

**CONDUIT OCCUPANCY LICENSE AGREEMENT BETWEEN THE CITY OF
MILWAUKEE AND MILWAUKEE SCHOOL OF ENGINEERING**

This Conduit Occupancy License Agreement (“Agreement”) is entered into as of the ____ day of _____, 2016, (the “Effective Date”), by and between the City of Milwaukee (“City”), a municipal corporation, having its principal place of business at 200 East Wells Street, Milwaukee, Wisconsin 53202 and the Milwaukee School of Engineering (“MSOE”), a Wisconsin educational institution, having its principal place of business at _____ (collectively, the “Parties”).

WHEREAS, the City owns and operates a conduit system located in the City of Milwaukee, County of Milwaukee, State of Wisconsin (“Conduit System”); and

WHEREAS, MSOE has requested permission to place and maintain telecommunications facilities (“MSOE’s Facilities”) in the portions of the City’s Conduit System described on Exhibit A to this Agreement; and

WHEREAS, by Resolution No. 140751, the City of Milwaukee Common Council authorized the City’s Chief Information Officer to install dark fiber and to provide network connectivity at no cost to the City in certain routes where capacity is available to enable MSOE to connect to the WiscNet/BOREAS-Net Abilene/Internet2 education community node located at the City’s Department of Administration-ITMD Network Operations Center; and

WHEREAS, permitting MSOE to occupy space within the City’s Conduit System will assist the accomplishment of the objectives of Resolution No. 140751; and

WHEREAS, MSOE does not provide telecommunications services for a fee directly to the public and is therefore not covered by Chapter 98 of the Milwaukee Code of Ordinances; and

WHEREAS, the Common Council of the City of Milwaukee has authorized this Agreement via Common Council Resolution File No. _____ adopted on _____; and

Now, Therefore, In consideration of the foregoing and of the mutual covenants provided herein, the Parties agree as follows:

A. SCOPE OF AGREEMENT

1. Grant of Use. Subject to the provisions of this Agreement, the City hereby grants to MSOE, on a license basis (“License”), the right to use the portion of City’s Conduit System outlined on Exhibit A for the placement of MSOE’s Facilities. Upon mutual agreement of the City, through its City Engineer, and

MSOE, Exhibit A may be amended from time to time to reflect changes in the use of the Conduit System by MSOE.

2. Non-Vesting Provision. No use of the City's Conduit System by MSOE or payment of any fees required under this Agreement shall create or vest in MSOE any easements or other ownership or property rights of any nature in the Conduit System. Furthermore, this Agreement shall not constitute an assignment of any City rights to use public or private property in which the Conduit System is located. In the event any property owner or municipal or other public authority terminates any permit or other right of MSOE to occupy the Conduit System, MSOE shall have the right to protest by appropriate proceedings, or renegotiate the termination of such permit. In such event, MSOE shall indemnify and hold the City harmless from any expense, legal action or cost, including reasonable attorney's fees, resulting from the exercise of its rights under this paragraph. In the event that MSOE has exhausted all its rights of appeal in protesting the above and has failed to obtain the relief sought in such proceedings or appeal, or if any renegotiations have failed, the City shall have the right to terminate this Agreement by giving at least ninety (90) days written notice to MSOE. Upon the effective date of termination undertaken in accordance with the provisions of the preceding sentence, this Agreement shall become null and void and neither party hereto shall have any further obligation to the other with respect thereto.
3. Permits and Approvals Required. Prior to the installation of MSOE's Facilities within the Conduit System located upon public/private property, MSOE shall obtain from the appropriate public and/or private authority any required authorization(s), permits or easements to install its Facilities within any portion of the Conduit System.
4. City's Maintenance Right. The City's right to maintain its Conduit System and to operate its facilities in conjunction therewith in such a manner as will best enable it to fulfill its own service requirements is in no manner limited by this Agreement.
5. No Restriction on the City. Nothing contained in this Agreement shall be construed to compel the City to construct, reconstruct, retain, extend, or place its Conduit System for use by MSOE unless needed for the City's own service requirements. Notwithstanding the foregoing, MSOE shall have the right to terminate this Agreement upon ninety (90) days' prior written notice to the City in the event MSOE is unable, because of the condition of the Conduit System, to use the Conduit System in the manner originally contemplated herein.
6. Compliance with Law. Nothing contained in this Agreement shall be construed as a limitation, restriction or prohibition against the City with respect to any agreement or arrangement which the City has heretofore

entered into with others not parties to this Agreement regarding the Conduit System covered by this Agreement. This Agreement is subject to all laws, ordinances and regulations which in any manner affect the rights and obligations of the Parties under this Agreement, so long as such laws, ordinances or regulations remain in effect.

7. Locate Request. MSOE shall register MSOE's Facilities with Diggers' Hotline in addition to other existing MSOE facilities. The City will not be listed as an owner of MSOE's Facilities, for purposes of Wis. Stat. § 182.0175(2m), even though MSOE's Facilities will run in the Conduit System in some locations. MSOE shall be responsible for responding to all facility locate requests for MSOE's Facilities. If MSOE is not currently a member of Diggers' Hotline, MSOE shall become a member in order to receive notifications from Diggers' Hotline and locate their corresponding facilities.

B. TERM

This Agreement shall become effective on the Effective Date and shall continue in effect for one (1) year thereafter unless terminated as provided herein or by operation of law.

C. MSOE OPTION ON RELOCATION

1. In the event the City elects to relocate its Conduit System, or any portion thereof, MSOE shall have the option to:
 - a. request the relocation of MSOE's Facilities along with the City's Conduit System and MSOE shall bear its pro rata share of any and all reasonable costs attributable to such relocation, or
 - b. terminate this Agreement without any further obligation to the City as per Section I.
2. In the event MSOE requests the relocation of MSOE's Facilities as provided in Section C.1.a. above, MSOE's pro-rata share of any and all costs attributable to such relocation shall be calculated by multiplying City's total cost of relocating the Conduit System by a fraction, the numerator of which shall be the number of innerducts MSOE is occupying within the Conduit System, and the denominator of which shall be the total possible number of innerducts located within the Conduit System.

D. CONSTRUCTION AND MAINTENANCE

1. Application Process.

- a. MSOE shall submit to the City Engineer a detailed request to occupy City conduit, which shall include the route of the requested occupancy, size of cable, excess cable storage requirements, construction design drawings, and installation schedule (“Occupancy Application”).
 - b. The City shall review the Occupancy Application and determine the feasibility of the request. If the City determines that the Occupancy Application is preliminarily feasible, the City shall notify MSOE of its determination.
 - c. MSOE shall obtain all necessary permits to allow MSOE’s contractor to enter the City’s Conduit System to survey for possible occupancy space and MSOE shall provide the survey information to the City for its review. The City shall review the manhole survey information to determine if there is sufficient available space within the City’s Conduit. If the City determines that there is sufficient space, then the City shall calculate the License fee for Conduit Occupancy (“License Fee”) due from MSOE and further described in Section G.1 below, notify MSOE that the Occupancy Application is approved, and shall set forth any installation instructions (“Notice to Proceed”). MSOE shall obtain all necessary permits to install its cable according to the installation instructions provided by the City.
2. Construction Practices. MSOE shall, at its own expense, during the term of this Agreement, maintain MSOE’s Facilities in a safe condition, properly identified and tagged along with a pull rope alongside MSOE cable, in accordance with regulations established by the City, so as not to physically conflict or electrically interfere with the facilities placed in the Conduit System by the City or others.
 3. Construction Management. Except in the event of a MSOE emergency as described in Section E.2 below, MSOE shall notify the City ten (10) days in advance by written notice at the address below before any routine repair or maintenance of MSOE’s Facilities:

Mr. Jeffrey S. Polenske
City Engineer
Zeidler Municipal Building
841 North Broadway, Room 701
Milwaukee, WI 53202

MSOE shall obtain all necessary City permits before occupying the right of way and accessing the manholes. MSOE shall comply with all OSHA rules and regulations for confined space entry which includes keeping on file the necessary confined spaces entry form. The City’s agents shall have the authority, without subjecting the City to any liability therefore, to suspend MSOE’s work or operations in and around City’s manholes/handholes if, in

the sole discretion of said employee or agent, any hazardous conditions arise or any unsafe practices, including unsafe practices which may threaten the integrity of the City's facilities, are being followed by MSOE's employees, agents or contractors. In the event of a City imposed suspension of MSOE's work, authorized representatives of the City and MSOE shall promptly meet at the earliest mutually possible time but no more than twelve (12) hours after the imposition of the suspension, to take all steps necessary to continue. Within that time, the City shall provide to MSOE written notice of steps to be taken by MSOE to eliminate any hazardous conditions or to revise any practices deemed to be unsafe. The presence of the City's authorized agent shall not relieve MSOE of its responsibility to conduct all of its work in and around the City's manholes/handholes in a safe and workmanlike manner.

4. Occupancy Plan. After any updates to MSOE's Facilities within the City conduit system, MSOE shall provide the City with an updated map indicating all City conduit occupied by MSOE.

E. EMERGENCY PROCEDURES

1. City Emergency. In the event of a City emergency:
 - a. The City's work shall take precedence over any and all operations of MSOE in the City's Conduit System;
 - b. The City may rearrange MSOE's Facilities in a reasonable manner.
2. MSOE Emergency. In the event of a MSOE emergency, MSOE shall promptly notify the City at the Unified Call Center at (414) 286-3481 prior to performing any maintenance or repair necessary to correct the emergency situation. After such notice is given, MSOE may enter the City's manholes, handholes, and conduits to perform any emergency repair or maintenance, provided that notwithstanding the completion of the emergency repair or maintenance, MSOE shall apply for a DPW permit as soon as reasonably practicable thereafter.

F. MAINTENANCE AND INSPECTION RIGHTS

1. Maintenance upon MSOE Default. If any part of MSOE's Facilities is not placed and maintained in accordance with the terms and conditions set forth in this Agreement and MSOE has not corrected the violation within thirty (30) days from receipt of written notice thereof from the City, then, in such event, the City may, at its option, correct said condition and notify MSOE in writing prior to performing such work. However, in the event such conditions pose an immediate threat to the safety of the City's employees or the public, interfere with the performance of the City's service obligations, or pose an immediate threat to the physical integrity of

the City's Facilities, and prior notice to MSOE before the City performs such work is not possible or reasonable under the circumstances, the City may perform such work and/or take such action that it deems necessary without first giving written notice to MSOE and without subjecting itself to any liability for damage to MSOE's Facilities or for any interruption of MSOE's services. As soon as practicable thereafter, the City will advise MSOE in writing of the work performed or the action taken. MSOE shall be responsible for all direct expenses reasonably incurred by the City associated with any work or action performed by the City pursuant hereto and shall reimburse the City within thirty (30) days from its receipt of the City's itemized invoice and supporting documentation.

2. Inspection Rights. The City reserves the right to make periodic inspections of any part of MSOE's Facilities in the Conduit System. The making of periodic inspections or the failure to do so shall not operate to impose upon the City any liability of any kind nor relieve MSOE of any responsibility, obligations or liability assumed under this Agreement.

G. FEES AND CHARGES

1. Within 10 days of receipt of the Notice to Proceed described in Section D.1.c above, MSOE shall pay the City the License Fee which shall be based on the rate of \$1 per linear foot.
2. All standard DPW permit fees shall apply.

H. LIABILITY AND INDEMNIFICATION

1. City Liability. The City shall exercise caution to avoid damaging MSOE's Facilities and shall make an immediate report to MSOE of any and all damage caused by its employees, agents or contractors. The City agrees to reimburse MSOE for all reasonable, actual, and direct costs incurred by MSOE for the physical repair of its Facilities damaged by the negligence of the City, its employees, or agents. However, the City shall not be responsible or liable for damages to MSOE's Facilities caused by the negligence of the City or other licensees whom the City has given permission to occupy its Conduit System.
2. MSOE Liability. MSOE shall exercise caution to avoid damaging the City's or other licensees' facilities and shall make a prompt report to the City of any and all damage caused by its employees, agents or contractors. MSOE agrees to reimburse the City or other licensees for all reasonable, actual and direct costs incurred by the City or other licensees for the physical repair of its Facilities damaged by the negligence of MSOE, its employees or agents.
3. MSOE Indemnification Obligation. MSOE assumes entire responsibility and liability for losses, expenses, demands and claims in connection with or

arising out of an injury, or alleged injury (including death) to any person, or damage, or alleged damage, to property of the City or others sustained or alleged to have been sustained in connection with or to have arisen out of, or resulting from the exercise by MSOE of its rights granted herein, including losses, expenses and damages sustained by the City, provided that the City shall have given prompt written notice to MSOE of the facts giving rise to such losses, expenses, damages or claims. MSOE agrees to indemnify and hold harmless the City, its agents and employees from any and all suits or actions brought against them, or any of them, based on any such alleged injury or damage, except for loss caused by direct or negligent action or omission of the City, its agents or employees or other licensee, including any failure to comply with Paragraph A.3 of this Agreement, and pay all damages, costs, and expenses (including reasonable attorney's fees) in connection therewith.

4. No Liability for Consequential Damages. Notwithstanding the above, neither party shall be liable to the other for indirect or consequential damages of the other party or of third parties, including, but not limited to, any interruption of service or for any loss of revenues resulting therefrom, whether caused by the negligence of either party or not.

I. TERMINATION

1. Mutual Termination. This Agreement may terminate at any time upon written mutual agreement of the Parties.
2. Termination by Default. If at any time either party fails or refuses to perform any of the conditions contained in this Agreement, and such failure or refusal shall continue for thirty (30) days after receipt of written notice from the other party, the non-defaulting party, at its election and upon ten (10) days advance written notice to the other party, may terminate this Agreement. Notwithstanding the above, where a default cannot reasonably be cured within thirty (30) days, if the defaulting party shall proceed promptly to cure the same and prosecute such cure with all due diligence, the time for curing the default shall be extended for such a period of time as may be reasonably necessary to complete such cure. The waiver by either party of any breach of any term, covenant or condition shall not be deemed to be a waiver of such term, covenant or condition or any subsequent breach of the same or any other term, covenant or condition.
3. Removal upon Termination. Upon termination of this Agreement for any reason, MSOE shall remove its Facilities within ninety (90) days following termination. In the event MSOE fails to remove its Facilities within ninety (90) days, the Facilities shall be deemed abandoned and the City, at its sole discretion and without liability, shall remove the Facilities and MSOE shall reimburse the City for all actual and direct costs reasonably associated with such removal.

4. Liability Not Extinguished. Termination of this Agreement shall not affect either party's liabilities and obligations incurred prior to the effective date of termination.

J. INSURANCE

1. Insurer Qualification. MSOE shall carry comprehensive or commercial general liability insurance together with coverage for contractual liability, issued by insurance carriers licensed to do business in the State of Wisconsin and maintaining an A- or better rating as established by A.M. Best & Company. The amounts of such insurance shall be in the amount of not less than \$1,000,000 as to any one occurrence and \$2,000,000 general aggregate. MSOE shall also carry such insurance as will protect it from all claims under any Worker's Compensation Law in effect that may be applicable to it. MSOE shall submit to the City certificates by each company insuring MSOE to the effect that it has insured MSOE for all liabilities of MSOE covered by this Agreement.
2. Liability Not Reduced. The required minimum limits of coverage shown above do not limit or diminish MSOE's liability under this Agreement.
3. Form of Certification. MSOE shall submit to the City a standard "Accord" insurance certificate (or comparable form reasonably acceptable to the City) signed by an authorized representative of its insurance company, certifying that the insurance coverage required hereunder is in effect for the purposes of this Agreement. Said insurance certificate shall certify that no material alteration, modification or termination of such coverage shall be effective without at least thirty (30) days' advance written notice to the City.
4. City as Additional Named Insured. All policies (excluding worker's compensation) shall include the City as an additional insured.
5. Insurance Document Review. At the City's sole cost, MSOE shall permit any authorized representative of the City to examine MSOE's original insurance policies should the City so reasonably request. In the event the City reviews MSOE's insurance policies, the City shall keep all information concerning MSOE's insurance policies confidential to the extent permissible under law.
6. Failure to Provide Insurance. Should MSOE at any time neglect or refuse to provide the insurance required herein, or should such insurance be canceled or non-renewed, the City shall have the right to terminate this Agreement or secure substitute coverages and MSOE shall reimburse the City for all actual and direct expenses and premiums reasonably paid in connection with such substitute coverage.

7. Effective Period. All insurance required in accordance with this Agreement must be effective before the City will authorize installation of MSOE's Facilities within the Conduit System and shall remain in force until such time as this Agreement is terminated and such Facilities are removed from the Conduit System or abandoned by MSOE.
8. Alternate Coverage. A combination of primary and excess/umbrella liability policies will be acceptable as a means to meet the limits required under this Agreement.

K. NOTICES.

Except as expressly indicated in this Agreement, all notices and other communications to be given pursuant to this Agreement shall be in writing and shall be deemed to have been duly given (i) if personally delivered to the person being served or to an officer of the corporate party being served; (ii) if mailed by United States certified mail, return receipt requested, postage prepaid; or (iii) if delivered by overnight carrier, delivery receipt requested, to the parties at the following addresses:

If to City:
Mr. Jeffrey S. Polenske
City Engineer
Zeidler Municipal Building
841 North Broadway, Room 701
Milwaukee, WI 53202

If to MSOE:
[Insert Contact name and address]

L. ASSIGNMENT

This Agreement shall be binding upon and inure to the benefit of the Parties and shall not be transferred, assigned or sublet to any other entity.

M. GENERAL PROVISIONS

1. Liens and Encumbrances. Except as otherwise provided in this Agreement, MSOE has no power or right to create and will not permit any lien or encumbrance, including, without limitation, tax liens, mechanics liens, or other liens or encumbrances with respect to work performed or equipment furnished, in connection with the installation, repair, maintenance or operation of its Facilities installed within the Conduit System.

2. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Wisconsin, without regard to the principles of conflict of law.
3. Records. Records shall be maintained by MSOE for a period of seven years after termination of this Agreement. In addition, the Parties understand that the City is bound by the Wisconsin Public Records Law, and as such, all of the terms of the Agreement are subject to and conditioned on the provisions of Wis. Stat. §§ 19.21-39. MSOE acknowledges that it is obligated to assist the City in retaining and producing records that are subject to the Wisconsin Public Records Law. MSOE shall agree to cause others under its control to cooperate with the City in the event that any of them receive a request under Wisconsin's Public Records Law for this Agreement or for any record relating to, or produced or collected under this Agreement which is subject to the Public Records Law.
4. Conflict of Interest.
 - a. Interest in Agreement. No officer, employee or agent of the City who exercises any functions or responsibilities in connection with the carrying out of any of the matters to which this Agreement pertains shall have any personal interest, direct or indirect, in this Agreement.
 - b. Interest of Other Local Public Officials. No member of the governing body of the City and no other public official of the City who exercises any functions or responsibilities in the review or approval of the carrying out of this Agreement shall have any personal interest, direct or indirect, in this Agreement.
 - c. Interest of MSOE and Employees. MSOE covenants, acknowledges, and agrees that no person who exercises any functions or responsibilities in connection with this Agreement has any personal financial interest, direct or indirect, in this Agreement. MSOE further covenants and acknowledges that it has no interest and shall not acquire any interest, direct or indirect, that would conflict in any manner or degree with its performance under this Agreement. MSOE further covenants that, in the performance of its obligations under this Agreement, no person having any such conflicting interest shall be employed.
5. Discrimination Prohibited.
 - a. In all hiring or employment made possible by or resulting from this Agreement there will not be any discrimination against any qualified employee or qualified applicant for employment because of race, color, religion, sexual orientation, sex, national origin or ancestry, age, disability, lawful source of income, marital status, gender identity or expression, past

or present membership in the military service, or familial status, or based upon affiliation with or perceived affiliation with any of these protected categories. This requirement shall apply to but not be limited to the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, lay-off or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship. There shall be posted in conspicuous places available to employees and applicants for employment, notices required or to be provided by federal or state agencies involved setting forth the provisions of the clause.

- b. No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity made possible by or resulting from this Agreement. The City and each employer will comply with all requirements imposed by or pursuant to the regulations of the appropriate federal agency effectuating Title VI of the Civil Rights Act of 1964.
 - c. MSOE agrees it will comply with all applicable requirements of the Americans with Disabilities Act of 1990, 42 U.S.C. 12101, et seq.
 - d. MSOE shall use good faith efforts to cause the foregoing provisions to be inserted in all subcontracts, if any, for any work covered by this Agreement so that such provisions will be binding upon each subcontractor, provided that the foregoing provisions shall not apply to Agreements or subcontracts for standard commercial supplies or raw materials.
6. Severability. If any term or provision of this Agreement shall to any extent be declared invalid or unenforceable, then the remainder of this Agreement shall not be affected thereby, and each term and provision of this Agreement shall be valid and be enforced to the fullest extent permitted by applicable law.
7. Entire Agreement/Amendment. This Agreement sets forth all of the covenants, provisions, agreements, conditions, and understandings between the Parties and there are no covenants, promises, agreements, conditions, or understandings, either oral or written, other than are herein set forth. This Agreement may not be modified orally or in any other manner other than by agreement, in writing, signed by each of the Parties to this Agreement.
8. Waiver. Neither party shall be deemed to have waived any of its respective rights hereunder unless the Party shall have signed such waiver in writing.
9. Titles. The titles of sections in this Agreement are for convenience only and do not limit or construe the meaning of any section.

10. Counterparts. This Agreement may be executed in one or more counterparts, all of which shall be considered to be one and the same agreement, and shall become effective on the date indicated after one or more counterparts have been signed by each of the parties and delivered to the other party.

In Witness Whereof, The Parties have executed this Agreement as of the day and year first above written.

CITY OF MILWAUKEE

**MILWAUKEE SCHOOL OF
ENGINEERING**

By: _____
Commissioner of Public Works

By: _____

Dated: _____

Name (Printed): _____

Title: _____

Dated: _____

COUNTERSIGNED:

Martin Matson, Comptroller

Dated: _____

Approved as to form, execution, and content this ____ day of _____, 2016.

Assistant City Attorney

230050