



800 City Hall, 200 E. Wells St., Milwaukee, WI 53202, Telephone 414-286-2601, Fax 414-286-8550

## MEMORANDUM

TO: Ronald D. Leonhardt, City Clerk  
W. Martin Morics, City Comptroller

FROM: Kevin P. Sullivan, Assistant City Attorney *KPS*

DATE: September 29, 2006

RE: Midwest Fiber Networks, LLC

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Attached to this memo is one duplicate, fully-executed original of a Facilities Use and License Agreement between the City of Milwaukee and Midwest Fiber Networks, LLC. Please note the Mayor's Office has also retained a fully-executed, duplicate original.

Please feel free to contact me should you have any questions.

KPS/ml:110277  
Attachment

c: Randy Gschwind

1052-2005-2684

## FACILITIES USE AND LICENSE AGREEMENT

This Facilities Use and License Agreement (this "Use Agreement") is dated this 18th day of September, 2006 (the "Effective Date"), and entered into by and between the City of Milwaukee, a Wisconsin municipality (the "City"), and Midwest Fiber Network, LLC, a Wisconsin limited liability company ("MWFN").

### Recitals

A. MWFN desires to construct and operate a wireless digital data and internet communications network utilizing Radios (as defined below) and related equipment within the City (the "Network").

B. MWFN wishes to locate, place, attach, install, operate and maintain Radios on facilities owned by the City, which are located within the Municipal Right-of-Way (as defined in § 1.8 below) or on other Municipal property.

C. MWFN wishes to place and maintain fiber optic cable in portions of the City's underground conduit system and Municipal Right of Way.

### Agreement

Now, Therefore, In consideration of the above recitals, which are incorporated herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree to the following covenants, terms and conditions:

1. Definitions. The following definitions shall apply generally to the provisions of this Use Agreement:

1.1 Adjusted Gross Revenues. "Adjusted Gross Revenues" means any and all revenue, whether received in the form of cash, credits, barter, trade, property or consideration of any kind or nature, which is received by MWFN for its Services (as defined below). This definition is intended to reach as broadly as possible to encompass all revenue.

1.2 City. "City" means the City of Milwaukee.

1.3 Conduit License Agreement. "Conduit License Agreement" means that certain Conduit Occupancy and License Agreement between the City and MWFN dated December 20, 2002, as the same has been or is amended from time to time.

1.4 Fee. "Fee" means any assessment, license, charge, fee, imposition, tax or levy of general application to entities doing business in the City lawfully imposed by any governmental body .

1.5 Installation Date. “Installation Date” shall mean the date that any Radio is installed by MWFN pursuant to this Use Agreement.

1.6 Laws. “Laws” means any and all statutes, constitutions, ordinances, resolutions, regulations, judicial decisions, administrative orders adopted after a public hearing of the City or other governmental agency having joint or several jurisdiction over the parties to this Use Agreement.

1.7 Municipal Facilities. “Municipal Facilities” means City-owned street light poles, lighting fixtures, electroliers, or other City-owned structures located within the Municipal Right-of-Way or on other Municipal property and may refer to such facilities in the singular or plural, as appropriate to the context in which used.

1.8 Municipal Right-of-Way. “Municipal Right-of-Way” means the space in, upon, above, along, across and over the public streets, roads, highways, lanes, courts, ways, alleys, boulevards, sidewalks, bicycle lanes, and places, including all public utility easements and public service easements as the same now or may hereafter exist, that are under the jurisdiction of the City. This term shall not include county, state or federal rights-of-way or any non-dedicated property owned by any person or entity other than the City, except as provided by applicable Laws or pursuant to an agreement between the City and any such person or entity.

1.9 Radio. “Radio” means the Radio frequency devices or future technology, whether referred to singly or collectively, to be installed and operated by MWFN hereunder.

1.10 Services. “Services” means all wireless internet access services and all other services utilizing any portion of the Network and provided by MWFN.

## 2. Term.

2.1. Initial Term. This Use Agreement shall be for an initial term of 14 years (“Initial Term”), commencing on the Effective Date.

2.2 Option to Extend. MWFN shall have the option to extend the term of this Use Agreement for two (2) additional periods of three (3) years (each additional three (3) year period being an “Option Term”), upon written notice to City of MWFN’s intention to exercise its option, at least one hundred and eighty (180) days before the expiration of the Initial Term, or each succeeding Option Term.

At least one hundred and eighty (180) days before the expiration of the Initial Term and each Option Term thereafter, City and MWFN shall in good faith commence negotiations toward extending the term of the Use Agreement for an additional Option Term of three (3) years, including renegotiation of the Annual Fee. If, at the end of the Initial Term and each Option Term thereafter, City and MWFN have not executed an amendment to this Use Agreement modifying the term as herein described, this Use Agreement shall be deemed to have been extended by the parties for an additional Option Term at the same Annual Fee, unless MWFN

notifies the other in writing at least sixty (60) days before the expiration of such Initial Term or Option Term, that it chooses to terminate this Use Agreement rather than have it extended.

2.3 The term “license” in this Use Agreement is not meant to imply that the City has the right to terminate this Use Agreement at will. It is the intention of the parties that this Use Agreement may only be terminated by the specific provisions contained herein.

3. Scope of Use Agreement. Any and all rights expressly granted to MWFN under this Use Agreement, which shall be exercised at MWFN’s sole cost and expense, shall be subject to the prior and continuing right of the City under applicable Laws to use any and all parts of the Municipal Right-of-Way exclusively or concurrently with any other person or entity and shall be further subject to all deeds, easements, dedications, conditions, covenants, restrictions, encumbrances and claims of title of record which may affect the Municipal Right-of-Way. Nothing in this Use Agreement shall be deemed to grant, convey, create, or vest in MWFN a real property interest in land, including any fee, leasehold interest or easement. Any work performed pursuant to the rights granted under this Use Agreement shall be subject to the reasonable prior review and approval of the City, as provided in sec. 5 of this Use Agreement. Notwithstanding the foregoing, the City will not grant to any third party access to, use of or rights in Municipal Facilities or Municipal Right of Way without including a provision binding such third party to adhere to provisions substantially similar to those provisions contained in Section 3.2 hereof.

3.1 Attachment to Municipal Facilities. The City hereby authorizes and permits MWFN, as a licensee, or its affiliate, Cablecom, LLC, to enter upon the Municipal Right-of-Way and to locate, place, attach, install, operate, maintain, remove, reattach, reinstall, relocate, and replace Radios and fiber optic facilities in (“in” should not imply “inside” any City boxes or cabinets) or on Municipal Facilities for the purposes of operating the Network and providing Services. In addition, subject to the provisions of § 4.2 below, MWFN shall have the opportunity to draw electricity for the operation of the Radios from the power source associated with each such attachment to Municipal Facilities.

3.2 No Interference. MWFN, in the performance and exercise of its rights and obligations under this Use Agreement, shall not interfere in any manner with the existence and operation of any and all public and private rights of way, or the physical location or condition of any sanitary sewers, water mains, storm drains, gas mains, poles, aerial and underground electrical and telephone wires, electroliers, cable television, and other telecommunications, utility or municipal property, (collectively, “Third Party Owners”), without the express written approval of the owner or owners of the affected property or properties, except as permitted by applicable Laws or this Use Agreement. If events of electrical or radio frequency interference arise between the facilities of MWFN and either of the City or such Third Party Owner, the parties shall work cooperatively to minimize the interference and implement agreed upon work around solutions.

3.3 Compliance with Laws. MWFN shall comply with all applicable Laws in the exercise and performance of its rights and obligations under this Use Agreement. If any Laws to be imposed by the City purport to amend or modify the terms of this Agreement, MWFN shall first be heard at a formal hearing before the Common Council prior to adoption of the Law(s)

and be given the opportunity to preserve the original terms of this Agreement. If any such Law modifies any material term of this Agreement, MWFN may terminate this Agreement with no further liability.

3.4 Fiberoptic Cable. MWFN may access the City's underground conduit system to place fiber optic cable therein as part of the Network, but only in accordance with and pursuant to the terms of the Conduit License Agreement; provided, however, Article G of the Conduit License Agreement shall be inapplicable to any new fiber optic cable inserted in the City's underground conduit system in connection with the operation of the Network. If there is any conflict between the Conduit License Agreement and this Use Agreement, the terms of this Use Agreement shall control.

3.5 Confidentiality. Any plans, specifications, maps, drawing, diagrams, financials or other descriptive information concerning Municipal Facilities or the Network provided by either party will be held in confidence by the receiving party, utilized solely in connection with the construction, operation and maintenance of the Network and will not be shared with or disseminated to any other person, excepting only those employees, agents, subcontractors and vendors engaged in the construction of the Network. To the extent permitted by law, the City shall keep all such information confidential as a trade secret of MWFN.

4. Compensation; Utility Charges. MWFN shall be solely responsible for the payment of all lawful Fees in connection with MWFN's performance under this Use Agreement, including all usual permit Fees, the current version of which are described on the attached Schedule and including those set forth below.

#### 4.1 Annual Fee.

As compensation for the use of the Municipal Facilities and not as tax levied or collected on income within the meaning of Sec. 66.0611, Stats., MWFN shall pay to the City, an Annual Fee payable semi-annually within 45 days after each semi-annual anniversary of the Effective Date for license occupancy of Municipal Facilities during that prior semi-annual period, except for the first semi-annual period where the Annual Fee shall be prorated based on the portion of the period from the Installation Date to the semi-annual payment date. The Annual Fee shall be:

(a) an amount equal to the annual per attachment fee computed in accordance with Section (i) below times the number of Municipal Facilities used by MWFN pursuant to the terms of this Agreement. For purposes of computing the Annual Fee, the number of attachments shall be determined on the last day of each semi-annual payment period. The Annual Fee shall be computed as follows:

(i) The Annual Fee for Municipal Facilities which are solely City owned shall be Twenty Five Dollars (\$25.00) per facility attachment.

(ii) MWFN's attachment to other non-City owned facilities (i.e., third party facilities) in the public Municipal Right-of-Way shall be subject to all applicable Laws including, but not

limited to, obtaining and making required payments for all necessary permits and special privileges for Municipal Right-of-Way occupancy. MWFN shall not, however, be required to pay the Annual Fee herein established for attachments to such non-City owned facilities in the Municipal Right-of-Way.

PLUS

(b)(i) The following percentages of MWFN’s Adjusted Gross Revenues attributable to Services for which the end-user’s connection to the Network is made by means of a Radio or other wireless mechanism for the following years subsequent to the Effective Date:

| <b>Years</b> | <b>Percentage</b> |
|--------------|-------------------|
| 1-3          | 0%                |
| 4-6          | 1%                |
| 7-14         | 3%                |

PLUS

The following percentages of MWFN’s Adjusted Gross Revenue attributable to Services for which the end-user’s connection to the Network is made by means of a wired contact (a “Wired Customer”) for the following years subsequent to the Effective Date:

| <b>Years</b> | <b>Percentage</b> |
|--------------|-------------------|
| 1-3          | 0%                |
| 4-6          | 0.5%              |
| 7-14         | 1.5%              |

provided, however, that for Wired Customers located outside of the City, only that percentage of Adjusted Gross Revenue from such Wired Customer equal to the percentage of the total distance to such Wired Customer which utilizes the Network will be counted for this purpose.

(c) City represents and covenants that City owns all Municipal Facilities for the use of which it is collecting the Annual Fee computed in accordance with § 4.1(a).

4.1.1 Accounting Matters. MWFN shall keep accurate books of account at its principal office in Milwaukee or such other location of its choosing for the purpose of determining the amounts due to the City under § 4.1 above. MWFN shall provide for City inspection of MWFN’s books of account relative to its operations in the City at MWFN’s principal office located in Milwaukee, Wisconsin. MWFN shall assist the City in compliance with any request for information to which the City must, by Law, respond. Notwithstanding the above, MWFN shall provide the City with any and all information concerning MWFN’s Adjusted Gross Revenues which the City Comptroller deems necessary to the amount of the Annual Fee pursuant

to Section 4.1(b) above. MWFN shall provide such information relative to its Adjusted Gross Revenue at a time and place designated by the City Comptroller.

4.2 Electricity Charges. MWFN shall be solely responsible for the payment of all electrical utility charges to the City, if the City provides the electricity or the applicable utility company based upon the Radios' usage of electricity and applicable tariffs. Notwithstanding the foregoing, the parties shall use their best efforts to estimate the aggregate electricity usage for Radio located in or on City Facilities and MWFN shall pay City, periodically, the cost therefor.

5. Relocation and Displacement of Radios. MWFN understands and acknowledges that City may require MWFN to relocate one or more of its Radios, and MWFN shall at City's direction relocate such Radios at MWFN's sole cost and expense, whenever City reasonably determines that the relocation is needed for any of the following purposes: (a) if required for the construction, completion, repair, relocation or maintenance of a City project; (b) because the Radio is interfering with or adversely affecting proper operation of City-owned light poles, traffic signals, or other Municipal Facilities; or (c) to protect or preserve the public health or safety. In any such case, the parties shall work cooperatively to find work around solutions that least interfere with the provision of Services or the City shall use its best efforts to afford MWFN a reasonably equivalent alternate location. If MWFN shall fail to relocate any Radios as requested by the City within a reasonable time under the circumstances in accordance with the foregoing provision, City shall be entitled to relocate the Radios at MWFN's sole cost and expense, upon prior notice to MWFN and in a manner that least interferes with the provision of Services on the Network. To the extent the City has actual knowledge thereof, the City will attempt promptly to inform MWFN of the displacement or removal of any pole on which any Radio is located.

5.1 Relocations at MWFN's Request. In the event MWFN desires to relocate any Radios from one Municipal Facility to another, MWFN shall so advise City. City will use reasonable efforts to accommodate MWFN by making another reasonably equivalent Municipal Facility available for use in accordance with and subject to the terms and conditions of this Use Agreement.

5.2 Damage to Municipal Right-of-Way. Whenever the removal or relocation of Radios is required or permitted under this Agreement, and such removal or relocation shall cause the Municipal Right-of-Way to be damaged, MWFN, at its sole cost and expense, shall promptly repair and return the Municipal Right-of-Way to its former condition. MWFN must notify the City immediately, regarding any damage to Municipal Facilities. City will undertake all repairs to Municipal Facilities at MWFN's sole cost in which the Radios are located to a safe and satisfactory condition in accordance with applicable Laws, normal wear and tear excepted. If MWFN does not repair the site as just described, then the City shall have the option, upon thirty (30) days' prior written notice to MWFN, to perform or cause to be performed such reasonable and necessary work on behalf of MWFN and to charge MWFN for the proposed costs to be incurred or the actual costs incurred by the City at City's standard rates. Upon the receipt of a demand for payment by the City, MWFN shall promptly reimburse the City for such costs.

5.3 City's Maintenance Right. The City's right to maintain and operate its Municipal Facilities in such a manner as will best enable the City to fulfill its own service requirements is in no manner limited by this Use Agreement. However, the City will use all reasonable efforts to avoid removal or relocation of, or interference with, any Radios or other Network components once installed on Municipal Facilities.

## 6. Construction and Maintenance.

6.1 Conditions for Make-Ready. In connection with its initial build, MWFN shall provide to City a copy of its construction design drawings, installation schedule and other information as reasonably requested by the City for City's approval not less than two (2) weeks prior to MWFN's requirement for facilities installation on Municipal Facilities. However, after the review of the plans provided by MWFN, if the City determines that two (2) weeks is not a reasonable amount of time to perform the work on the plans provided by MWFN, the City shall notify MWFN in writing of this and provide MWFN with an estimate of the amount of time requested to do the work on the plans provided by MWFN. Such approval shall not be unreasonably conditioned, withheld or delayed and the approval process shall be undertaken in accordance with the procedures outlined in the attached Schedule..

6.2 Notice to Proceed. After the completion of the make-ready work, the City's Commissioner of Public Works shall, under the terms and conditions established by this Agreement, authorize MWFN to place the Radios on Municipal Facilities. This Use Agreement shall suffice as issuance for all City permits required for MWFN to proceed with construction, subject to completion of the make-ready work described above.

6.3 Construction Practices. MWFN shall, at its own expense, during the term of this Use Agreement, maintain its facilities covered by this Use Agreement in a safe condition, properly identified and tagged, in accordance with regulations established by the City and made available to MWFN in writing, so as not to physically conflict or electrically interfere with existing Municipal Facilities.

6.4 Construction Management. MWFN shall notify the City ten (10) days in advance by written notice as provided in Section 15 before any routine repair or maintenance of its facilities. The City's agents shall have the authority, without subjecting the City to any liability therefor, to suspend MWFN's work or operations in and around the Municipal Facilities if, the reasonable business judgment of said employee or agent, any hazardous conditions arise or any unsafe practices, including unsafe practices which may threaten the integrity of the Municipal Facilities, are being followed by MWFN's employees, agents or contractors. In the event of a City imposed suspension of MWFN's work, authorized representatives of the City and MWFN shall promptly meet at the earliest possible moment 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 MWFN written notice of steps to be taken by MWFN 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 MWFN of its responsibility to conduct all of its work in and around the Municipal Facilities in a safe and workmanlike manner.



6.5 Map. MWFN shall provide the City with an updated map indicating all Municipal Facilities occupied by MWFN along with the payment of the Annual Fee. To the extent permitted by law, the City shall keep this information confidential as a trade secret of MWFN.

6.6 Construction Timing. MWFN shall construct the Network as follows:

6.6.1 MWFN shall construct a demonstration area covering the area bounded by 10<sup>th</sup> Street on the East, Vliet Street on the North, U.S. Highway 41 on the West and Canal Street on the South (the “Demonstration Area”). The Network in this Area shall be complete and operational on or before 120 days following the Effective Date.

6.6.2 MWFN shall complete partial construction of the Network according to, and on a timetable set forth in, a detailed plan and schedule to be delivered to the City no later than completion of the Demonstration Area (“Plan and Schedule”). The City will not grant access to Municipal Facilities to other competitors of MWFN seeking to construct a Network in any given geographic area of the City until the Plan and Schedule calls for such area to have been built out by MWFN. Pursuant to the Plan and Schedule, MWFN shall substantially complete construction of the Network, and have the same operational, throughout the entire City on or before eighteen (18) months after the Effective Date.

6.7 Network Standards. MWFN shall construct and maintain the Network in accordance with standards adopted from time to time by the Institute of Electrical and Electronics Engineers. The Network shall be capable of transmitting voice, video and data, and provide adequate signal strength throughout at least 90% of the geographic area of the City and 100% of all populated areas of the City. MWFN shall periodically upgrade and improve the Network to a then-current state-of-the-art standard, considering existing market demand, issues of technical interference and financial feasibility.

6.8 Open Network. The Network shall be capable of supporting multiple internet service providers (“ISPs”) through some or all of the Network. MWFN shall operate the ISO layer 2 portion of the Network in such a manner as to provide a common, nondiscriminatory service platform for multiple ISPs.

6.9 Other Networks and Interference With Other Signals.

6.9.1 The parties acknowledge that other wireless networks currently exist or will be developed which cover some portion of the City (“Other Networks”). To the extent technically feasible and financially viable, MWFN shall engage to make the Network compatible with Other Networks, so as to ease the process of roaming by users from the Network to Other Networks.

6.9.2 The Network shall not block, eliminate, override or otherwise provide substantial interference to a wireless network currently operated by the City or any public utility. The parties acknowledge that instances of interference may arise and they will work cooperatively to manage those instances per Section 3.2 of this Use Agreement.

## 7. Emergency Procedures.

7.1 City Emergency. In the event of a City emergency, City's work shall take precedence over any and all operations of MWFN on the Municipal Facilities. To the extent possible, when responding to such emergency, the City shall take reasonable care to avoid or minimize disruption and interference with operation of the Network.

7.2 MWFN Emergency. In the event of a MWFN emergency, MWFN shall immediately notify the City at its Department of Public Works at (414)286-3481 prior to performing any maintenance or repair necessary to correct the emergency situation.

## 8. Conditions.

8.1 MWFN Conditions. MWFN's obligations hereunder are subject to and conditioned upon the satisfaction in full of the following conditions:

8.1.1 MWFN shall have entered into an agreement, in form and content satisfactory to MWFN (the "Vendor Agreement"), with at least one mutually approved Network vendor (the "Network Vendor").

8.1.2 MWFN shall have received approvals, on terms satisfactory to MWFN, to use conduit and other necessary facilities from utilities whose infrastructure may be required or desirable for construction and operation of the Network. MWFN shall have received all necessary approvals from applicable government entities required to construct and operate the Network.

8.2 City Conditions. City's obligations hereunder are subject to and conditioned upon the satisfaction in full of the following conditions:

8.2.1 The City shall have reviewed and approved the Vendor Agreement.

8.2.2 A Network Vendor shall have provided City with a guaranty of performance ("Guaranty"), in form and content satisfactory to the City, in respect of MWFN's obligations under this Use Agreement.

8.2.3 MWFN shall have posted a bond with or for the benefit of the City in an amount to be determined by the City ("Bond"), which amount shall be determined by the number of Radios attached to Municipal Facilities from time to time multiplied by an estimate of the cost (the "Cost") to remove such Radios and restore such Municipal Facilities to their prior condition. The City and MWFN shall meet and discuss the determination of the amount of the Cost.

8.2.4 Intentionally Omitted.

8.2.5 MWFN shall have provided the City with an affidavit complying with Section 310-14 of the Milwaukee Code of Ordinances.

8.2.6 MWFN shall have entered into an agreement with at least one ISP, in form and content satisfactory to the City, wherein such ISP agrees to provide retail internet services to consumers or subscribers in the City.

8.2.7 MWFN shall have received a financing commitment from a lender to provide adequate financing for the construction and operation of the Network, in form, upon terms and conditions, in an amount and from a lender satisfactory to the City.

## 9. Maintenance and Inspection Rights.

9.1 Maintenance upon MWFN Default. If any part of MWFN's facilities is not placed and maintained in accordance with the terms and conditions set forth in this Use Agreement and MWFN has not corrected the violation within thirty (30) days from receipt of written notice thereof from the City, or such longer period as may be reasonably necessary under the circumstances, then, in such event, the City may, at its option, correct said condition and notify MWFN 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 Municipal Facilities, and prior notice to MWFN is not possible under the circumstances, the City may perform such work and/or take such action that it deems necessary without first giving written notice to MWFN and without subjecting itself to any liability for damage to MWFN's facilities or for any interruption of MWFN's services provided the City uses reasonable care in its activities to minimize any disruption to Services on the Network. Immediately thereafter, the City will advise MWFN in writing of the work performed or the action taken. MWFN shall be responsible for all reasonable expenses 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 invoice therefor.

9.2 Inspection Rights. Subject to any applicable confidentiality requirements, the City may review copies of agreements entered into between MWFN and its tenants to ensure MWFN's compliance with the terms of this Use Agreement. The City reserves the right to make periodic inspections of any part of MWFN's facilities. MWFN shall have the right to have its employees or representatives present during the time of any such inspection. The City shall give MWFN advance written notice of such inspections, except in those instances where, in the reasonable business judgment of the City, safety considerations justify the need for such an inspection without the delay of providing written notice. In that event, the City shall provide notice by any means available as immediately as possible thereafter. The making of periodic inspections or the failure to do so shall not operate to impose upon the City any liability of any kind whatsoever nor relieve MWFN of any responsibility, obligations or liability assumed under this Use Agreement.

9.3 Financial Statements. MWFN shall maintain appropriate books of account and accounting records, permitting the City to inspect same at any reasonable time and MWFN shall provide the City with access to a copy of its internally prepared quarterly financial statements

within 30 days of quarter end and a copy of its accountant-reviewed annual financial statements within 90 days of year end.

9.4 Operating Reports. MWFN shall provide the City, within 15 days of each calendar quarter-end, a report, in form and content satisfactory to the City, detailing its progress in constructing the Network, the manner in which the Network is performing and all other material information relative to MWFN's operation of the Network.

10. Indemnification and Waiver. MWFN shall indemnify, defend, protect, and hold harmless the City, its council members, officers and employees from and against any and all third party claims, demands, losses, damages, liabilities, fines, charges, penalties, administrative and judicial proceedings and orders, judgments, and all reasonable costs and expenses incurred in connection therewith, including reasonable attorney's fees and costs of defense (collectively, the "Losses") to the extent resulting from MWFN's construction and operation of the Network undertaken pursuant to this Use Agreement.

The foregoing indemnity shall not cover Losses arising from or related to: (a) the negligence or willful misconduct of the City, its council members, officers, employees, agents or contractors; (b) agreements, rights or obligations previously or subsequently entered into or extended by the City to third parties; (c) violation of any Laws related to this Use Agreement by the City, its council members, officers, employees, agents or contractors; (d) the City's breach of its obligations or representations under this Use Agreement; or (e) events solely controlled by the City.

The City shall indemnify, defend, protect and hold harmless MWFN, its corporate members, officers and employees from and against any and all Losses arising from the negligence or willful misconduct of the City, its council members, officers, employees, agents or contractors.

The indemnity obligations above are conditioned upon the following: (a) the aggrieved party shall promptly notify the indemnifying party in writing of such Losses upon discovery; (b) the indemnifying party shall have sole control of, and the aggrieved party shall reasonably cooperate in all respects, in the defense of Losses and all related settlement negotiations; and (c) the aggrieved party shall not make any admission or disclosure or otherwise take any action prejudicial to the indemnifying party.

Both MWFN and the City represent that, as of the Effective Date, neither party has any notice or knowledge of any Losses asserted or threatened by any third party with respect to matters contemplated in this Agreement.

Notwithstanding the above, neither party shall be liable to the other for indirect or consequential damages of the other party, 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.

11. Insurance. MWFN, or its affiliated entity, Cablecom LLC, shall obtain and maintain at all times during the term of this Agreement Commercial General Liability insurance and Commercial Automobile Liability insurance protecting MWFN in an amount not less than Five Million Dollars (\$5,000,000) annual aggregate for each personal injury liability and products-

completed operations. Such minimum limits may be met through an umbrella or excess coverage insurance policy. The Commercial General Liability insurance policy shall name the City, its council members, officers and employees as additional insureds as respects any covered liability arising out of MWFN's performance of work under this Use Agreement. Coverage shall be in an occurrence form and in accordance with the limits and provisions specified herein. Claims-made policies are not acceptable. Such insurance shall not be canceled, nor shall the occurrence or aggregate limits set forth above be reduced, until the City has received at least thirty (30) days' advance written notice of such cancellation or change. MWFN shall be responsible for notifying the City of such change or cancellation.

11.1 Filing of Certificates and Endorsements. Prior to the commencement of any work pursuant to this Use Agreement, MWFN shall file with the City the required original certificate(s) of insurance with endorsements, which shall state the following:

- (a) the policy number; name of insurance company; name and address of the agent or authorized representative; name and address of insured; project name; policy expiration date; and specific coverage amounts;
- (b) that the City shall receive thirty (30) days' prior notice of cancellation.
- (c) that MWFN's Commercial General Liability insurance policy is primary as respects any other valid or collectible insurance that the City may possess, including any self-insured retentions the City may have; and any other insurance the City does possess shall be considered excess insurance only and shall not be required to contribute with this insurance; and
- (d) that MWFN's Commercial General Liability insurance policy waives any right of recovery the insurance company may have against the City.

The certificate(s) of insurance with endorsements and notices shall be mailed to the City at the address specified in § 15 below.

11.2 Workers' Compensation Insurance. MWFN shall obtain and maintain at all times during the term of this Use Agreement statutory workers' compensation and employer's liability insurance in an amount not less than One Million Dollars (\$1,000,000) and shall furnish the City with a certificate showing proof of such coverage.

11.3 Insurer Criteria. Any insurance provider of MWFN shall be admitted and authorized to do business in the State of Wisconsin and shall carry a minimum rating assigned by A.M. Best & Company's Key Rating Guide of "A" Overall and a Financial Size Category of "X" (i.e., a size of \$500,000,000 to \$750,000,000 based on capital, surplus and conditional reserves). Insurance policies and certificates issued by non-admitted insurance companies are not acceptable.

11.4 Severability of Interest. Any deductibles or self-insured retentions must be stated on the certificate(s) of insurance, which shall be sent to and approved by the City. "Severability

of interest” or “separation of insureds” clauses shall be made a part of the Commercial General Liability and Commercial Automobile Liability policies.

12. City Benefits. MWFN shall provide, or shall cause a Network Vendor to provide, the following, as additional compensation and consideration for the rights conferred by the City pursuant to this Use Agreement:

12.1 Walled Garden. There shall be available, on the Network, free access, for any person who can establish a connection to the Network, to sixty (60) websites operated by governmental agencies, not-for-profit organizations, educational and charitable institutions or other similar content providers. These websites will be selected by the City in its sole discretion and shall be subject to change or replacement from time to time as the City shall determine.

12.2 Job Training. MWFN shall establish a job training program for residents of the City for the broadband telecommunications industry.

12.3 Resident Employment. In constructing the Network, MWFN shall make reasonable and good faith efforts to employ “Residents” of the “CDBG area” (as such terms are defined in Milwaukee Code of Ordinances 309-41) in a number equal to 25% of MWFN’s total employees.

12.4 City Accounts. The City shall be provided up to 400 service accounts with a Network Vendor or other ISP satisfactory to City at no charge, for use by agents and employees of the City in connection with public safety, infrastructure, public works, neighborhood services and similar municipal activities. The City may obtain additional service accounts at a price equal to a 25% discount below the retail price generally offered to the public. MWFN shall ensure that the City is allocated its own service set identifier number (SSID) on the Network for City and public service use if requested by the City.

12.5 Digital Divide Fund. Contribute at least \$150,000 to a Digital Divide Fund controlled by the City. The Digital Divide Fund shall support and promote greater access to computers and the Internet for low income citizens of the City.

12.6 Public Safety. MWFN shall use reasonable and good faith efforts to see that Network is made available for priority use by City Fire Department, Police Department and other public safety departments in time of accident, natural disaster, attack or other emergency.

13. Default. Each of the following shall constitute an Event of Default under this Use Agreement:

13.1 Failure to Pay. MWFN shall fail to make any payment provided herein, as and when the same shall be due within twenty (20) days after notice of nonpayment.

13.2 Failure to Perform. MWFN shall fail to fully and timely perform any material covenant, commitment or obligation or otherwise breaches any term, provision or requirement set forth herein which failure shall continue uncured for a period equal to 90 days following notice of same from the City or for such longer period if the default is not susceptible of a cure

within 90 days, provided MWFN promptly initiates steps to cure the default following receipt of notice of same from the City and thereafter diligently pursues further efforts to cure; provided, however, that in the event of a failure to timely and fully comply with the covenant set forth at Section 6.6.1 above, MWFN shall not have any grace or cure period and an Event of Default shall have occurred immediately upon breach thereof.

13.3 Insolvency. MWFN shall

13.3.1 Become insolvent;

13.3.2. Be unable, or admit its inability, to pay its debts as the same become due;

13.3.3 Make a general assignment for the benefit of creditors or an agent authorized to liquidate its property;

13.3.4 Become subject, voluntarily or involuntarily, to an order for relief under the U.S. Bankruptcy Code, and, in the case of an involuntary proceeding, such order is not vacated within 60 days of entry;

13.3.5 File a petition to effect, or consent to the entry of, a plan of reorganization or other arrangement with creditors;

13.3.6 Apply to a court for the appointment of a receiver for any of its assets or have such a receiver appointed; or

13.3.7 Otherwise become the subject of any federal or state bankruptcy or insolvency proceeding.

14. Remedies. Upon the occurrence of an Event of Default, and following the passage of any grace or notice period, City may do any of the following:

14.1 Guaranty. Proceed to enforce the Guaranty.

14.2 Terminate. Terminate this Use Agreement with MWFN.

14.3 Collection. Take any steps authorized by Law to collect unpaid and outstanding monetary obligations, including without limitation costs of collection and the City's reasonable attorneys fees.

14.4 Bond. Take and receive payment of proceeds of the Bond.

14.5 Remove Radios. Provided the City shall have terminated this Use Agreement pursuant to Section 14.2 above, remove all Radios from Municipal Facilities, unless the

Guarantor or an ISP has fully cured the Event of Default and is continuing to operate the Network.

15. Notices. All notices which shall or may be given pursuant to this Use Agreement shall be in writing and delivered personally or transmitted (a) through the United States mail, by registered or certified mail, postage prepaid; (b) by means of prepaid overnight delivery service; or (c) by facsimile or email transmission, if a hard copy of the same is followed by delivery through the U.S. mail or by overnight delivery service as just described, addressed as follows:

if to the City:

City of Milwaukee  
Attn: Director of Administration  
200 East Wells Street, Room 606  
Milwaukee, WI 53202

Attn: City Clerk  
200 E. Wells Street, Room 205  
Milwaukee, WI 53202

Attn: City Attorney  
200 E. Wells Street, Room 800  
Milwaukee, WI 53202

if to MWFN:

Midwest Fiber Networks, LLC  
3701 West Burnham Street  
Milwaukee, WI 53215

15.1 Date of Notices; Changing Notice Address. Notices shall be deemed given upon receipt in the case of personal delivery, three (3) days after deposit in the mail, or the next business day in the case of facsimile, email or overnight delivery. Either party may from time to time designate any other address for this purpose by written notice to the other party delivered in the manner set forth above.

16. Termination.

16.1 Mutual Termination. This Use Agreement may terminate at any time upon written mutual agreement of the parties hereto.

16.2 Termination by Default. If at any time there occurs an Event of Default, the City may terminate this Use Agreement pursuant to Article 14.



16.3 Termination by MWFN. MWFN may terminate this Use Agreement, upon written notice to the City, in the event that

16.3.1 Notwithstanding MWFN's good faith attempts to complete and operate the Network in the Demonstration Area, the Network substantially fails to function in the Demonstration Area, or MWFN's Network Vendor or tenants decide not to proceed with the Demonstration Area or full construction thereafter; or

16.3.2 Following completion of the Network and operation of the Network for one full year, MWFN determines there exists a Lack of Business. Lack of Business shall mean (a) MWFN reports past results and projects future results in which annual revenues attributable to the Network are insufficient to cover MWFN's costs to maintain and operate the Network; (b) MWFN becomes insolvent or subject to bankruptcy or receivership proceedings; or (c) the Network fails to function in its intended manner due to technology obstacles which MWFN is incapable of overcoming in a financially viable manner.

16.3.3 The City materially defaults in its obligations under this Agreement.

16.4 Removal Upon Termination. Upon termination of this Use Agreement for any reason, MWFN shall remove its facilities from the Municipal Facilities within ninety (90) days following such termination or such longer period as may be reasonable necessary under the circumstances. In the event MWFN fails to remove its facilities within such ninety (90) day or extended period, the City, at its sole discretion and without liability, may remove the facilities and MWFN shall reimburse the City for all costs associated with such removal, including any damages to City Facilities resulting from such removals. However, MWFN may maintain in place fiber optic facilities being used by a MWFN customer upon payment of the then-required payments as provided in the Conduit License Agreement, as the same may be extended, amended, replaced or otherwise modified.

16.5 Liability Not Extinguished. Termination of this Use Agreement shall not affect MWFN's liabilities and obligations incurred hereunder prior to the effective date of such termination.

17. Assignment. This Use Agreement shall not be assigned by MWFN without the express written consent of the City, which consent shall not be unreasonably withheld, conditioned or delayed. Notwithstanding the foregoing, the transfer of the rights and obligations of MWFN hereunder to a parent, subsidiary, successor or affiliate shall not be deemed an assignment for the purposes of this Use Agreement.

17.1 Obligations After Assignment. In the event of any assignment by either party, the assigning or transferring party shall remain liable for all its obligations under this Use Agreement, unless: (a) the other party consents to release, by written instrument, the assigning or transferring party from such obligations, and (b) the assignee or transferee shall have affirmatively assumed in writing all of the obligations of the assigning or transferring party under this Use Agreement.

17.2 Transfer of Assets. Any transfer, assignment or sale of assets or business interests to an unaffiliated entity must receive prior City approval, not to be unreasonably withheld, excluding transactions (a) required to secure or maintain financing arrangements; (b) conducted in the ordinary course of business; or (c) involving 20% or less of the assets or business interests of MWFN so long as prior notice is given the City.

18. Miscellaneous Provisions. The provisions which follow shall apply generally to the obligations of the parties under this Use Agreement.

18.1 Nonexclusive Use. MWFN acknowledges that this Use Agreement does not provide MWFN with exclusive use of the Municipal Right-of-Way or any Municipal Facility and that City shall have the right to permit other providers of communications services to install equipment or devices in the Municipal Right-of-Way and on Municipal Facilities, so long as the foregoing do not materially interfere with operation of the Network. If the City enters into an agreement with a third party (the "Third Party Agreement") related to the deployment of a high-speed wireless network, the City shall provide a copy to MWFN. Within one hundred twenty (120) days after receipt, MWFN may elect, by written notice, to reopen discussion with the City on any financial or operational term in the Third Party Agreement that places MWFN at a competitive disadvantage, after considering the terms of this Use Agreement and the Third Party Agreement taken as a whole, in providing the Services. The City and MWFN shall negotiate in good faith appropriate modifications in this Use Agreement to obviate such competitive disadvantage.

18.2 Waiver of Breach. The waiver by either party of any breach or violation of any provision of this Use Agreement shall not be deemed to be a waiver or a continuing waiver of any subsequent breach or violation of the same or any other provision of this Use Agreement.

18.3 Severability of Provisions. Both parties agree not to commence any litigation challenging the validity of this Agreement or any provision hereof and hereby affirmatively waives their right to do so. However, if any one or more of the provisions of this Agreement shall be held by court of competent jurisdiction in a final judicial action to be void, voidable or unenforceable, such provision(s) shall be deemed severable from the remaining provisions of this Agreement; and the parties shall promptly engage in negotiations for a replacement provision that most closely approximates the original intent of the parties.

18.4 Contacting MWFN. MWFN shall be available to the staff employees of any City department having jurisdiction over MWFN's activities twenty-four (24) hours a day, seven (7) days a week, regarding problems or complaints resulting from the attachment, installation, operation, maintenance or removal of the Radios. The City may contact by telephone the network control center operator at telephone number 414-226-2205 regarding such problems or complaints.

18.5 Governing Law; Jurisdiction. This Use Agreement shall be governed and construed by and in accordance with the laws of the State of Wisconsin, without reference to its conflicts of law principles. If suit is brought by a party to this Use Agreement, the parties agree that trial of

such action shall be vested exclusively in the state courts of Wisconsin, County of Milwaukee, or in the United States District Court for the Eastern District of Wisconsin.

18.6 Consent Criteria. In any case where the approval or consent of one party hereto is required, requested or otherwise to be given under this Use Agreement, such party shall not unreasonably delay, condition or withhold its approval or consent.

18.7 Representations and Warranties. Each of the parties to this Agreement represents and warrants that it has the full right, power, legal capacity and authority to enter into and perform the parties' respective obligations hereunder and that such obligations shall be binding upon such party without the requirement of the approval or consent of any other person or entity in connection herewith.

18.8 Amendment of Use Agreement. This Use Agreement may not be amended except pursuant to a written instrument signed by both parties.

18.9 Entire Agreement. This Use Agreement contains the entire understanding between the parties with respect to the subject matter herein. There are no representations, agreements or understandings (whether oral or written) between or among the parties relating to the subject matter of this Use Agreement which are not fully expressed herein. Notwithstanding the foregoing, except as expressly modified hereby, the Conduit License Agreement shall continue in full force and effect according to its terms.

18.10 Liens and Encumbrances. MWFN has no power, authority 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 within the Municipal Right-of-Way. The foregoing shall not preclude MWFN from granting or allowing liens or other encumbrances against Network elements owned by MWFN.

18.11 Renegotiation of Terms. Either party to this Use Agreement may reopen negotiations over the financial terms of this Use Agreement as of each three year anniversary of the Effective Date. In order to do so, a party must provide written notice to the other anytime during the period of 180 days preceding any such three year anniversary date of the Effective Date (a "Notice Date"). Such notice shall contain a description of the terms the noticing party is seeking to add, delete or modify in the Use Agreement ("Renegotiation Terms"). Following the Notice Date, the parties shall negotiate in good faith over such Renegotiation Terms for a period of 180 days (the "Renegotiation Period"). If the parties are unable to come to agreement with respect to the Renegotiation Terms and do not execute an Amendment to Use Agreement which sets forth the Renegotiation Terms before expiration of the Renegotiation Period, then the matter shall be referred to binding arbitration. Such arbitration shall be conducted by the Wisconsin Public Service Commission, the American Arbitration Association or other arbiter mutually acceptable to the parties.

18.12 Limitation of Use. MWFN may not use the Municipal Right-of-Way or Municipal Facilities for the provision of "cable service" (as that term is defined in federal, state or local

Law) in violation of any applicable Law prohibiting, limiting or conditioning such use. The City's grant of the rights under this Use Agreement is not intended nor should it be construed to be a grant of a cable franchise under federal or state law or under Chapter 99, Milwaukee Code of Ordinances.

**18.13 Jury Trial Waiver. The parties hereby waive their respective rights to a jury trial on any claim or cause of action based upon or arising from this Use Agreement.**

18.14 Force Majeure. MWFN shall not be responsible for performance of any obligation under this Agreement that is prevented or delayed by reasons outside of its reasonable control, including without limitation floods, fires, hurricanes, tornadoes, earthquakes or other unavoidable casualty, acts of public enemy, insurrection, war, riot, sabotage, epidemic, strike or other labor disputes, freight embayances, acts or omissions of government, utility or other third parties or unusually severe weather conditions.

18.15 VALUE Members. The benefits, pricing and related terms extended to the City under this Agreement may be extended by MWFN to any other VALUE member such as local government entities in southeast Wisconsin, including but not limited to Milwaukee Metropolitan Sewerage District and Milwaukee Public Schools and to Wisconsin colleges, universities and other school systems, all to the extent such parties negotiate and enter into an agreement with MWFN relating to the foregoing; provided, however, the City makes not representation concerning the foregoing.

18.16 Private Activity Rules. The parties acknowledge that Internal Revenue Service Rules and Regulations limit the extent to which private parties may access and utilize certain Municipal Facilities ("Certain Facilities") which have been constructed using proceeds from tax exempt City bond issues (the "Private Activity Rules"). The parties further acknowledge that MWFN may seek to utilize Certain Facilities in the construction of the Network. Each party covenants to work collaboratively with the other in addressing the application of Private Activity Rules in connection with the plan, design, implementation, installation, modification or expansion of the Network. MWFN shall not be liable for any delays or inability to perform under this Use Agreement if the delay or inability is related to Private Activity Rules. Furthermore, MWFN's obligations under Section 10 shall not cover Losses related to or arising from Private Activity Rules.

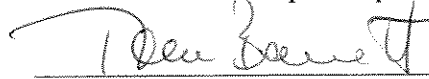
Once the City has approved installations on particular Municipal Facilities, there shall be a presumption as to those installations that MWFN has complied with its obligations regarding Private Activity Rules. If the City requires that MWFN relocate any installations for reasons related to Private Activity Rules, MWFN may offset the costs of relocation against any future amounts otherwise owed by MWFN to the City. In the absence of the ability to offset such costs, the City shall cover the actual costs to relocate any installations. Costs of relocation shall include, without limit, any downtime credits issued to users of the Network as a result of an associated Network outage.

MWFN will inform the City sufficiently in advance of any modifications or expansions to the original installation of the Network in order to permit the City to review and approve such

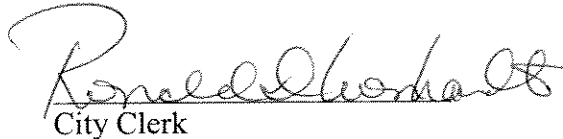
modifications or expansion as compliant with Private Activity Rules. The City shall perform its review in a timely manner.

In Witness Whereof, And in order to bind themselves legally to the terms and conditions of this Use Agreement, the duly authorized representatives of the parties have executed this Use Agreement as of the Effective Date.

CITY OF MILWAUKEE,  
a Wisconsin municipal corporation

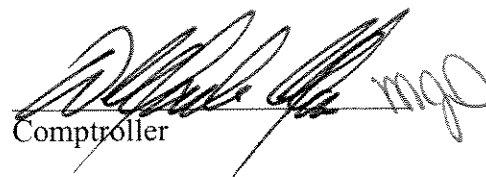


Mayor



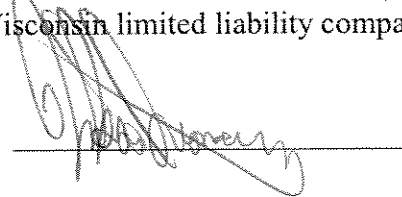
City Clerk

COUNTERSIGNED:



Comptroller

MIDWEST FIBER NETWORKS, LLC  
a Wisconsin limited liability company

By: 

Approved as to form, content and execution  
this 25<sup>th</sup> day of September, 2006



Assistant City Attorney

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