscellaneous Provisions.**

7.1 **Notices.** All notices to be given hereunder shall be in writing and shall be served, either personally or by United States mail, certified or registered, postage prepaid, return receipt requested to the addresses set forth below, or to any other address provided by one party to the other in writing.

To CITY: City of San José
Office of Civic Innovation, Attn: Dolan Beckel
200 E. Santa Clara Street, 17rd Floor Tower
San José, CA 95113

To COMPANY:

With a copy to:

Such written notice shall to be effective when properly sent and received, refused or returned undelivered.

7.2 **Entire Agreement.** This AGREEMENT contains the entire understanding between the parties with respect to the subject matter herein. This AGREEMENT supersedes any and all prior representations, agreements,

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arrangements, or understandings (whether oral or written) between or among the parties relating to the subject matter of this AGREEMENT. This AGREEMENT may not be amended except pursuant to a written instrument signed by all parties.

7.3 Assignment. COMPANY shall not assign any interest in this AGREEMENT and shall not transfer any interest in the same (whether by assignment or notation), without the prior written approval of CITY; provided that COMPANY may assign any interest in this AGREEMENT only to (i) any entity that is an affiliate of COMPANY, or (ii) to any entity that acquires all or substantially all of the COMPANY’s assets that are subject to this AGREEMENT.

7.4 Waiver. [Intentionally Omitted].

7.5 Applicable Law and Venue. This AGREEMENT shall be governed by and interpreted in accordance with the laws of the State of California. In the event that suit shall be brought by either party to enforce or interpret the terms of this AGREEMENT, the parties agree that venue shall be exclusively vested in the state courts of the County of Santa Clara, or if federal jurisdiction is appropriate, exclusively in the United States District Court, Northern District of California, San José, California.

7.6 No Third Party Beneficiaries. This AGREEMENT shall not be construed as, or deemed to be an AGREEMENT for the benefit of, any third party or parties; and no third party or parties shall have any right or action hereunder for any cause whatsoever.

7.7 No Joint Venture. Neither this AGREEMENT, nor the reimbursements made hereunder, shall constitute or create any form of association, joint venture, partnership, or cooperative activity of any nature whatsoever for any purpose between CITY and COMPANY.

7.8 Counterparts. This AGREEMENT may be signed in counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same AGREEMENT. The persons executing this AGREEMENT are duly authorized to execute this AGREEMENT in their individual or representative capacity as indicated.

7.9 Severability. If any provision of this AGREEMENT shall be determined to be invalid by any court of competent jurisdiction, the remaining portions of this AGREEMENT shall remain in full force and effect.

[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.

APPROVED AS TO FORM:

“CITY”

CITY OF SAN JOSE,
a municipal corporation

ELIZABETH KLOTZ
Senior Deputy City Attorney

By _____
NAME:
TITLE:
Date _____, 2018

“COMPANY”

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