


# Memo

TO: Honorable Mayor and Members of the City Council

FROM: Rick Otto, City Manager 

DATE: August 13, 2021

SUBJECT: Item 7.2 Verizon Master Encroachment Agreement

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Attached is an updated version of the proposed Master Encroachment Agreement with Verizon Wireless, as the version that was included with the agenda packet did not reflect the final changes that were negotiated with Verizon. This updated agreement has two minor differences from the version included in the agenda packet:

- Section 2.11 was updated to include an additional five-year extension to the agreement term
- Section 12 was updated to include insurance language that better reflects Verizon's and the City's insurance needs for the agreement

**MASTER ENCROACHMENT AGREEMENT**  
**[Telecommunications Network Facilities within Public Right-of-Way – Verizon]**

**THIS MASTER ENCROACHMENT AGREEMENT** for the Construction, Installation, Maintenance and Operation of Telecommunications Network Facilities Within the Public Right-of-Way (“Agreement”) is entered into effective as of \_\_\_\_\_, 2021 (“Effective Date”) between the CITY OF ORANGE, a municipal corporation organized and operating under the laws of the State of California (“City”), and LOS ANGELES SMSA LIMITED PARTNERSHIP, d/b/a VERIZON WIRELESS (“Permittee” and together with City, the “Parties” and each, a “Party”).

**RECITALS**

**WHEREAS**, Permittee is a limited partnership, duly organized and existing under the laws of the State of California and authorized by the Public Utilities Commission of the State of California (“PUC”) under its Certificate of Public Convenience and Necessity (“CPCN”) to provide telecommunications services;

**WHEREAS**, Permittee seeks City’s permission to construct, install, and maintain a comprehensive network of Telecommunications Network Facilities (as defined herein) within City’s Public Right-of-Way (as defined herein) within City, which work is within the scope of Permittee’s CPCN;

**WHEREAS**, City has the authority to regulate the terms and conditions for the use of the Public Right-of-Way for the construction, installation, maintenance, and operation of Telecommunications Network Facilities by telecommunications providers through the issuance of Permits (as defined herein) and the authority to impose permit and other fees on Permittee in connection with its placement of Telecommunications Network Facilities in the Public Right-of-Way;

**WHEREAS**, the purpose of this Agreement is to provide the general framework within which Permittee will apply for necessary Permits and install, move, and/or remove Telecommunications Network Facilities on City Property located within the Public Right-of-Way within the corporate limits of City;

**NOW, THEREFORE**, in consideration of the Recitals and the mutual promises contained herein, the Parties do hereby agree to the following terms and conditions:

**1. Definitions.**

**City** – means the City of Orange, a municipal corporation organized and operating under the laws of the State of California, and includes the duly elected or appointed officers, agents, employees, and volunteers of the City of Orange, individually or collectively.

**City Property** – means any City-owned buildings, land or other property located outside of the Public Right-of-Way, and any City-owned infrastructure located within the Public Right-of-Way, including, without limitation utility poles, traffic light poles, wires, fiber-optic strands, conduit and street light poles.

**Laws** – means any order, certificate, judicial decision, statute, constitution, ordinance, resolution, rule, tariff, administrative order, or other requirement of any municipality, county, state, federal, or other agency having joint or several jurisdiction over the parties to this Agreement, in effect either at the time of execution of this Agreement or at any time during the location of the Facilities in the Public Right-of-Way including, without limitation, any regulation or order of an official entity or body, including the Federal Communications Commission (“FCC”) or any successor agency. A reference to “Laws” shall include, without limitation, any lawful provision of the Orange Municipal Code (“OMC”) or any other City ordinance, resolution or regulation.

**Permit** – means an individual encroachment permit, in substantially the same form as attached hereto as Exhibit “A,” obtained by Permittee from City pursuant to an application filed in accordance with all applicable City procedures and requirements. The term does not include permits, agreements or other authorizations required to occupy City Property other than that subject to the Permit. The Permit authorizes Permittee to install the Facilities described in the Permit.

**Permittee** – means the Permittee named as a Party, above, and its lawful successors or permitted assigns.

**Public Right-of-Way** – means the surface, the air space above the surface, and the area below the surface of the public streets, roads, sidewalks, lanes, courts, ways, alleys, boulevards, and similar places, as the same now or may thereafter exist, that are owned or controlled by City, are dedicated to the use of the general public for street purposes, and are under the jurisdiction of City. This term shall not include any property owned by any person or agency other than City, except as provided by applicable Laws or pursuant to an agreement between City and any person. This term shall not include any City Property.

**Telecommunications Network Facilities or Facilities** – means, without limitation, antennas, radios, fiber optic cables, wires, lines, conduits, converters, splice boxes, cabinets, handholes, manholes, vaults, drains, surface location markers, waveguides, poles, towers, conductors, ducts, amplifiers, appliances, pedestals, or other associated equipment and related hardware, appurtenances, and facilities to be used by Permittee to provide service or to be located by Permittee on City Property and/or in any Public Right-of-Way of City and used or be useful for the transmission of Telecommunications Services – all as described in more detail in any and all Permits.

**Telecommunications Services** – means services that Permittee is authorized to offer and/or provide through the Facilities pursuant to its CPCN and PUC decisions pertaining to telecommunications.

## **2. Limitations and Restrictions of Permit.**

2.1 Subject to the provisions of this Agreement and all applicable Laws, City hereby allows Permittee and its employees, contractors, subcontractors, agents, representatives and permitted assigns to encroach upon City’s Public Right-of-Way for the purpose of construction, installation, maintenance, location, movement, operation, placement, protection, reconstruction, reinstallation, relocation, removal, repair and replacement of the Facilities on City Property as

described and shown in any applicable Permit, which by this reference is incorporated herein (“Work”). Permittee hereby certifies that the descriptions and drawings submitted to City to obtain any and all Permits are true, complete and accurate. This permission granted under this Agreement is not a permission to do any Work except as described in applicable Permits and is subject to all applicable City procedures and requirements, including but not limited to the requirement for prior review and approval of City of each Permit, and the acceptance hereof shall evidence Permittee’s agreement to all applicable City procedures and requirements, and the additional conditions contained herein. In the event of a contradiction, conflict or inconsistency between the terms of the Agreement and any Permit, the terms of the Permit shall govern the Work to be performed under such Permit.

2.2 Permittee provides Telecommunications Services in California. The type of services Permittee offers to its carrier customers through Facilities in the Public Right-of-Way consists of communications services which are presently permitted by law. If Permittee is authorized by the PUC to provide additional and/or alternative services, including but not limited to community antenna television systems or commercial video programming, and intends to offer such services to customers within the corporate limits of City, Permittee shall give City as much advance written notice as practicable, up to and including three (3) months’ prior notice, of its intent to change the service provided by way of the Facilities installed under this Agreement, and comply with all applicable City procedures and requirements. Permittee acknowledges that any expansion or changes in the regulatory authority over such services may, if mandated by law, require Permittee to enter into a new agreement consistent with all applicable City procedures and requirements regulating such services or the expansion or change in services, if such service changes fall under the lawful regulation, jurisdiction, and authority of City in accordance with Laws.

2.3 Permittee shall not commence any Work until Permittee has first obtained a Permit to do so. Permit applications and accompanying fees must be submitted and paid, respectively, in accordance with the provisions of City’s policies, procedures, and rules. City shall, in writing, either approve the Permit application, or reject the application by identifying the specific reasons why the Permit application is not in compliance with this Agreement or the HPMPC. Commencing on the first day of the month following the approval of a Permit by City (“Commencement Date”), Permittee shall pay City the sum of TWO HUNDRED SEVENTY DOLLARS and 00/100 (\$270.00) (“Attachment Fee”) for the street light attachment approved under the respective Permit. The first payment of the Attachment Fee for each Permit shall be due and payable within forty-five (45) days of the Commencement Date. Thereafter, all remaining Attachment Fees shall be paid on or before the anniversary of the Commencement Date. All Attachment Fees shall be reasonably prorated by the Parties for any period during which the Facilities at a particular location are not in operation or the applicable Permit is terminated for any reason. The Attachment Fees shall be delivered to City by mailing a check to the following address: City of Orange, Attn: Accounts Receivable, 300 East Chapman Avenue, Orange, CA 92866. Commencing on the first anniversary of the Commencement Date for each respective Permit, and on each anniversary thereafter, the annual Attachment Fees for such Permit shall be increased by an amount equal to three percent (3%) of the Attachment Fees in effect for the immediately previous year. City shall provide Permittee a completed, current Internal Revenue Service Form W-9 and state and local withholding forms if required.

2.4 Permittee is hereby given notice of existing state law, Chapter 3.1, Division 5, Title 1 of the Government Code, Sections 4215 et seq., which requires owners of underground facilities to join a regional notification center such as Underground Service Alert (USA); requires contractors to contact such a regional notification center prior to excavation; requires facility owners to mark their underground facilities when notified; and sets civil penalties for failure to comply therewith. Prior to construction, Permittee shall contact USA to verify the location of existing underground facilities.

2.5 Except as permitted by applicable Laws or this Agreement, in the performance and exercise of its rights and obligations under this Agreement, Permittee shall not interfere in any material manner with the existence and operation of any and all public and private rights-of-way, sanitary sewers, water mains, storm drains, gas mains, poles, overhead and underground electric and telephone wires, streetlamps, traffic signals, cable television, and other telecommunications, utility, and municipal property existing as of the date Permittee installs its Facilities onto City Property without the approval of the owner(s) of the affected property or properties. In addition, and notwithstanding the foregoing, Permittee may not, without prior approval from City, install any Facilities underneath any City sidewalk that runs parallel to a curb. City agrees that City and/or any other tenants of any City Property that house Permittee's Facilities who currently have or in the future take possession of such City Property will be permitted to install only such equipment that is of the type and frequency which will not cause harmful interference which is measurable in accordance with then-existing industry standards to the then-existing Facilities of Permittee. The Parties acknowledge that there will not be an adequate remedy at law for noncompliance with the provisions of this Section and therefore, either Party shall have the right to equitable remedies, such as, without limitation, injunctive relief and specific performance.

2.6 This Agreement is not a grant by City of any property interest but is made subject and subordinate to the prior and continuing right of City to use all the Public Right-of-Way in the performance of its duties, including, but not limited to, public use as a street and for the purpose of laying, installing, maintaining, repairing, protecting, replacing, and removing sanitary sewers, water mains, storm drains, gas mains, poles, overhead and underground electric and telephone wires, streetlamps, traffic signals, cable television, and other utility and municipal uses together with appurtenances thereof and with right of ingress and egress, along, over, across, and in said Public Right-of-Way.

2.7 This Agreement is made subject to all easements, restrictions, conditions, covenants, encumbrances, and claims of title which may affect the Public Right-of-Way which are recorded in the public record or of which City notifies Permittee in writing on or before the date of this Agreement, and it is understood that Permittee, at its own cost and expense, shall obtain such permission as may be necessary and consistent with any other existing rights. Notwithstanding the foregoing, no reference herein to a "Public Right-of-Way" shall be deemed to be a representation or guarantee by City that its interest or other rights to control the use of such property is sufficient to permit its use for such purposes, and Permittee shall be deemed to gain only those rights to use as are properly in City and as City may have the undisputed right and power to give.

2.8 The construction, installation, operation, maintenance, and removal of said Facilities shall be accomplished without cost or expense to City in compliance with the applicable

Permit and in such a manner as not to endanger personnel or property, or unreasonably obstruct travel on any road, walk, or other access thereon within said Public Right- of-Way. Notwithstanding the foregoing, unless required by federal, state or local law, City's approval for equipment shall not be required in connection with equipment that consists of upgrades or replacements of "like-kind" equipment which is substantially similar in appearance, dimensions and weight.

2.9 Permittee, in its sole discretion, may submit a Permit to City for approval which allows Permittee to replace an existing City-owned standard pole with a replacement pole ("Replacement Pole") sufficient to accommodate Permittee's Facilities. Upon installation of a Replacement Pole, title to the Replacement Pole shall automatically transfer to City without the need for execution of a written instrument evidencing the same. If a Replacement Pole is damaged or destroyed and is no longer suitable to support Permittee's Telecommunication Network Facilities, Permittee shall be responsible for the cost difference, if any, in replacing such replacement pole. The cost difference shall be determined by subtracting the cost of City's standard pole from the cost of the Replacement Pole, if the cost of the Replacement Pole is greater than that of City's standard pole.

2.10 If Permittee's Facilities are installed on more than ten (10) Replacement Poles, Permittee shall provide and deliver to City one (1) additional Replacement Pole (excluding mast arm) so that a replacement is immediately available to City in case an existing Replacement Pole in use by Permittee is damaged or destroyed and is no longer suitable to support Permittee's Telecommunication Network Facilities.

2.11 The term of this Agreement ("Term") shall commence as of the Effective Date, and shall continue until the earlier of (a) ten (10) years or (b) such time as the Agreement is terminated by either Party pursuant to the termination procedures set forth below in Section 8 of this Agreement. Not less than ninety (90) days prior to the expiration of the Term (unless earlier terminated pursuant to Section 8), either Party may provide written notice seeking to re-negotiate any provision of this Agreement or provide written notice to the other Party of non-renewal of the Agreement. If the Parties are renegotiating the Agreement in good faith but cannot come to agreement prior to expiration of the Term, the Agreement shall expire on its own terms unless the Parties agree in writing to extend the Agreement as currently executed for an additional maximum period of one hundred eighty (180) days ("Status Quo Extended Term"). If negotiations are not concluded and the Parties do not come to terms on a new agreement by the expiration of the Status Quo Extended Term, the Agreement shall expire and be terminated by its own terms. If the Parties come to terms on a new agreement prior to expiration of the Status Quo Extended Term, but City is unable to obtain City Council approval prior to such expiration, the Status Quo Extended Term shall be extended to the date of City Council action on the new agreement, after which date, if City Council has approved the new agreement, it shall become effective. If neither Party provides written notice seeking to re-negotiate the Agreement or seeking non-renewal prior to the expiration of the Term pursuant to the terms of this Section 2.11, the Term of the Agreement shall automatically be extended for two (2) additional periods of five (5) years, and all other provisions of this Agreement shall remain intact.

2.12 The term of each Permit shall be for ten (10) years beginning on its Commencement Date. So long as this Agreement has not expired, the term of each Permit shall automatically be

extended for three (3) additional five (5) year terms unless Permittee terminates it at the end of the then-current term by giving City written notice of the intent to terminate at least three (3) months prior to the end of the then-current term. The expiration of the Agreement shall not terminate any Permit, but instead, (i) the terms of the Agreement shall continue to apply to any existing Permits in place as of the termination of the Agreement, and (ii) the Permit shall expire upon the expiration of the then-current term (i.e., no additional renewals are permitted).

**3. No Interests in City Property or Public Right-of-Way.**

3.1 No Right, Title or Interest. The permission granted hereunder shall not in any event constitute an easement on or an encumbrance against City Property or against the Public Right-of-Way. No right, title or interest (including franchise interest) in the Public Right-of-Way, or any part thereof, shall vest or accrue in Permittee by reason of this Agreement or the issuance of any Permit or exercise of any privilege given thereby.

3.2 Possessory Interest. The Parties agree that no possessory interest is created by this Agreement. However, to the extent that a possessory interest is deemed created by a governmental entity with taxation authority, Permittee acknowledges that City has given to Permittee notice pursuant to California Revenue and Taxation Code Section 107.6 that the use or occupancy of any public property pursuant to this Agreement may create a possessory interest which may be subject to the payment of property taxes levied upon such interest. Permittee shall be solely liable for, and shall pay and discharge prior to delinquency, any and all possessory interact taxes or other taxes levied against Permittee's right to possession, occupancy, or use of any public property pursuant to any right of possession, occupancy, or use created by this Agreement.

**4. Compliance with All Laws.**

Permittee shall comply with all applicable Laws and all other applicable City procedures and requirements, including City's Small Wireless Facility Installation Policy as adopted by the City Council, at all times. No repair or construction shall be performed except in accordance with this Agreement and applicable City procedures and requirements, to the extent they are not in conflict with any paramount authority of the state or federal government.

**5. Reservation of Rights.**

City's agreement hereto is not a waiver of and is without prejudice to any right City may have under law to regulate, tax or impose fees or charges on Permittee, including, but not limited to fees or charges for attaching Facilities to City Property (whether such is in the Public Right-of-Way or not, and using City-generated power) or any right Permittee may have under the law to provide services through the Facilities pursuant to state or federal Laws, rules or regulations, including but not limited to Public Utilities Code Sections 7901 and 7901.1, Government Code Section 65964.1 and Section 253(c) of the Telecommunications Act of 1996. Permittee shall be subject to any taxes, fees or charges that City lawfully imposes on the Facilities and Telecommunications Services in the future. Nothing herein shall affect in any way City's power or right to impose or collect any tax or fee on users or providers of the services to be provided by Permittee. Nothing herein is intended to impose regulations or conditions on Permittee that City is preempted from imposing by state or federal Laws.

**6. Work Standards; Repairs.**

6.1 The Work shall be done in a good and skillful manner, subject to the supervision and reasonable satisfaction of City. Permittee's representative shall be physically present at any construction site at all times that construction or excavation is being conducted. Permittee's Work shall comply with all standards imposed by City law and be conducted with the least possible hindrance or interference to the Public Right-of-Way and City Property.

6.2 Permittee shall be responsible for any damage to City street pavements, existing utilities, curbs, gutters, sidewalks or to any private property or improvements, including but not limited to subsidence, cracking, erosion, collapse, weakening, or loss of lateral support, to the extent caused by its installation, maintenance, repair or removal of its Facilities in Public Right-of-Way, and shall repair, replace and restore in kind any such damaged facilities at its sole expense and to the reasonable satisfaction of City.

6.3 If Public Right-of-Way to be used by Permittee has preexisting installation(s) placed in said Right-of-Way, Permittee shall assume the responsibility to verify the location of the preexisting installation and notify City and any third party of Permittee's proposed installation. The reasonable cost of any work required of such third party or City to provide adequate space or required clearance to accommodate Permittee's installation shall be borne solely by Permittee.

6.4 Permittee shall be responsible for ensuring that the Work of employees, contractors, subcontractors, agents, representatives and permitted assigns is performed consistent with this Agreement and applicable Laws, and shall be responsible for all acts or omissions of such third parties when acting upon the direction of Permittee including responsibility for promptly correcting acts or omissions. This section is not meant to alter tort liability of Permittee to third parties.

**7. Removal, Relocation and Abandonment.**

7.1 Subject to the provisions of this Section 7, Permittee shall at its sole expense and without cost or expense to City, properly remove, relocate and/or abandon (in accordance with Section 7.6) any or all of the Facilities installed, used, and maintained under this Agreement if and when such Facilities may be deemed by City to be detrimental to the public health, safety, or welfare; are in conflict vertically and/or horizontally with any proposed City installation; interfere with any City construction project; or must be removed, relocated and/or abandoned due to any abandonment, change of grade, alignment or width of any street, sidewalk or other public facility by City or other public agency, including the construction, maintenance, or operation of any other City underground or aboveground facilities including but not limited to any sewer, storm drain, conduits, streetlamps, traffic signals, gas, water, electric or other utility system, or pipes owned by City or any other public agency; provided, however, that Permittee shall not be required to bear the expense of a removal, relocation or abandonment requested under this Section 7.1 on behalf of, or for the benefit of, any third party unaffiliated with either Party.

7.2 If Permittee is required to remove, relocate or abandon (in accordance with Section 7.6) its Facilities pursuant to Section 7.1, City shall reasonably cooperate with Permittee to determine a mutually acceptable location on Public Right-of-Way where Permittee may relocate



said Facilities. In the event Permittee relocates the Facilities to a new location as set forth in this Section 7.2, the terms of this Agreement will apply to the Work at the relocated Facilities unless the Parties agree otherwise. Permittee will be required to apply for a new Permit to conduct Work to relocate and re-install Facilities in the new location, the approval of which Permit shall not be unreasonably withheld. If the removal or relocation is caused by City, then any Permit fees associated with such application shall be waived.

7.3 If Permittee is required to remove, relocate or abandon its Facilities pursuant to Section 7.1, such removal, relocation or abandonment (in accordance with Section 7.6) shall be completed within one hundred eighty (180) days after written notice delivered by City unless exigencies dictate a shorter period for removal, relocation and/or abandonment, and such shorter period is stated in the written request ("RRA Notice Period"). The RRA Notice Period shall be no less than forty-five (45) days, subject to permitting and agency approvals.

7.4 If removal or relocation cannot reasonably be accomplished within the RRA Notice Period or the Parties agree in writing to a period longer than the RRA Notice Period, then Permittee shall commence such removal or relocation within the RRA Notice Period and thereafter continue the same diligently until completion thereof.

7.5 If Permittee has not complied with such written request for removal, relocation or abandonment within the RRA Notice Period or executed a written agreement to extend the RRA Notice Period within the RRA Notice Period, then, on the first business day immediately following the last day of the RRA Notice Period, City may cause the removal, relocation or abandoning work to be done at Permittee's sole cost and expense and, in the case of relocation, may use its sole discretion to determine a new location for the Facilities. Under such circumstances, City shall only be obligated to perform such work in a manner consistent with the standard practices of City in performing street work and construction. City shall not be obligated to repair or replace any materials or improvements in a form or manner consistent with any applicable Permit or any plans and specifications submitted by Permittee, and City shall not be responsible for any damages whatsoever to Permittee as a result of City performing such work, unless City performs such work in a negligent or reckless manner.

7.6 If any portions of the Facilities covered under this Agreement are no longer used by Permittee, or are abandoned for a period in excess of one year, Permittee shall notify City and shall either promptly vacate and remove the Facilities at its own expense or, with City's permission, may abandon some or all the Facilities in place. After such non-operation, removal or abandonment, Permittee shall have no further obligations to City (including the payment of any Attachment Fees) and no further rights to the Facilities. Under such circumstances, Permittee shall cooperate in good faith to execute any documents necessary to convey title to the Facilities to City.

7.7 In the event Permittee removes, relocates or abandons its Facilities or any portion thereof, it shall be so completed consistent with all applicable City procedures and requirements. Should Permittee remove the Facilities from the Public Right-of-Way, Permittee shall, within ten (10) days after such removal, give notice thereof to City specifying the Public Right-of-Way affected and the location thereof as well as the date of removal. Before proceeding with removal or relocation work, Permittee shall obtain a Permit from City and pay applicable permitting, plan check, and inspection fees.

## **8. Termination, Default and Remedies.**

8.1 Permittee may terminate any or all Permits at any time for cause or for no cause at all, and City may terminate any and all Permits for cause only, by delivering thirty (30) days' written notice of said termination to the other Party. "For cause" termination by City shall be limited to those reasons expressly provided herein. Such termination by Permittee shall not relieve it of any obligation to City regarding any existing breach of any Permit or this Agreement at the time of such termination.

8.2 Within ninety (90) days after such termination, Permittee shall remove its Facilities from the Public Right-of-Way and repair and restore such Right-of-Way to ameliorate all effects caused by such removal, except that Permittee shall not be responsible for damage resulting from normal wear and tear, acts of God, and natural disasters. Notwithstanding such termination, Permittee's obligations under the following sections of this Agreement shall survive the termination of this Agreement: Sections 4, 6.3, 7.7, and 8.8.

8.3 In connection with a particular Permit, in the event that Permittee fails to install its Facility on City Property as authorized under such Permit within one (1) year after the date Permittee receives all applicable governmental approvals to install its Facility, City may notify Permittee in writing of its intent to terminate the Permit due to abandonment. If Permittee does not respond to said notice within thirty (30) days of delivery, City shall have the right, at its sole discretion, to declare the Permit terminated by abandonment, provided however, in the event the delay in installation is due to no fault by Permittee, City shall extend the period in which Permittee is required to install its Facilities under this Section 8.3.

8.4 In the event Permittee defaults, or fails to keep, fulfill or perform any of the material terms or conditions of this Agreement or any Permit and fails to remedy such default within forty-five (45) days after delivery of written notice from City of such default or failure, or, if such cure cannot reasonably be completed within said forty-five (45) days, Permittee fails to commence such cure and thereafter diligently continue to cure the default until completion thereof, City may, upon written notice to Permittee, terminate this Agreement, if the default is under the Agreement or a substantial number of Permits, or the affected Permit. Upon such termination, this Agreement or the affected Permit, as applicable, shall be cancelled, and all of the rights and privileges of Permittee under the Agreement or the affected Permit, as applicable, shall be deemed surrendered.

8.5 Notwithstanding the notice and cure periods set forth in Sections 7.3, 7.6, 8.3 and 8.4, in the event that City finds that the Telecommunications Network System poses an imminent threat to the public health, welfare and safety, City shall so notify Permittee in writing and telephonically to Permittee's Network Operations Center number at 1-800-264-6620 ("NOC") and, after providing Permittee an opportunity to cure, may take immediate steps to mitigate the threat, including but not limited to removal and relocation of the Facilities, the reasonable and documented cost of such work to be borne solely by Permittee, unless such threat was caused by negligence or willful misconduct of City or its employees, agents or contractors. The Parties agree to attempt in good faith to work cooperatively with one another to neutralize and mitigate any threat to public health, welfare and safety caused by or exacerbated by the Facilities.

8.6 Failure on the part of any Party to comply with the terms and conditions of this Agreement, including but without limitation Permittee's representation that the CPCN is valid and has not been terminated, revoked or abandoned, and the Work and use of the Facilities is within the scope of the CPCN, shall constitute a default and material breach of this Agreement. Each Party shall be entitled to exercise all rights and remedies in the event of a breach, including, in the case of a default and material breach by Permittee, City's right, at its sole discretion, to withhold issuance of any new Permits and/or commence administrative enforcement proceedings against Permittee pursuant to all applicable Laws.

8.7 Upon termination for any reason, City may require Permittee to remove the affected Facilities and restore the Public Right-of-Way and City Property at its sole cost and according to the requirements of the Permit and the OMC. Under such circumstances, Section 7.5 shall apply. If, within ninety (90) days of termination, Permittee does not remove the affected Facilities pursuant to Section 8.2, the Facilities shall be deemed conveyed to City and Permittee shall have no further obligation to remove, relocate, or maintain the Facilities and no further right to control or use the Facilities. Upon the Facilities being deemed so conveyed to City, Permittee shall take all necessary steps, including but not limited to executing any necessary documents, to transfer ownership of the Facilities to City.

8.8 Upon expiration or termination for any reason, Permittee shall remain liable for any amount due under the Agreement, which obligation to pay shall survive any termination of this Agreement; provided, however, the obligation of Permittee to pay Attachment Fees shall terminate (and such fees shall be prorated in accordance with Section 2.3 above) upon such termination. Anything herein to the contrary notwithstanding, the provisions of the Agreement relating to indemnification and any other provisions which by their nature should survive termination or expiration of this Agreement, shall so survive.

## **9. Performance Bond.**

9.1 Prior to issuance of the first Permit after the Effective Date, Permittee shall file with and shall thereafter at all times during the remaining term of this Agreement and any and all Permits keep on file with City a performance bond, in a form that shall be reasonably approved by City and under any and all circumstances in compliance with applicable Laws, naming City as obligee in an amount equal to approximately one hundred percent (100%) of the total cost of removal of the Facilities (as reasonably approved by City and as may be increased or decreased from time to time with approval of City, the "Bond").

9.2 The Parties agree that the initial amount of the Bond shall be \$30,000, which is based upon the estimated cost of removing fifteen (15) Facilities, to guarantee and assure the faithful performance of Permittee's obligations under this Agreement. Upon the issuance of the 16<sup>th</sup> Permit and every subsequent Permit, City may request Permittee to increase the amount of the Bond by \$2,000 for each subsequent Facility Permittee installs on City Property. Alternatively, Permittee, may in its sole discretion, purchase or increase the existing bond by the number of likely additional Facilities multiplied by \$2,000.

9.3 City shall have the right to draw against the Bond, only in the event of an uncured default beyond applicable notice and cure periods by Permittee that results in an unauthorized

abandonment of the Facilities; provided that Permittee is first given written notice of any intent to draw against the Bond and an opportunity to cure, and only to the extent of the actual cost of removal of any Facilities that are abandoned by Permittee without City's permission or otherwise not in accordance with Sections 7.5 and 7.6. Upon such withdrawal from the Bond, City shall provide notice to Permittee of the amount withdrawn and the date thereof. Forty-five (45) days after City's delivery of notice of the Bond withdrawal authorized herein, Permittee shall deposit such further bond, or other security, as City may require, which is sufficient to meet the requirements of this Agreement. Any portion of the Bond that is not drawn upon by City as reimbursement for actual costs of removal of the Facilities shall be released and refunded to Permittee upon written notice by City to the surety and Permittee, which shall be provided upon expiration or early termination of the Agreement and the removal of all of the Facilities.

#### **10. Hold Harmless and Indemnification.**

10.1 Permittee, for itself, its agents, contractors and employees, shall defend, indemnify and hold harmless City, its duly elected and appointed officers, agents, employees, and representatives from and against any and all suits and causes of action, claims, charges, damages, demands, judgments, fines, costs and expenses including without limitation reasonable attorneys' fees, and penalties or losses of any kind or nature whatsoever, to the extent caused by Permittee's breach of this Agreement and any Permit, except to the extent arising from City's or its officers', agents', employees' or representatives' negligence, willful misconduct or criminal act.

10.2 Except to the extent caused by City's or its officers', agents', employees' or representatives' negligence, willful misconduct or criminal acts, this indemnification shall include without limitation and to the extent caused by Permittee claims for: (1) injury to or death of any person; (2) property damage; (3) performance or failure to perform the obligations under this Agreement and any Permit by Permittee, or its contractors, subcontractors, agents, employees, or other persons acting on Permittee's direction; (4) the design, placement, maintenance, repair, or condition of the Facilities; (5) all claims, demands, damage, causes of action, proceedings, loss, liability, costs and expenses (including reasonable attorneys' fees) of any kind alleging injury to or death of persons or damage to public or private property including environmental damage that arises from or is directly attributable to, the Facilities or any release, remediation, and/or clean-up costs caused by any release of hazardous materials or contaminants from the Facilities during operations and/or after abandonment; and (6) all other claims of any nature whatsoever which may be caused by the Work.

10.3 In the event that City or any of its duly elected or appointed officers, agents, employees or representatives shall be made a party to any action due to Permittee's violation of this Agreement or any Permit or any federal, state or local Laws including but not limited to Section 4 of this Agreement, Permittee shall indemnify, defend (with legal counsel reasonably acceptable to City) and hold City harmless from any and all such claims.

10.4 Permittee, for itself and its successors and assigns, hereby waives all claims and causes of action, whether now existing or hereafter arising, against City or its duly elected or appointed officers, agents, or employees, for damages, physical or otherwise, to any of the Facilities covered by this Agreement from any cause whatsoever, except to the extent caused by

City's or its officers', agents', employees' or representatives' negligence, willful misconduct or criminal acts.

10.5 The provisions of this Section 10 shall apply regardless of whether City prepared, supplied, or approved plans or specifications or inspected any of the Work or improvements installed and constructed pursuant to this Agreement and any Permit.

**11. Limits of Liability.**

11.1 Neither Party shall be liable, under any theory, to the other Party, for any indirect, special punitive or consequential damages including, but not limited to, any claim for loss of services, lost revenue or profits or third-party damages whether in contract, tort, or otherwise, even if the Party was or should have been aware of the possibility of these damages, whether under theory of contract, tort (including negligence), strict liability, or otherwise.

11.2 Nothing in this Agreement shall be deemed to make City or any officer or employee of City responsible or liable to Permittee or any other person by reason of City's approval of plans for the Work or by reason of any inspections of the Facilities conducted by City, except and to the extent caused by City's negligence, willful misconduct or criminal acts.

**12. Insurance.**

12.1 Except to the extent caused by City's negligence, willful misconduct or criminal acts, Permittee shall assume all responsibility for damages to property or injuries to persons, including accidental death, which may arise from or be caused by Permittee's performance under this Agreement and any Permit, or by anyone Permittee has directly employed, and whether such damage or injury shall accrue or be discovered before or after termination of this Agreement and Permit.

12.2 Prior to the issuance of any Permit, Permittee shall be required to secure and keep in full force and effect at all times during the term of this Agreement and any Permit, policies of commercial general liability, commercial automobile liability insurance and such other insurance as City may from time to time require, written by a company or companies authorized to do business within the State of California. Said policies shall include the City of Orange, its duly elected or appointed officers, and employees as additional insureds as their interest may appear under this Agreement, under the policies in the following amounts which may be adjusted from time to time, upon prior written notice to, review and acceptance by Permittee, to reflect changes of circumstances and the rate of inflation:

(a) Commercial General Liability Insurance in an amount of One Million Dollars (\$1,000,000) per occurrence for bodily injury including accidental death and property damage and One Million Dollars (\$1,000,000) general aggregate including damage to rented premises; and

(b) Commercial Automobile Liability Insurance covering all owned and non-owned vehicles with a combined single limit of One Million Dollars (\$1,000,000) each accident for bodily injury, including accidental death and for property damage.

(c) Workers' compensation insurance as required by law for the protection of its employees during the progress of the Work and employer's liability insurance in an amount of One Million Dollars (\$1,000,000) each accident/disease/policy limit.

12.3 The commercial general liability insurance shall contain a "Severability of Interest" clause and be "Primary Coverage" for any loss arising from or caused in whole by Permittee's performance under this Agreement. Upon receipt of notice from its insurer(s), Permittee shall use commercially reasonable efforts to provide City with thirty (30) days' prior written notice of any policy cancellation of coverage.

12.4 Prior to the issuance of any Permit and on an annual basis, Permittee shall furnish City with a "certificate of insurance" and a blanket "additional insured endorsement" for both the commercial general and automobile liability insurance. The endorsements shall include the City of Orange, its duly elected or appointed officers, and employees as additional insureds as their interest may appear under this Agreement under the commercial general liability and commercial automobile liability policies required herein. This insurance is primary to the coverage of City. Neither City nor any of its insurers shall be required to contribute to any loss.

**PERMITTEE SHALL FURNISH THE REQUIRED CERTIFICATE(S) OF INSURANCE AND ENDORSEMENT(S) WITHIN 30 DAYS OF THE EXECUTION OF THE AGREEMENT BY BOTH PARTIES, BUT IN ANY EVENT, BEFORE CITY ISSUES THE FIRST PERMIT.**

12.5 In the event Permittee employs contractors or subcontractors as part of the Work covered by this Agreement, it shall be the responsibility of Permittee to ensure that all contractors or subcontractors comply with substantially similar insurance requirements that are stated in this Agreement.

### **13. General Conditions.**

13.1 Any right or power conferred, or duty imposed upon any officer, employee, department or commission of City, shall be subject to transfer by operation of law to any other officer, employee, department or commission of City.

13.2 Permittee agrees to keep its Facilities, reasonably related City-owned facilities, including streets, and the Public Right-of-Way in good and safe condition and free from any nuisance, to the reasonable satisfaction of City.

13.3 The permission provided under this Agreement and any Permit is non-exclusive. The grant of any Permit or any of the terms or conditions contained herein shall not be construed to prevent City from granting similar permits and/or licenses or any identical, similar or other type of license or franchise to use the Public Right-of-Way to any person, firm or corporation other than Permittee.

13.4 This Agreement and any Permit are not intended for any third party's benefit and cannot be enforced by any third party.

13.5 This Agreement and any and all Permits shall be governed by the laws of the State of California, without regard to its conflict of laws principles.

13.6 This Agreement and any and all Permits issued to Permittee contain the entire understanding between the Parties with respect to the subject matter herein. There are no representations, agreements or understanding (whether oral or written) between or among the Parties relating to the subject matter of this Agreement that are not fully expressed herein. This Agreement may not be amended except pursuant to a written instrument signed by all Parties.

13.7 No provision herein made for the purpose of securing performance of the terms and conditions of this Agreement and any Permit shall be deemed an exclusive remedy, or to afford the exclusive procedure for the enforcement of the Agreement's or any Permit's terms and conditions, but the remedies and procedures herein provided, in addition to those provided by law, shall be deemed to be cumulative.

13.8 No rights and duties under this Agreement or any Permit shall be assigned or delegated by Permittee without the prior written approval of City, which approval shall not be unreasonably withheld. Notwithstanding any provision in this Agreement to the contrary, Permittee shall have the right to assign this Agreement without City's consent to any parent, subsidiary, affiliate, or any person, firm, or corporation that shall control, be under the control of, or be under common control with Permittee, or to any entity into which Permittee may be merged or consolidated or which purchases all or substantially all of the assets of Permittee that are subject to this Agreement; provided, however, that in the event of such assignment, Permittee shall provide within sixty (60) days of such assignment (a) written notice to City, specifically identifying (i) the name of the assignee; (ii) its corporate form (e.g., corporation, limited liability company, etc.); (iii) its place of incorporation or organization; (iv) its CPCN number; (v) the name, title, address, telephone number and e-mail address of the appropriate person for notice purposes if different from that set forth in Section 13.12, below; and (vi) the assignee's relationship to Permittee; (b) a copy of the assignee's CPCN; and (c) a copy of any document memorializing such assignment. To the extent Permittee desires to maintain the confidentiality of such document, City will execute a separate confidentiality agreement. The Parties agree and acknowledge that, notwithstanding anything in this Agreement to the contrary, certain Facilities deployed by Permittee in the Public Rights-of-Way pursuant to this Agreement may be owned and/or operated by Permittee's third-party wireless carrier customers ("Carriers") and installed and maintained by Permittee pursuant to license agreements between Permittee and such Carriers. Such Facilities shall be treated as Permittee's Facilities for all purposes under this Agreement provided that (i) Permittee remains responsible and liable for all performance obligations under the Agreement with respect to such Facilities; (ii) Permittee's sole point of contact regarding such Facilities shall be Permittee; and (iii) Permittee shall have the right to remove and relocate the Facilities.

13.9 A waiver by either Party of any breach of any term, covenant, or condition contained in this Agreement and any Permit shall not be deemed to be a waiver of any subsequent breach of the same or any other term, covenant, or condition contained in this Agreement or any other Permit whether of the same or different character.

13.10 If any action at law or in equity is brought to enforce or interpret the terms of this Agreement or of any Permit, the prevailing party shall be entitled to reasonable attorney's fees,

costs, and necessary disbursements in addition to any other relief to which such party may be entitled.

13.11 If any one or more of the covenants or agreements or portions thereof provided in this Agreement or any Permit shall be held by a court of competent jurisdiction in a final judicial action to be void, voidable, or unenforceable, such covenant or covenants, such agreement or agreements, or such portions thereof shall be null and void and shall be deemed separable from the remaining covenants or agreements or portions thereof and shall in no way affect the validity or enforceability of the remaining portions of this Agreement or of any Permit.

13.12 All notices herein must be in writing and, unless otherwise provided herein, shall be deemed validly given on the date either personally delivered to the address indicated below, or on the date of receipt if delivered by commercial express carrier (e.g., FedEx, DHL, etc.) as confirmed by signature of the receiving Party, or on the third (3rd) business day following deposit, postage prepaid, using certified mail, return receipt requested, in any U.S. Postal mailbox or at any U.S. Post Office. Should City or Permittee change its address, the other Party shall immediately be notified in writing of such change, provided, however, that each address for notice must include a street address and not merely a post office box. All notices, demands or requests between the Parties shall be given to the other Party addressed as follows:

City: City of Orange  
Public Works Director / City Engineer  
300 East Chapman Avenue  
Orange, CA 92866  
(714)744-5525

Permittee: Los Angeles SMSA Limited Partnership,  
d/b/a Verizon Wireless  
180 Washington Valley Road  
Bedminster, NJ 07921  
Attention: Network Real Estate  
Site: City of Orange SC MLA

13.13 In case of an emergency due to interference or any unforeseen events, City will act to protect the public health and safety of its citizens, and to protect public and private property, notwithstanding any provision in this Agreement. City will make every reasonable effort to coordinate its emergency response with Permittee. To that end, City will use the NOC number provided above. Additionally, in order to protect the public health and safety, prior to City accessing or performing any work on a City Property on which Permittee has installed Telecommunications Equipment, Licensee shall deactivate such Telecommunications Equipment if any of City's employees or agents must move closer to the Equipment than the FCC recommended minimum distance. In such case, City will contact Permittee at the NOC number to request immediate deactivation.

13.14 If any Laws (including, but not limited to, those issued by the FCC or its successor agency) and any binding judicial interpretations thereof that govern any aspect of the rights or obligations of the Parties under this Agreement shall change after the Effective Date and such



change makes any aspect of such rights or obligations inconsistent with the then-effective Laws, then the Parties agree to promptly amend the Agreement as reasonably required to accommodate and/or ensure compliance with any such legal or regulatory change.

IN WITNESS of this Agreement, the parties have entered into this Agreement as of the year and day first above written.

**“PERMITEE”**

**“CITY”**

LOS ANGELES SMSA LIMITED  
PARTNERSHIP, d/b/a VERIZON WIRELESS

CITY OF ORANGE, a municipal corporation

\*By: \_\_\_\_\_  
Printed Name: \_\_\_\_\_  
Title: \_\_\_\_\_

By: \_\_\_\_\_  
Mark A. Murphy, Mayor

ATTEST:

\_\_\_\_\_  
Pamela Coleman, City Clerk

APPROVED AS TO FORM:

\_\_\_\_\_  
Mary E. Binning  
Senior Assistant City Attorney

**EXHIBIT "A"**  
**FORM OF PERMIT**