

**RESOLUTION**

**FRANCHISE AND CONCESSION REVIEW COMMITTEE**

**CITY OF NEW YORK**

**Cal. No. 1**

In the matter of approval of a proposed information services franchise agreement ("the Franchise Agreement") between the City of New York and Pilot Fiber NY, LLC ("Pilot").

WHEREAS, pursuant to Authorizing Resolution 1909,( adopted by New York City Council on August 22, 2013), the New York City Department of Information Technology and Telecommunications ("DoITT") issued a solicitation on April 13 2015 for franchises for the provision of information services, as permitted by said Authorizing Resolution; and

WHEREAS, Pilot responded to said solicitation; and

WHEREAS, the FCRC held a public hearing regarding the proposed Franchise Agreement on March 6, 2017 and said hearing was closed on that date.

NOW, THEREFORE, BE IT

RESOLVED, that the Franchise and Concession Review Committee does hereby approve the proposed Franchise Agreement between the City of New York and Pilot Fiber NY, LLC.

THIS IS A TRUE COPY OF THE RESOLUTION ADOPTED BY THE  
FRANCHISE AND CONCESSION REVIEW COMMITTEE ON:

**March 8, 2017**

Date:\_\_\_\_\_

Signed\_\_\_\_\_

Title: Director of the Mayor's Office of Contract Services

**RECOMMENDATION FOR AWARD OF FRANCHISE AGREEMENT MEMORANDUM COVER SHEET**  
*(Attach, in the following order, FRFA Checklist and Narrative and "Responsibility Determination" form)*

<b>AGENCY</b> Department of Information Technology & Telecommunications	<b>RECOMMENDED FRANCHISEE</b> <b>Name</b> Pilot Fiber NY LLC <b>Address:</b> 305 Broadway FL 7, New York, NY 10007 <b>Telephone #</b> 646-844-8308 <input checked="" type="checkbox"/> EIN <input type="checkbox"/> SSN #46-5345047	<b>FRANCHISE I.D. #</b> 8582017FRAN1 <u>INFORMATION</u> <u>SERVICES</u>
# VOTES required for proposed action = 5		
DESCRIPTION OF FRANCHISE (Attach Proposed Resolution and Proposed Agreement)		
Borough(s) Location of Franchise: Citywide C.B.(s) All		
PUBLIC SERVICE TO BE PROVIDED Information services.		
SELECTION PROCEDURE <input checked="" type="checkbox"/> Request for Proposals <input type="checkbox"/> Other _____		
FRANCHISE AGREEMENT TERM Initial Term From Effective Date To 06/30/2021 Renewal Option(s) Term Possible renewal extension to the 15 <sup>th</sup> anniversary of the effective date		SUBSIDIES TO FRANCHISEE <input type="checkbox"/> N/A \$ _____
DCP determined the franchise would have land use impacts or implications. <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO If YES, proposed franchise reviewed and approved pursuant to Sections 197-c and 197-d of the City Charter. <input type="checkbox"/> CPC approved on ____/____/____ <input type="checkbox"/> City Council approved on ____/____/____ <input type="checkbox"/> N/A		
<input checked="" type="checkbox"/> Law Department determined RFP/other solicitation document consistent with adopted authorizing resolution on 4/8/15. <input type="checkbox"/> Law Department approved franchise agreement on ____/____/____		
AUTHORIZED AGENCY STAFF This is to certify that the information presented herein is accurate and that I find the proposed franchisee to be responsible and approve of the award of the subject franchise agreement. This is to further certify that the subject franchise agreement was approved by the FCRC on ____/____/____ by a vote of ____ to ____. Name _____ Title _____ Signature _____ Date ____/____/____		
CERTIFICATE OF PROCEDURAL REQUISITES This is to certify that the agency has complied with the prescribed procedural requisites for award of the subject franchise agreement. Signature _____ Date ____/____/____ City Chief Procurement Officer		

## **RECOMMENDATION FOR AWARD OF FRANCHISE AGREEMENT MEMORANDUM**

***Instructions:*** Check all applicable boxes and provide all applicable information requested below. If any requested date or information is unavailable, describe the reason it cannot be ascertained.

### **A. AUTHORIZING RESOLUTION (Attach copy)**

1. Mayor's Office of Legislative Affairs transmitted proposed authorizing resolution to City Council.
2. City Council conducted public hearing on 05/13/2013.
3. City Council adopted authorizing resolution on 08/22/2013.

### **B. SOLICITATION/EVALUATION/AWARD**

1. RFP/solicitation document issued on 04/13/2015. (Attach copy)
2. ☒ The Agency certifies that it complied with all the procedures for the solicitation, evaluation and/or award of the subject franchise as set forth in the applicable authorizing resolution and request for proposals, if applicable.

#### **Basis for Award:**

***Instructions:*** Check applicable box below; attach a list of proposed franchisee's Board of Directors.

- ☐ Recommended franchisee is highest rated proposer and offered highest amount of revenue (overall or for the competition pool).
- ☐ Recommended franchisee was sole proposer or was determined to be only responsive proposer (overall or for the competition pool), and the agency certifies that a sufficient number of other entities had a reasonable opportunity to propose, the recommended franchisee meets the minimum requirements of the RFP or other solicitation and award is in the best interest of the City. ***Explain:***
- ☒ The subject franchise is a non-exclusive franchise and the recommended franchisee has been determined to be both technically qualified and responsible.
- ☐ Other ***Describe:***

**C. PUBLIC HEARING & APPROVAL**

1. Agency filed proposed agreement with FCRC on 02/21/2017.

2. Public Hearing Notice

☒ a. Agency published, for at least 15 business days immediately prior to the public hearing, a public hearing notice and summary of the terms and conditions of the proposed agreement in the City Record from 02/08/2017 - 03/06/2017.

☒ b. Agency provided written notice containing a summary of the terms and conditions of the proposed agreement to each affected CB and BP by 02/07/2017. (Check the applicable box below and provide the requested information)

☐ Franchise relates to property in one borough only and, as such, agency additionally published a public hearing notice and summary of the terms and conditions of the proposed agreement twice in \_\_\_\_\_, a NYC daily, citywide newspaper on \_\_\_/\_\_\_/\_\_\_ and \_\_\_/\_\_\_/\_\_\_, and in \_\_\_\_\_, a NYC weekly, local newspaper published in the affected borough on \_\_\_/\_\_\_/\_\_\_ and \_\_\_/\_\_\_/\_\_\_ . A copy of each such notice containing a summary of the terms and conditions of the proposed agreement was sent to each affected CB and the affected BP by \_\_\_/\_\_\_/\_\_\_.

☒ Franchise relates to property in more than one borough and, as such, agency additionally published a public hearing notice and summary of the terms and conditions of the proposed agreement twice in NY Post a NYC daily, citywide newspaper on 02/16/2017 and 02/17/2017, and in Metro, also a NYC daily, citywide newspaper on 02/16/2017 and 02/17/2017. A copy of each such notice containing a summary of the terms and conditions of the proposed agreement was sent to each affected CB, each affected BP and each affected Council Member by 02/07/17.

☐ Franchise relates to a bus route contained within one borough only and, as such, agency additionally published a public hearing notice and summary of the terms and conditions of the proposed agreement twice in \_\_\_\_\_, a NYC daily, citywide newspaper on \_\_\_/\_\_\_/\_\_\_ and \_\_\_/\_\_\_/\_\_\_, and in \_\_\_\_\_, a NYC weekly, local newspaper published in the affected borough on \_\_\_/\_\_\_/\_\_\_ and \_\_\_/\_\_\_/\_\_\_ . A copy of each such notice containing a summary of the terms and conditions of the proposed agreement was sent to each affected CB and the affected BP by \_\_\_/\_\_\_/\_\_\_.

☐ Franchise relates to a bus route that crosses one or more borough boundaries and, as such, agency additionally published a public hearing notice and summary of the terms and conditions of the proposed agreement twice in \_\_\_\_\_, a NYC daily, citywide newspaper on \_\_\_/\_\_\_/\_\_\_ and \_\_\_/\_\_\_/\_\_\_, and in \_\_\_\_\_, also a NYC daily, citywide newspaper on \_\_\_/\_\_\_/\_\_\_ and \_\_\_/\_\_\_/\_\_\_ . A copy of each such notice containing a summary of the terms and conditions of the proposed agreement was sent to each affected CB, each affected BP and each affected Council Member by \_\_\_/\_\_\_/\_\_\_ . A notice was posted in the buses operating upon the applicable route.

☐ b. Franchise relates to extension of the operating authority of a private bus company that receives a subsidy from the City and, as such, at least 1 business day prior to the public hearing the Agency published a public hearing notice in the City Record on \_\_\_/\_\_\_/\_\_\_.

3. FCRC conducted a public hearing within 30 days of filing on 03/06/2017.

## NOTICE OF PUBLIC HEARING

NOTICE OF A FRANCHISE AND CONCESSION REVIEW COMMITTEE ("FCRC") PUBLIC HEARING to be held on Monday March 6, 2017 commencing at 2:30 PM at 2 Lafayette Street, 14th Floor Auditorium, Borough of Manhattan on the following items: 1) a proposed information services franchise agreement between the City of New York and Pilot Fiber NY, LLC; and 2) a proposed telecommunications services franchise agreement between the City of New York and Pilot Fiber NY, LLC. The proposed franchise agreements authorize the franchisees to install, operate and maintain facilities on, over and under the City's inalienable property to provide, respectively, information services and telecommunications services, each as defined in the respective franchise agreements. The proposed franchise agreements have a term ending June 30, 2021, subject to possible renewal to the fifteenth anniversary of the date the agreements become effective, and provide for compensation to the City to begin at 56 cents per linear foot in Manhattan and 51 cents per linear foot in other boroughs, escalating two cents a quarter thereafter, subject to certain adjustments.

A copy of the proposed franchise agreements may be viewed at the Department of Information Technology and Telecommunications, 2 Metrotech Center, 4th Floor, Brooklyn, New York 11201, commencing February 17, 2017 through March 6, 2017, between the hours of 9:30 AM and 3:30 PM, excluding Saturdays, Sundays and holidays. Hard copies of the proposed franchise agreements may be obtained, by appointment, at a cost of \$.25 per page. All payments shall be made at the time of pickup by check or money order made payable to the New York City Department of Finance. The proposed franchise agreements may also be obtained in PDF form at no cost, by email request. Interested parties should contact James Icobelli at 718-403-8042 or by email at [jicobelli@doitt.nyc.gov](mailto:jicobelli@doitt.nyc.gov).

NOTE: Individuals requesting sign language interpreters at the public hearing should contact the Mayor's Office of Contract Services, Public Hearing Unit, 253 Broadway, 9<sup>th</sup> Floor, New York, New York 10007, (212) 788-7490, no later than SEVEN (7) BUSINESS DAYS PRIOR TO THE PUBLIC HEARING. TDD users should call Verizon relay service.

The Hearing may be cablecast on NYCMedia channels.

**FRANCHISE AGREEMENT**

Between

**THE CITY OF NEW YORK**

And

**PILOT FIBER NY LLC**

Information Services Franchise

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THIS AGREEMENT, dated as of the \_\_\_\_ day of \_\_\_\_, 2017 (the “Execution Date”), is by and between THE CITY OF NEW YORK (as defined in Section 1 hereof, the “City”) and Pilot Fiber NY LLC, a New York limited liability company whose principal place of business is located at 305 Broadway, New York, NY 10007 (as defined in Section 1 hereof, the “Company”), (each, a “party” and collectively, the “parties”).

W I T N E S S E T H :

WHEREAS, the New York City Department of Information Technology and Telecommunications (as defined in Section 1 hereof, “DoITT”), on behalf of the City, has the authority to grant franchises (“Franchises”) involving the occupation or use of the Inalienable Property (as defined in Section 1 hereof) of the City in connection with the provision of Information Services (as defined in Section 1 hereof); and

WHEREAS, the Company has submitted to DoITT its proposal to obtain a Franchise in response to a solicitation issued by DoITT pursuant to Resolution Number 1909 (adopted by the New York City Council on August 22, 2013); and

WHEREAS, on \_\_\_\_\_, 2017 the New York City Franchise and Concession Review Committee (as defined in Section 1 hereof, the “FCRC”) held a public hearing on a proposed Franchise to install, operate and maintain cable, wire, fiber optic telecommunications cable (or other closed-path transmission medium that may be used in lieu of cable, wire or fiber optic telecommunications cable for the same purposes) and related equipment and facilities within the City’s Inalienable Property to be used in providing Information Services, which hearing was a full public proceeding affording due process in compliance with the requirements of Chapter 14 of the City Charter; and

WHEREAS, DoITT has with respect to the proposed Franchise complied with the New York State Environmental Quality Act (“SEQRA”) (Section 8-010 et. seq.) of the New York State Environmental Conservation Law), the SEQRA regulations set forth at Part 617 of Title 6 of the New York Code of Rules and Regulations, and the City Environmental Quality Review process (Chapter 5 of Title 62 and Chapter 6 of Title 43 of the Rules of the City of New York); and

WHEREAS, the New York City Department of City Planning determined that the proposed Franchise would not have land use impacts or implications and that therefore the proposed Franchise is not subject to the Uniform Land Use Review Procedure set forth in Section 197-c of the New York City Charter;

NOW, THEREFORE, in consideration of the foregoing clauses, which clauses are hereby made a part of this Agreement, the mutual covenants and agreements herein contained, and other good and valuable consideration, the parties hereby covenant and agree as follows:

## SECTION 1 DEFINED TERMS

For purposes of this Agreement, the following terms, phrases, words, and their derivatives will have the meanings set forth in this Section, unless the context clearly indicates that another meaning is intended.

1.1 “Affiliate” means each Person who directly or indirectly owns or controls, or is owned or controlled by, or is under common ownership or control with, the Company.

1.2 “Agreement” means this agreement, together with the Appendices attached hereto and all amendments, modifications or renewals hereof or thereof.

1.3 “Block” has the meaning set forth therefor in Section 3.2 hereof.

1.4 “Block Linear Feet” has the meaning set forth therefor in Section 3.2 hereof.

1.5 “Cable Television Service” means “cable service” as that term is defined, as of the Effective Date, in 47 USC Section 522 (6).

1.6 “Cable Television Franchise” means a franchise granted by the City expressly authorizing the use of the Inalienable Property for the provision of Cable Television Service to Residents.

1.7 “City” means the City of New York or, as appropriate in the case of specific provisions of this Agreement, any board, bureau, authority, agency, commission, department or any other entity of the City of New York, or any authorized officer, official, employee or agent thereof, or any successor thereto.

1.8 “Commissioner” means the Commissioner of DoITT, or his or her designee, or any successor in function to the Commissioner.

1.9 **“Company” means Pilot Fiber NY LLC, a limited liability company organized and existing under the laws of the State of New York and authorized to do business in the State of New York, whose principal place of business is located at 305 Broadway, New York, NY 10007, or a successor entity thereto permitted as provided in Section 7 hereof.**

1.10 “Comptroller” means the Comptroller of the City, the Comptroller’s designee, or any successor in function to the Comptroller.

1.11 “Control” of an entity, business or asset means the power (de facto or de jure) to direct or cause the direction of the management and policies of or related to such entity, business or asset, whether such power is exercisable directly or through intermediate entities.

1.12 “CPI Adjustment” applied to a dollar amount for purposes of calculating a payment means an adjustment in which said dollar amount is multiplied by a fraction, the numerator of which is the Consumer Price Index (All Urban Consumers, All Items, New York-Northern New Jersey-Long Island, NY-NJ-CT-PA, 1982-84=100) announced by the U.S.

Department of Labor for the month prior to the month in which said payment is to be made and the denominator of which is the same index announced by the U.S. Department of Labor for the month in which the Effective Date occurred. If the U.S. government no longer announces an index as described in the preceding sentence, the City will select an alternative index that is expected to be as comparable as practicable in its effect as the index described in the preceding sentence would have been.

1.13 “Credit Support” means a letter of credit, security deposit, or comparable form of equivalent financial assurance.

1.14 “DoITT” means the Department of Information Technology and Telecommunications of the City of New York, or any successor thereto.

1.15 “Effective Date” means the date stated in a notice issued by the City to the Company, which date will be ten (10) days after the first date on which all of the following conditions have been met: (a) this Agreement has been registered with the Comptroller as provided in Sections 375 and 93.p. of the City Charter, (b) all documents have been submitted as required by Section 2.2 hereof, (c) the City’s Vendex review process (if lawfully applicable to franchises of the type covered by this Agreement) with respect to the Company has been completed without disqualifying information having arisen, (d) the Initial Payment described in Section 3.3 hereof has been paid to the City, (e) the Credit Support has been arranged by the Company and is available to the City in accordance with the terms and conditions of this Agreement and (f) payment has been made of an amount sufficient to pay, or reimburse the City for, all costs incurred in publishing the legally required notice(s) with respect to the FCRC’s hearing regarding the Franchise granted by this Agreement.

1.16 “FCC” means the Federal Communications Commission, or any successor thereto.

1.17 “FCRC” means the Franchise and Concession Review Committee of the City of New York, or any successor thereto.

1.18 “Franchise Area” means the City of New York.

1.19 “Inalienable Property” means that property of the City which is inalienable pursuant to Section 383 of the New York City Charter or a successor provision thereto. References to the Inalienable Property in this Agreement will be deemed to include the space on, over and under the surface of the Inalienable Property (except that where the City’s property rights to such Inalienable Property is expressly limited in a particular case to specified dimensional boundaries then such references shall be limited, in regard to such particular property, as thus expressly limited).

1.20 “Indemnitees” has the meaning set forth therefor in Section 8.1 hereof.

1.21 “Information Services” has the meaning set forth therefor in 47 USC Section 153 (24) as of the Effective Date.

1.22 “Initial Payment” means the payment due as provided in Section 3.3.1 hereof.

1.23 “Installation Area” has the meaning set forth therefor in Section 3.2.3 hereof.

1.24 “Mayor” means the chief executive officer of the City, the designee thereof, or any successor to the executive powers thereof.

1.25 “New Franchisee” means an entity that is not, as of the Effective Date and for three years after the Effective Date, operating under the Franchise granted by this Agreement any facilities which have been installed in the Inalienable Property prior to the Effective Date either pursuant to a previous or other franchise from the City or otherwise which have been transferred to the Franchisee’s ownership.

1.26 “Person” means any natural person or any association, firm, partnership, joint venture, corporation, or other legally recognized entity, whether for profit or not for profit, but shall not mean the City.

1.27 “Phased Adjustment” has the meaning set forth therefor in Section 3.2.4 hereof.

1.28 “Pre-Credit Amount” has the meaning set forth therefor in Section 3.2 hereof.

1.29 “PSC” means the New York State Public Service Commission or any successor thereto.

1.30 “Resident” means an occupant who: (i) resides in a dwelling which has or is entitled to receive from the City a residential certificate of occupancy, including, without limitation, a private dwelling, class A multiple dwelling, or an interim multiple dwelling or (ii) has continuously resided in the same buildings as a permanent resident and who takes occupancy pursuant to a lease (or other similar arrangement) of at least six (6) months duration. For purposes of this Agreement, the terms “private dwelling,” “class A multiple dwelling,” and “interim multiple dwelling” shall have the same meaning as they may have in the New York State Multiple Dwelling Law, as such law may from time to time be amended.

1.31 “Security Fund” has the meaning set forth therefor in Section 5.1 hereof.

1.32 “Service” or “Information Service” means “information service” as that term is defined, as of the Effective Date, in 47 USC Section 153(24).

1.33 “Stub Adjustment” has the meaning set forth therefor in Section 3.2.2(b) hereof.

1.34 “System” means the cable, wire, fiber optic telecommunications cable (or other closed-path transmission medium that may be used in lieu of cable, wire or fiber optic telecommunications cable for the same purposes), and related equipment and facilities, within the Inalienable Property, used by the Company to provide the Information Services.

1.35 “Telecommunications Service” means “telecommunications service” as that term is defined, as of the Effective Date, in 47 USC Section 153 (53).

1.36 “Telecommunications Service Franchise” means a franchise granted by the City expressly authorizing the use of the Inalienable Property for the provision of Telecommunications Service.

1.37 “Term” has the meaning set forth therefor in Section 2.1 hereof.

## **SECTION 2 GRANT OF AUTHORITY**

2.1 Term This Agreement and the franchise granted hereunder, will commence upon the Effective Date, and will continue until and including June 30, 2021, unless earlier terminated as described herein. The period of time that this Agreement remains in effect is herein referred to as the “Term.”

### **2.2 Conditions to Effectiveness**

2.2.1 Certain Actions by the Company Before Effective Date As provided in Section 1.15 above, the occurrence of the Effective Date is conditional on, among other things, the submission to the City by the Company of certain documents as described in this Section 2.2. Said documents are (a) evidence as described in Section 8.6.1 below of the Company’s liability insurance coverage pursuant to Section 8 hereof; (b) an opinion of the Company’s counsel dated as of the date this Agreement is executed by the Company, in form reasonably satisfactory to the City, (c) an affirmation signed by an authorized officer or representative of the Company in the form set forth in the solicitation issued by DoITT seeking a proposal from the Company for the Franchise granted hereunder; (d) an IRS W-9 form certifying the Company’s tax identification number; (e) organizational and authorizing documents as described in Sections 10.5.1 and 10.5.2 hereof; (f) documentation verifying that the Company has completed all required submissions under the City’s VENDEX process, and the City’s review thereof has been completed; and (g) documentation verifying that the City’s review of the Company’s submissions pursuant to Local Law 34 of 2007 has been completed and the City has found that the Company is in compliance with the requirements of said Local Law 34. The City will issue a notice to the Company setting forth the Effective Date, such notice to be issued within ten (10) days of the first date on which all required conditions to occurrence of the Effective Date, as set forth in this Section 2.2 and in Section 1.14 above, have been met.

### **2.3 Nature of Franchise, Effect of Termination and Renewal**

2.3.1 Nature of Franchise The City hereby grants the Company, subject to the terms and conditions of this Agreement, a nonexclusive franchise providing the Company with the right and the City’s consent to install, operate, repair, maintain, remove and replace the System (authorization to install non-closed path transmission facilities, such as antennae and similar equipment which transmits or receives information wirelessly, within the Inalienable Property is not granted pursuant to this Agreement, although the Company is permitted to separately seek a franchise granting such authorization). The Franchise granted hereunder does not include the right or consent to install, maintain or operate any computer kiosks or other similar facilities within the Inalienable Property of the City the purpose of which is the reception and use of Information Services, or any other service, by pedestrians, vehicles or other users or occupants of the Inalienable Property, although the Company is permitted to separately seek authority from

the City granting such authorization. The Franchise granted hereunder does not include the right or consent to use the Inalienable Property of the City for the transmission of Cable Television Service or Telecommunications Service, unless such authority is expressly granted hereinafter, although to the extent not thus expressly granted hereinafter, the Company is permitted to separately seek authority from the City granting such authorization.

**2.3.2 Effect of Termination** Upon termination of this Agreement, the Franchise granted hereunder will expire; all rights of the Company in such Franchise will cease, with no value allocable to such Franchise; and the rights of the City and the Company to the System, or any part thereof, will be determined as provided in Section 10.8 hereof. The termination of this Agreement and the Franchise granted hereunder may not, for any reason, operate as a waiver or release of any obligation of the Company or any other Person, as applicable, for any liability (i) pursuant to Section 8.1 hereof, which arose or arises out of any act or failure to act required hereunder prior to the termination; (ii) which exists pursuant to Sections 3 (“Compensation”), 6.5.2 (“Right of Inspection”), 10.8 (“Rights Upon Termination”), 10.13 (“Governing Law”) and 10.16 (“Claims Under Agreement”) hereof; and (iii) to maintain in full force and effect the Security Fund described in Section 5 hereof and the coverage under the liability insurance policies required under and in accordance with Section 8 hereof.

**2.3.3 Renewal Option.** (a) For purposes of this Section 2.3.3, the following terms shall be defined as follows: A “Recent Franchise Agreement” shall mean any written franchise agreement entered into by the City and authorizing a franchisee to use the Inalienable Property for purposes comparable to those described in Section 2.3.1 provided that the date on which such agreement first became effective is between July 1, 2019 and the date the Company chooses to exercise the option which is described in this Section 2.3.3 below. A “Recent Franchisee” is a franchisee under a Recent Franchise Agreement. If there are no Recent Franchise Agreements in existence as of January 1, 2021, then the period during which a franchise agreement falls within the definition of a Recent Franchise Agreement shall be deemed to extend back in time an additional one year (to July 1, 2018), and if that still does not result in at least one Recent Franchise Agreement, then that time period shall further extend back in additional one-year increments until at least one franchise agreement falls within the definition of a Recent Franchise Agreement, except that in no event will a Recent Franchise Agreement go back further in time than this Agreement. A franchise agreement may be considered a Recent Franchise Agreement even if it is entered into with a franchisee that held a previous franchise from the City and even if the facilities in the Inalienable Property authorized thereby were previously authorized under a previous franchise from the City.

(b) During the period beginning October 1, 2020 and ending April 1, 2021, the Company shall (provided it is not then in default of any of its material obligations under this Agreement) have the option to extend the scheduled end date of the Term from June 30, 2021 to the fifteenth (15<sup>th</sup>) anniversary of the Effective Date (along with a comparable extension of the term of the Company’s Telecommunications Service Franchise as described therein), provided that if the Company exercises such option, then beginning July 1, 2021, the terms and conditions of this Agreement shall, at the City’s option, be deemed to be revised to match those of that Recent Franchise Agreement the Recent Franchisee under which most closely matches the Company, based on the standards set forth in clauses (i) through (viii) below of this subsection (b). Failure to exercise such option by the Company shall not bar the Company and the City

(each acting with the fullest amount of discretion authorized by applicable law) from reaching a mutual agreement to authorize the Company to continue to use the City's rights of way for the provision of Information Services after July 1, 2021 upon terms and conditions agreed to by the City and the Company.

The standards to be applied in determining which Recent Franchisee most closely matches the Company shall be as follows:

- (i) the degree to which the purposes described in Section 2.3.1, or provision of comparable effect, in the Recent Franchisee's Recent Franchise Agreement matches the purposes described in Section 2.3.1 hereof;
- (ii) the length of time the Recent Franchisee, or its affiliates or predecessors in interest, have had to amortize its or their investment in the facilities installed in the Inalienable Property pursuant to franchise rights granted by the City;
- (iii) the size of the Recent Franchisee, measured on an invested-capital basis;
- (iv) the extent of the installation by the Recent Franchisee in the Inalienable Property of cable, wire, fiber optic telecommunications cable or other closed-path transmission medium as part of its Information Services system;
- (v) the types and forms of Information Services being generally offered by the Recent Franchisee and the type of ultimate end-user customer base and mix of customers for such services;
- (vi) the percentage of the Recent Franchisee's Information Services provided on a wholesale basis to third-party providers of retail services;
- (vii) the degree to which the provision of Information Services constitutes the primary business activity of the Recent Franchisee; and
- (viii) the degree to which there are material extrinsic circumstances (e.g., governmental grant, subsidy or other assistance, or tax exemption) existing in favor of the Recent Franchisee.

If the Company and the City cannot agree which Recent Franchisee most closely matches the Company, then an arbitrator shall make such determination, such arbitrator to be selected by the City with the approval of the Company not to be unreasonably withheld, which arbitrator shall make such determination following procedures of the American Arbitration Association.



2.3.4 Other Renewal. Except as expressly set forth in the preceding Section 2.3.3, this Agreement does not grant to the Company any right to renewal of this Agreement or the franchise granted hereunder. At the end of the Term, the City will have the discretion to renew this Agreement, or not, subject only to such limitations on such discretion as may exist under applicable state and/or federal law.

## 2.4 Conditions and Limitations on Franchise.

2.4.1 Not Exclusive. Nothing in this Agreement affects the right of the City to grant to any Person a franchise, consent or right to occupy and use Inalienable Property, or any part thereof, for the construction, operation and/or maintenance of a system in order to provide Information Services in the City for any purpose, or the right of the City (i) to construct, operate and/or maintain a system to provide Information Services in the City or (ii) to acquire, in accordance with Section 10.08 below, and operate the System.

### 2.4.2 Construction of System

(a) The Company shall use commercially reasonable efforts to coordinate (and in any event comply with all legal requirements, if any, to so coordinate) its construction schedule with the appropriate City agencies, including, without limitation, the Department of Transportation, the appropriate Borough Engineer and the Office of Construction, to minimize unnecessary disruption.

(b) The Company shall obtain all construction, building, street opening or other permits or approvals necessary before installing the System. The Company shall provide copies of any such permits and approvals to DoITT promptly following receipt of a request therefor.

(c) Construction within the Inalienable Property which falls within the boundaries of New York City park land will be subject to the approval of the City's Department of Parks and Recreation (or successor agency), acting with the fullest discretion permitted by law, and such discretion is a limit on the scope of the Franchise covered hereby. Construction within the Inalienable Property which falls within the boundaries of New York City waterfront or wharf property as defined in Section 1150 of the New York City Charter will be subject to the approval of the City's Department of Transportation or Department of Small Business Services, whichever has jurisdiction over the particular property under City law, or the appropriate successor agency, acting with the fullest discretion permitted by law, and such discretion is a limit on the scope of the Franchise covered hereby. To the extent that such construction activity within park, wharf or waterfront property would temporarily materially interfere with the use of such property for park, wharf or waterfront use, as the case may be, the responsible agency may require reasonable compensation to the City for such interference (in addition to, and not in lieu of, the reasonable compensation for use of the Inalienable Property generally under this Agreement as set forth in Section 3 hereof) to the fullest extent permitted by law.

## **SECTION 3 COMPENSATION**

3.1 Compensation. The Company agrees to provide reasonable compensation to the City, in return for the benefit conferred by the City of the Franchise to use the Inalienable Property for the purpose of offering and providing Information Services, to be as described in this Section 3.

3.2 Monetary Compensation.

3.2.1 As a Franchise fee to be paid as compensation in exchange for the benefit and privilege of using the Inalienable Property for the purpose of offering and providing Information Services, the Company shall pay to the City the following amount per calendar quarter or portion thereof:

(a) the excess, if any, of the applicable Pre-Credit Amount (as calculated pursuant to Sections 3.2.2(a) and 3.2.2(b) hereof), over any amounts paid by the Company to the City, with respect to the facilities over which Information Services are being offered to the public pursuant to this Agreement, as franchise compensation under any Telecommunications Services Franchise held by the Company which compensation is attributable to the same calendar quarter or portion thereof, but

(b) in no event less than the product of \$70,000 multiplied by the CPI Adjustment (except that if the Company is a New Franchisee said \$70,000 figure shall be reduced to \$5,000 until but not including the first anniversary of the Effective Date, \$15,000 from the first anniversary of the Effective Date until but not including the second anniversary of the Effective Date, and \$35,000 from the second anniversary of the Effective Date until but not including the third anniversary of the Effective Date).

Notwithstanding the preceding however, if the Company is a New Franchisee, then the amount payable under this Section 3.2.1 with respect to the first eighteen months of the Term shall not be, as to any calendar quarter, greater than the amount described in paragraph (b) above with respect to that quarter (even if the amount described in paragraph (a) above for such quarter would be greater the paragraph (b) amount for such quarter).

3.2.2 (a) The Pre-Credit Amount with respect to any full calendar quarter equals fifty-six (56) cents (adjusted each quarter by the Phased Adjustment as defined below) per calendar quarter per foot of Installation Area, as that term is defined below, with respect to Installation Area located in the borough of Manhattan and equals fifty-one (51) cents (adjusted each quarter by the Phased Adjustment as defined below) per calendar quarter per foot of Installation Area, as that term is defined below, with respect to Installation Area located in the boroughs of the Bronx, Brooklyn, Queens and Staten Island. The references to fifty-six (56) cents and fifty-one (51) cents in this paragraph are based on the assumption that this Franchise Agreement first becomes effective during the second quarter of calendar year 2017. Should this Franchise Agreement first become effective after June 30, 2017, said references to fifty-six (56) cents and fifty-one (51) cents in this subsection shall each be deemed increased by two cents for each full calendar quarter, beginning with the third calendar quarter of calendar year 2017, which has elapsed prior to this Franchise Agreement becoming effective.

(b) The Pre-Credit Amount with respect to any period of less than a full quarter shall be calculated by multiplying the Pre-Credit Amount for a full calendar quarter by the Stub Adjustment. The Stub Adjustment for any period less than a full calendar quarter is the percentage equal to the number of days in the applicable period divided by 90. The Stub Adjustment is not applicable to Installation Area adjustments and may only be used as a prorating factor with regards to the first and last quarter of the Term.

3.2.3 The “Installation Area” is defined pursuant to the following provisions:

(a) Unless the Company submits documentation as described in Section 3.2.3(b) below, the Installation Area in each borough or portion thereof will be calculated by adding together the Block Linear Feet applicable to every Block in such borough or portion thereof in which the Company has the System within the Inalienable Property. “Block Linear Feet” applicable to any Block in the City means the number of feet (rounded to the nearest foot) that results by measuring a straight line along the surface of the street from the midpoint of the intersection at one end of the block to the midpoint of the intersection at the other end of the block. A “Block” means a mapped street of the City running from one intersection with another mapped street of the City to the next intersection with another mapped street of the City.

(b) If the Company submits documentation to the City showing to the City’s reasonable satisfaction that, with respect to any particular Block, the portion of the System located therein is located underground and that in length run less than the full Block Linear Feet of such Block, then the Installation Area with respect to the Block will be adjusted to the actual length of such facilities in lieu of the full Block Linear Feet of the Block.

(c) If the Company maintains multiple systems at any Block, as a result of, for example, multiple systems having been originally constructed for different owners which have come or hereafter subsequently come under the common ownership of the Company, then the Installation Area will be calculated separately with respect to each such system, and the sum of the multiple Installation Areas is to be applied in the calculation of the Pre-Credit Amount as described above.

(d) To the extent the Company installs or has installed facilities on a bridge or in a tunnel which is part of the Inalienable Property, the Installation Area shall include the length of the bridge or tunnel, or portion thereof, in which the Company’s facilities run and which are within the Inalienable Property. If such bridge or tunnel connects between the borough of Manhattan and another borough, the Installation Area with respect to the bridge or tunnel shall be deemed to be within Manhattan up to the geographic midpoint between the bulkhead line on the Manhattan side and the bulkhead line on the other borough side when run along the line of the bridge or tunnel.

3.2.4 The “Phased Adjustment” means an increase, with respect to each calendar quarter after the first calendar quarter to occur during the Term, in the amount of two cents (\$.02), such that, for example, with respect to the (i) second full quarter to occur during the Term, the Pre-Credit Amount will be fifty-eight (58) cents per calendar quarter per foot of Installation Area in Manhattan and fifty-three (53) cents per calendar quarter per foot of

Installation Area in Staten Island, Queens, Brooklyn and the Bronx, (ii) the third full quarter to occur during the Term, the Pre-Credit Amount will be sixty (60) cents per calendar quarter per foot of Installation Area in Manhattan and fifty-five (55) cents per calendar quarter per foot of Installation Area in Staten Island, Queens, Brooklyn and the Bronx, with each Phased Adjustment becoming applicable at the beginning of each calendar quarter throughout the Term. The illustrative references in the preceding sentence to fifty-eight (58) cents, fifty-three (53) cents, sixty (60) cents and fifty-five (55) cents are based on the assumption that this Agreement first becomes effective during the second quarter of calendar year 2017. Should this Agreement first become effective after June 30, 2017, each of said references in the preceding sentence shall be deemed increased by two cents for each full calendar quarter, beginning with the third calendar quarter of calendar year 2017, which has fully elapsed prior to this Franchise Agreement becoming effective.

The application of the Phased Adjustment increases quarterly through June 30, 2021 as described in this Section 3.2.4 is not intended to suggest that further such quarterly increases will continue to be added in the event either the Term is extended beyond June 30, 2021 as contemplated in Section 2.3.3 above or if the term of the franchise granted hereunder is otherwise renewed, it being the current intention of the parties that franchise compensation during any term beyond June 30, 2021 will be determined pursuant to the process provided for in Section 2.3.3 if applicable, or otherwise pursuant to negotiation and applicable law, without reference to any assumption that there would be further application of similar additional phased adjustments that would continue to similarly increase franchise compensation after June 30, 2021.

### 3.3 Timing

3.3.1 Initial Payment. As a condition of the occurrence of the Effective Date, the Company shall make an Initial Payment which shall represent the sum of (x) the Company's good faith estimate regarding the amount due under Section 3.2 hereof attributable to the initial partial calendar quarter to occur within the Term, plus (y) the Company's good faith estimate regarding the amount due under Section 3.2 hereof attributable to the first full calendar quarter to occur within the Term.

3.3.2 Subsequent Payments. All payments made pursuant to Section 3.2 after the Initial Payment hereof must be made in advance on a quarterly basis no later than forty-five (45) days prior to the beginning of each calendar quarter with respect to which payment has not yet been made. The Company shall in good faith estimate each such quarterly payment based on the Installation Area expected to be applicable to the next quarter. Within one hundred twenty (120) days following the end of each calendar year, the Company shall calculate the exact monetary compensation due to the City pursuant to Section 3.2 hereof for all the calendar quarters of said calendar year. Should the total monetary compensation for such calendar year thus calculated be found to have exceeded the estimated quarterly payments made by the Company for such calendar year, the Company shall, within the 120-day period following the end of the calendar year, remit to the City any balance due. Should the estimated quarterly payments made by the Company for the calendar year be found to have exceeded the total calculated monetary compensation for the year, the overpayment will constitute a credit against the next payment or

payments due from the Company hereunder. However, notwithstanding anything to the contrary in the preceding sentences of this Section 3.3.2, if the Company is a New Franchisee, then the Company may at its option defer payment (interest-free) of up to one-half of the amount due hereunder with respect to each of the first six quarterly payments to be made pursuant to this Section 3.3.2. In the event of such deferral, the deferred amount with respect to each such quarter shall be due and payable on the third anniversary of the date the deferred amount would have been due had it not been deferred, but in no event later than the last day of the Term.

3.4 Non-Monetary Compensation. As further compensation in exchange for the benefit and privilege of using the Inalienable Property for the purpose of offering and providing Information Services, the Company shall provide (in addition to and not in lieu of the monetary compensation required pursuant to Section 3.2 above) facilities and services constituting non-monetary compensation to the City as follows:

the Company shall provide the facilities and services described in Appendix B;

3.5 Records. The Company shall keep comprehensive itemized records of the relevant aspects of its operations in sufficient detail to enable the City to determine whether all compensation owed to the City pursuant to this Section 3 is being paid to the City.

3.6 Reservation of Rights. No acceptance of any compensation payment by the City may be construed as an accord and satisfaction that the amount paid is in fact the correct amount, nor may such acceptance of any payment be construed as a release of any claim that the City may have for further or additional sums payable under the provisions of this Agreement. All amounts paid, and all representations by the Company as to amounts due hereunder, will be subject to audit by the City.

3.7 Ordinary Business Expense. Nothing contained in this Section 3 or elsewhere in this Agreement is intended to prevent the Company from treating the compensation that it pays pursuant to this Agreement as an ordinary expense of doing business and, accordingly, from deducting said payments from gross income in any City, state, or federal income tax return.

3.8 Costs Related to Company-Sought Transactions. The Company shall, as part of the reasonable compensation payable to the City for use of the Inalienable Property, pay, in addition to and not in lieu of all other reasonable compensation due hereunder, to the City or to third parties, at the direction of DoITT, an amount equal to the reasonable costs and expenses which the City incurs for the services of third parties (including, but not limited to, attorneys, arbitrators, and other consultants) in connection with any Company-sought renegotiation, transfer, amendment or other modification of this Agreement or the Franchise granted hereunder during the Term, provided the City has given the Company notice in advance of any work being performed by such third party. Such modifications shall not include the renegotiation, renewal or other modifications that take place at the end of the Term in the normal course of dealing between the City and the Company in anticipation of a possible extension or renewal of the Company's rights. The Company expressly agrees that the payments made pursuant to this Section 3.8 are in addition to and not in lieu of, and may not be offset against, the compensation to be paid to the City by the Company pursuant to other provisions of this Section 3.

### 3.9 No Credits or Deductions.

(a) The Company, as part and parcel of its agreement hereunder to pay reasonable compensation for the use of the Inalienable Property, expressly acknowledges and agrees that:

(i) the compensation to be provided pursuant to this Section 3 may not be deemed to be in the nature of a tax, and is in addition to any and all taxes or other fees or charges which the Company or any Affiliate must pay to the City or to any state or federal agency or authority, all of which are separate and distinct obligations of the Company; and

(ii) with respect to the Franchise granted pursuant to this Agreement, the Company expressly relinquishes and waives its rights and the rights of any Affiliate to a deduction or other credit pursuant to Section 626 of the New York State Real Property Tax Law and any successor or amendment thereto, and (to the extent such waiver is permitted by law) to any subsequent law, rule, regulation, or order which would purport to permit any of the acts prohibited by this Section 3.9; and

(iii) except as might be permitted by Section 3.7, the Company may not, and may not otherwise support any attempt by an Affiliate to, make any claim for any deduction of, or other credit for, all or any part of the amount of the compensation (whether monetary or in-kind), or other consideration to be provided pursuant to this Agreement from or against any City or other governmental taxes of general applicability or other fees or charges which the Company or any Affiliate is required to pay to the City or other governmental agency; and

(iv) except as might be permitted by Section 3.7, the Company may not, and may not otherwise support any attempt by an Affiliate to, apply or seek to apply all or any part of the amount of the compensation (whether monetary or in-kind) or other consideration to be provided pursuant to this Agreement as a deduction or other credit from or against any City or other government taxes of general applicability (other than income taxes) or other fees or charges, each of which are hereby deemed to be separate and distinct obligations of the Company and the Affiliates; and

(v) except as might be permitted by Section 3.7, the Company may not, and may not otherwise support any attempt by an Affiliate to, apply or seek to apply all or any part of the amount of any City or other governmental taxes or other fees or charges of general applicability as a deduction or other credit from or against any of the consideration to be provided pursuant to this Agreement, each of which are hereby deemed to be separate and distinct obligations of the Company and the Affiliates.

(b) In any situation where the Company believes the effect of this Section 3.9 is unduly harming, in a manner inconsistent with the intent of this Section 3.9, an Affiliate of the Company or the Company may petition the Commissioner for relief, and such relief will not be unreasonably withheld.

3.10 Interest on Late Payments. In the event that any payment required by this Agreement is not actually received by the City on or before the applicable date fixed in this Agreement,

interest thereon will accrue from such date until received at a rate equal to the rate of interest then in effect that would be charged by the City for late payments of water charges of a comparable amount.

3.11 Method of Payment. Except as provided elsewhere in this Agreement, all payments made by the Company to the City pursuant to this Agreement must be paid to the City's Department of Finance and must be sent to DoITT, c/o Director of Franchise Audits and Revenue, 2 Metrotech Center, 4<sup>th</sup> Floor, Brooklyn, New York 11201, or to such alternative payee and/or address as DoITT may designate by written notice to the Company from time to time.

3.12 Continuing Obligation and Holdover. In the event the Company continues to operate within the Inalienable Property all or any part of the System after the Term for the purpose of providing Information Services, then (a) the Company shall continue to comply with all applicable provisions of this Agreement, including, without limitation, all compensation and other payment provisions of this Agreement, throughout the period of such continued operation, provided that any such continued operation may not be construed as a renewal or other extension of this Agreement or the Franchise granted pursuant to this Agreement, nor as a limitation on the remedies, if any, available to the City as a result of such continued operation after the Term, including, but not limited to, damages and restitution and (b) in addition to all other remedies available to the City under this Agreement or by law, the Company shall also pay to the City all payments that the City is entitled to receive under this Agreement including, but not limited to, the compensation set forth in this Section 3 as if the Term remained in effect.

3.13 Company's Right to Recover Fee. Nothing in this Agreement shall be construed to prohibit the Company from itemizing or passing through the Franchise fee payable pursuant to Section 3.2 hereof in the form of a line item on its bills to its end users.

#### **SECTION 4 CONSTRUCTION AND MAINTENANCE REQUIREMENTS**

4.1 Generally The Company agrees to exercise its right described in Section 2.3.1 above in accordance with the standards of work and operation as set forth in this Section 4 and Appendix A attached hereto and incorporated herein. The facilities to be installed in the Inalienable Property pursuant to this Agreement are not to materially exceed in size or otherwise differ in the nature of the imposition placed on the Inalienable Property from that which is standard in the industry with respect to the provision of the Information Services. To the extent that the Company seeks to install or maintain facilities that exceed such standard, the City reserves the right to require the Company to obtain additional authority from the City to do so as such authority is not being granted by the Franchise covered hereby.

4.2 Quality In order to assure that the Inalienable Property and its continuing use by the public is adequately protected, all work involved in the construction, operation, maintenance, repair, upgrade and removal of the System located within the Inalienable Property must be performed in a safe, thorough and reliable manner using materials of good and durable quality. If, at any time, it is determined by any entity with applicable authority or jurisdiction that any part of the System located within the Inalienable Property is harmful to the public health or

safety, then the Company shall, at its own cost and expense, take all steps necessary to correct all such conditions.

4.3 Licenses and Permits In order to assure that the Inalienable Property and its continuing use by the public is adequately protected, the Company has the sole responsibility for diligently obtaining, at its own cost and expense, and thereafter complying with, at its own cost and expense, all permits, licenses or other forms of approval or authorization necessary to construct, operate, maintain, upgrade or repair the System located within the Inalienable Property, including, but not limited to, any necessary approvals from Persons to use any privately-owned equipment or other property (including, without limitation, any privately-owned easements, poles and conduits) located within the Inalienable Property.

4.4 Public Works and Improvements Nothing in this Agreement shall, and nothing in this Agreement is intended to, abrogate the right of the City to perform, or to arrange to have performed, any public works or public improvements of any description or change, or to arrange to have changed, the grades, lines or boundaries of any Inalienable Property. In the event that the System interferes with the installation, upgrade, construction, operation, maintenance, repair, relocation or removal of such public works or public improvements, or such change in grades, lines or boundaries, then Section 4.7 of this Agreement will apply.

4.5 No Waiver Nothing in this Agreement may be construed as a waiver of any codes, ordinances or regulations of the City or of the City's right to require the Company, or other Persons using, constructing or maintaining the System, to secure the appropriate permits or authorizations for such use, provided that (except as set forth in to Section 2.4.2(c)) no fee or charge may be imposed for any such permit or authorization, other than the standard fees or charges generally applicable to all Persons for such permits or authorizations. Any such standard fee or charge may not be an offset against, or in lieu of, the amounts the Company has agreed to pay to the City pursuant to Section 3 of this Agreement.

4.6 Eliminated, Discontinued, Closed Or Demapped Streets Or Other Inalienable Property In the event that all or any part of the Inalienable Property is eliminated, discontinued, closed or demapped, or the status of such property otherwise changes so that it is no longer to be included in the category of Inalienable Property, all rights and privileges of the Company acknowledged and recognized pursuant to this Agreement with respect to said (formerly) Inalienable Property, or any part thereof, so eliminated, discontinued, closed, demapped or otherwise recategorized, will cease upon the effective date of such elimination, discontinuance, closing, demapping or other such recategorization and the Company shall at the direction of the City and upon reasonable notice from the City remove any and all or any portion of the System located within such property by a date not later than the effective date of such elimination, discontinuance, closing, demapping or other recategorization or such later date as the City may direct.

4.7 Protection, Relocation, Alteration of the System In the event that the System interferes with the installation, construction, upgrade, operation, maintenance, repair, relocation or removal of public works or public improvements, or in the event the grades, lines or boundaries of any Inalienable Property are changed at any time during the Term in a manner affecting the System, then the Company shall, at its own cost and expense (unless dedicated funds have been provided to the City by another entity specifically for such purpose), upon reasonable notice from the City,



promptly protect or alter or relocate the System, or any part thereof, as directed by the City. In the event that the Company refuses or neglects to so protect, alter or relocate all or part of the System, the City has the right, upon notice by the City, to break through, remove, alter, or relocate all or any part of the System without any liability to the Company, and the Company shall pay to the City the costs incurred in connection with such breaking through, removal, alteration, or relocation.

4.8 City Authority to Move Facilities The City may, at any time, in case of fire, disaster or other emergency, as determined by the City in its reasonable discretion, cut or move any part of the System within the Inalienable Property, in which event the City will not be liable therefor to the Company. If practicable, the City will notify the Company in writing prior to such cutting or moving, but in any event will notify the Company in writing as soon as possible following any such action.

4.9 Company Required to Move Facilities The Company shall, upon prior written notice by the City or any Person holding a permit to move any structure, and within the time that is reasonable under the circumstances, temporarily move the System within the Inalienable Property to permit the moving of said structure (provided that for the duration of any period that any portion of the System moved pursuant to this Section 4.9 is out of service as a result of such action by the City, and such out of service status is documented by the Company to the reasonable satisfaction of DoITT, such facilities shall be treated as not “being used for the provision of Information Services” for purposes of the definition of Installation Area set forth in Section 3.2.3 hereof). The Company may impose a reasonable charge on any Person other than the City for any such movement of the System.

4.10 Protect Structures In connection with the construction, operation, maintenance, repair, upgrade or removal of the System within the Inalienable Property, the Company shall, at its own cost and expense, protect any and all existing structures belonging to the City and all designated landmarks and historic pavements, as well as all other structures within any designated landmark district. The Company shall obtain the prior approval of the City before undertaking any alteration of any water main, sewerage or drainage system, equipment or facility or any other municipal structure within the Inalienable Property, required because of the presence of the System. The Company shall make any such alteration at its own cost and expense and in a manner prescribed by the City. The Company agrees to be liable, at its own cost and expense, to replace or repair and restore to its prior condition in a manner as may be reasonably specified by the City, any municipal structure or any other Inalienable Property involved in the construction, operation, maintenance, repair, upgrade or removal of the System that may become disturbed or damaged as a result of any work thereon by or on behalf of the Company.

4.11 No Obstruction In connection with the construction, operation, maintenance, upgrade, repair or removal of the System, the Company may not, without the prior consent of the appropriate authorities, obstruct the Inalienable Property, or the subways, railways, passenger travel, river navigation, or other pedestrian or vehicular traffic that is using the Inalienable Property.

4.12 Safety Precautions

(a) The Company shall, at its own cost and expense, undertake all necessary and appropriate efforts to prevent accidents at its work sites within the Inalienable Property, including the placing and maintenance of proper guards, fences, barricades, security personnel and suitable and sufficient lighting.

(b) The Company agrees to apply for membership in the Mutual Aid and Restoration Consortium (“MARC”) and if accepted for such membership, to execute the then applicable MARC agreement, and be fully active in MARC activities, including participation in MARC alerts, drills and meetings. If it is determined by a court of competent jurisdiction after all appeals have been exhausted that the agreement by the Company described in the preceding sentence is, pursuant to federal law, not enforceable against the Company, then this provision will be severed from this Agreement, and this Agreement will remain in effect as if this provision had not been included.

## **SECTION 5 SECURITY FUND AND GUARANTY**

5.1 General Requirement Prior to or simultaneously with the execution and delivery of this Agreement, the Company shall have arranged for the Credit Support to be available to the City in an amount equal to the product of four times the portion of the Initial Payment described in Section 3.3.1 estimated to be attributable to the first full calendar quarter of the Term. The Credit Support must be in a form reasonably satisfactory to the City, and the Credit Support will serve as a security fund (the “Security Fund”), securing the Company’s full payment and performance of its obligations under this Agreement. Throughout the Term, and for one year thereafter, the Company shall maintain the Security Fund in the amount specified in this Section 5.1 provided that each time the monetary compensation payable by the Company to the City under Section 3.2 hereof exceeds the aggregate amount of the Credit Support by at least fifty thousand dollars (\$50,000) during any one calendar year then, within one hundred twenty (120) days of the end of such calendar year, the aggregate amount of the Credit Support must be increased to and maintained (until any future such increase) at an amount equal to said compensation for such year rounded up to the next non-fractional multiple of one hundred thousand dollars (\$100,000). Notwithstanding anything to the contrary in the preceding sentence, in no event shall the Security Fund in place after the one hundred twentieth (120<sup>th</sup>) day of any calendar year be less than the amount applicable to such calendar year under Section 3.2.1(b) above.

5.2 Purpose The Security Fund will serve as security for full payment and performance by the Company in accordance with this Agreement and any costs, losses or damages incurred by the City as a result of any failure by the Company to abide by any provision or provisions of this Agreement.

5.3 Withdrawals from the Security Fund In the circumstances described in Section 9.3 hereof, the City may withdraw from the Security Fund such amount as necessary to satisfy (to the degree possible) the Company’s obligations not otherwise met (and to reimburse the City for costs, losses or damages incurred as the result of the Company’s failure(s) to meet its obligations), provided, however, that the City may not make any withdrawal by reason of any breach or default of which the Company has not been given notice. The City may not seek

recourse against the Security Fund for any costs or damages for which the City has previously been compensated through a withdrawal from the Security Fund or otherwise by the Company.

5.4 Notice of Withdrawals Within one (1) week after any withdrawal from the Security Fund, the City shall notify the Company of the date and amount thereof. The withdrawal of amounts from the Security Fund will constitute a credit against the amount of the applicable liability of the Company to the City but only to the extent of said withdrawal.

5.5 Replenishment by the Company Within thirty (30) days after receipt of notice from the City that any amount has been withdrawn from the Security Fund, as provided in Section 5.4 hereof, the Company shall replenish the Security Fund to the amount specified in Section 5.1 hereof, by submitting such documentation as may be necessary to restore the Credit Support which constitutes the Security Fund to the full amount required by Section 5.1. If the Company has not made the required replenishment of the Security Fund within such thirty (30) day period, liquidated damages for such failure will accrue at the rate specified in Section 3.10 hereof, such accrual to commence at the end of such 30-day period, and which liquidated damages shall be payable to the City as reasonable compensation to the City for its loss of securitization for the Company's obligations hereunder.

5.6 Replenishment by the City If a court finally determines that a withdrawal from the Security Fund by the City was improper, the City shall refund the improperly withdrawn amount to the Company such that the balance in the Security Fund will not exceed the amount specified in Section 5.1 hereof.

5.7 Not a Limit on Liability The Company's obligations of payment and performance, and the liability of the Company pursuant to this Agreement, will not be limited by the amount of the Security Fund required by this Section 5.

5.8 Renewal Any letter of credit that is to constitute the Security Fund required hereunder must provide that it will not be cancelled, and will not expire without renewal, except after at least sixty (60) days' notice to the City of the impending cancellation, or expiration without renewal, of such letter of credit. Any failure to replace or renew a Security Fund letter of credit by a date which is thirty (30) days prior to the impending cancellation or expiration of such a letter of credit will constitute an Event of Default under this Agreement, which the City may cure by (a) drawing on the Security Fund and itself holding the proceeds as a replacement Security Fund (with all rights to draw on the proceeds for Security Fund purposes as provided under this Agreement) until such time as the Company completes the required letter of credit replacement or renewal or (b) exercising any other lawful remedy or remedies. Interest earned on proceeds held by the City as a replacement Security Fund will be retained by the City.

## **SECTION 6 RIGHT OF WAY MANAGEMENT IMPLEMENTATION MATTERS**

6.1 Protection from Disclosure To the extent permissible under applicable law, the City shall protect from disclosure any confidential, proprietary information submitted to or made available by the Company to the City under this Agreement, provided that the Company notifies the City of, and clearly labels, the information which the Company deems to be confidential, proprietary

information as such. Such notification and labeling will be the sole responsibility of the Company.

**6.2 Management and Records** To the extent necessary to preserve, protect and otherwise manage the Inalienable Property, the City will have the right to oversee, regulate and inspect periodically the construction, maintenance, operation and upgrade of the System located within the Inalienable Property, including any part thereof, in accordance with the provisions of this Agreement and applicable law. To the extent consistent with the City's right to thus preserve, protect and otherwise manage the Inalienable Property, and/or the City's right to assure that it is being and will be paid the compensation due under this Agreement, the Company shall establish and maintain managerial and operational records, standards, procedures and controls to enable the Company to prove, in reasonable detail, to the satisfaction of the City at all times throughout the Term, that the Company is complying with the terms of this Agreement. The Company shall retain such records for not less than six (6) years following their creation and for such additional period as DoITT may reasonably direct consistent with the goals of such record retention described in this Section 6.2. In order to support the City's ability to appropriately preserve, protect and otherwise manage the Inalienable Property, the Company shall on an annual basis provide DoITT with a report (in form and format reasonably acceptable to the Commissioner) describing any construction or installation of cable, wire, fiber optic telecommunications cable, or other closed-path transmission medium that may be used in lieu of cable, wire, fiber optic telecommunications cable, or other facilities and equipment within the Inalienable Property (phrases such as "within the Inalienable Property", "of the Inalienable Property", "manage the Inalienable Property" etc. as used in this Agreement will be deemed to refer to and include, in addition to the surface of the Inalienable Property, any space on, over and under the surface of the Inalienable Property, unless expressly stated otherwise) that has occurred during the previous twelve months, which report must include a map of such constructed or installed facilities that is consistent in form with the requirements of Section B.4. of Appendix A attached hereto. Each such report must include safety and compliance review and inspection documentation as required by law and as further reasonably required by DoITT. The Company must deliver the first such report no earlier than January 1 of the first full calendar year falling entirely within the Term and no later than the first anniversary of the Effective Date, with each successive report thereafter to be delivered annually between January 1 and the anniversary of the Effective Date. In order to further advance the City's ability to appropriately preserve, protect and otherwise manage the Inalienable Property, the Company shall on an annual basis, provide DoITT with a report describing the Company's reasonably anticipated plans for the coming twelve months for any construction or installation of the System within the Inalienable Property. The first such report must be delivered no earlier than January 1 of the first full calendar year falling entirely within the Term and no later than the first anniversary of the Effective Date, with each successive report thereafter to be delivered annually between January 1 and the anniversary of the Effective Date. The Company shall further provide to the City, upon the City's request, and within a reasonable period under the circumstances, any additional information, material and/or reports that the City reasonably deems necessary to the City's efforts to preserve, protect and otherwise manage the Inalienable Property or to assure that the City is being and will be paid the compensation due from the Company under this Agreement.

**6.3 Rules and Regulations** To the full extent permitted by applicable law either now or in the future, the City reserves the right to adopt or issue (in accordance with lawful procedures for

such adoption or issuance) such rules, regulations, orders, or other directives that are not inconsistent with the terms of this Agreement and are reasonably necessary or appropriate in the lawful exercise of the City's authority as manager of the Inalienable Property and its police powers, and the Company agrees to comply with all such lawful rules, regulations, orders, or other directives.

6.4 Ownership Reports In order to assist the City in determining whether the Company is capable of ongoing compliance with this Agreement, including, without limitation, ongoing payment of the amounts payable by the Company hereunder, the Company shall promptly report to the City any change in ownership of the Company which is inconsistent with the description of ownership set forth in Appendix D hereof or the most recently submitted previous such report.

#### 6.5 Books and Records/Audit

6.5.1 Records To the extent appropriate to assist the City in determining whether the Company is taking appropriate care of the Inalienable Property, complying with the terms of this Agreement, and paying the amounts payable by the Company hereunder, the Company shall throughout the Term maintain complete and accurate records of the operations of the Company with respect to the System in a manner that allows the City at all times to determine whether the Company is in compliance with this Agreement. All records required to be maintained hereunder must be retained for not less than six (6) years from the date of their creation.

6.5.2 Right of Inspection To the extent appropriate to assist the City in determining whether the Company is taking appropriate care of the Inalienable Property, complying with the terms of this Agreement, and paying the amounts payable by the Company hereunder, the Commissioner and the Comptroller, or their designated representatives, will have the right to inspect, examine or audit during normal business hours and upon reasonable notice to the Company under the circumstances, all documents, records or other information which pertain to the Company or any Affiliate with respect to the System and its operation or the Company's performance under this Agreement. All such documents must be made available within New York City or in such other place that the City may agree upon in writing in order to facilitate said inspection, examination, or audit, provided, however, that if such documents are located outside of the City, then, upon notice to the Company, the Company shall pay the reasonable expenses incurred by the Commissioner, the Comptroller or their designated representatives in traveling to such location. Access by the City to any of the documents covered by this Section 6.5.2 may not be denied by the Company on grounds that such documents are alleged by the Company to contain confidential, proprietary or privileged information, provided that this requirement will not be deemed to constitute a waiver of the Company's right to assert that confidential, proprietary or privileged information contained in such documents should not be disclosed by the City as described in Section 6.1 above.

### **SECTION 7 TRANSFERS AND ASSIGNMENTS**

7.1 City Approval Required. The ownership and control structure of the Company as of the date of execution of this Agreement is set forth in Appendix D hereof. Subject to the provisions of this Article, each of the following shall be subject to the prior approval of the City: (i) any sale, assignment or transfer of the franchisee's interest in this Agreement, the System or the

franchise granted hereunder, (ii) any transaction in which any change is proposed, which would result, directly or indirectly, in a change in the ownership of twenty percent (20%) or more of the voting interests or thirty-three percent (33%) or more of the non-voting interests of the ownership of the Company or the System assets or the franchise granted hereunder, and (iii) any other transaction in which a change in “Control” (as defined in Section 1.11 above) of the Company, the System or the franchise granted hereunder would occur; provided, however, that the foregoing requirements of this Section 7.1 will not be applicable with respect to transfers of any ownership interests expressly permitted in the “Permitted Transfers” section, if any, of Appendix D. To the fullest extent practical under the circumstances, application to the City for any approval required hereunder must be made at least one hundred twenty (120) calendar days prior to the contemplated effective date of the transaction. Such application must contain complete information on the proposed transaction, including details of the legal, financial, technical, and other qualifications of the transferee. At a minimum, the following information must be included in the application:

- (a) any shareholder reports or filings with the Securities and Exchange Commission that pertain to the transaction;
- (b) a report detailing any changes in ownership of voting or non-voting interests of over five percent (5%);
- (c) other information necessary to provide an accurate understanding of the financial position of the Company and the System before and after the proposed transaction;
- (d) information regarding any potential impact of the transaction on rates and service of subscribers; and
- (e) any material contracts that relate to the proposed transaction as it affects the City and, upon reasonable request by the City, all material documents and other information related or referred to therein and which are necessary to understand the proposed transaction;

provided, however, that if the Company believes that the requested information is confidential and proprietary, then the Company must provide the following documentation to the City: (i) specific identification of the information; (ii) a statement attesting to the reason(s) the Company believes the information is confidential; and (iii) a statement that the documents are available at the Company’s designated offices for inspection by the City.

7.2 City Action on Transfer. To the extent not prohibited by federal law, the City may, with respect to any transaction covered by Section 7.1: (i) grant; (ii) grant subject to conditions directly related to concerns relevant to such transaction; or (iii) deny its approval of the transaction.

7.3 Waiver of Transfer Application Requirements. To the extent consistent with federal law, the City may waive in writing any requirement that information be submitted as part of the transfer application covered by Section 7.1, without thereby waiving any rights the City may have to request such information after the application is filed.

7.4 Subsequent Approvals. The City's approval of a transaction described in Section 7.1 in one instance will not render unnecessary approval of any subsequent transaction.

7.5 Approval Does Not Constitute Waiver. Approval by the City of a transfer described in Section 7.1 will not constitute a waiver or release of any of the rights of the City under this Agreement, whether arising before or after the date of the transfer, except that upon full assumption of the terms of this Agreement by an approved transferee, the transferor shall be fully released from any obligations accruing after the date of such assumption.

7.6 No Consent Required For Transfers Securing Indebtedness. The Company will not be required to file an application or obtain the consent or approval of the City for a transfer in trust, by mortgage, by other hypothecation, by assignment of any rights, title, or interest of the Company in the System, system assets or the Franchise granted hereunder in order to secure indebtedness. However, the Company will notify the City within ten (10) days if at any time there is a mortgage or security interest granted on the System, the Franchise granted hereunder or substantially all of the assets of the System. To the extent applicable, the submission of the Company's audited financial statements prepared for the Company's bondholders will constitute such notice.

7.7 Preliminary Determination Procedure. In the event that a change in direct or indirect ownership interest or interests in the Company, the System or the Franchise granted hereunder, is planned and the Company seeks the City's view of whether such transaction is one that would require the City's approval as described in Section 7.1 above, the Company may submit a written request to the Commissioner (in accordance with the notice requirements of Section 10.4 hereof) describing the proposed transaction and seeking a determination as to whether such approval is required and including any arguments the Company wishes to make that the consent of the City is not required. Upon review of such written request, the Commissioner will notify the Company in writing of the Commissioner's determination whether such approval by the City is required, provided that prior to such determination, if the Commissioner reasonably requests any information relevant to such determination, the Company shall provide such information.

## **SECTION 8 LIABILITY AND INSURANCE**

8.1 Liability and Indemnification The Company will be liable for, and the Company and each Affiliate (but not including any member of the Company or any owner of such member) will indemnify, defend and hold the City, its officials, agents, servants, employees, attorneys, consultants and independent contractors (the "Indemnitees") harmless from, any and all liabilities, suits, obligations, fines, damages, penalties, claims, costs, charges and expenses (including, without limitation, reasonable attorneys' fees and disbursements) (collectively "Liabilities" and each individually a "Liability", and including, without limitation, damages or loss to any real or personal property of, or any injury to or death of, any Person or the City), that may be imposed upon or incurred by or asserted against any of the Indemnitees arising out of the construction, operation, maintenance, upgrade, repair, removal or relocation of the System or otherwise arising out of or related to this Agreement; provided, however, that the foregoing liability and indemnity obligation of the Company pursuant to this Section 8.1 will not apply to any gross negligence or willful misconduct of the City, its officials, employees, servants, agents, attorneys, consultants or independent contractors. Further, it is a condition of this Agreement

that the City assumes no liability for any Liability or Liabilities to either Persons or property on account of the same, except as expressly provided herein.

8.2 Limitation on Liability for Public Work, etc. None of the City, its officials, agents, servants, employees, attorneys, consultants or independent contractors will have any liability to the Company for any damage as a result of or in connection with the protection, breaking through, movement, removal, alteration, or relocation of any part of the System by or on behalf of the Company or the City in connection with any emergency, public work, public improvement, alteration of any municipal structure, any change in the grade or line of any Inalienable Property, or the elimination, discontinuation, closing or demapping of any Inalienable Property. When reasonably possible, the Company will be consulted prior to any such activity and given the opportunity to perform such work itself, but the City will have no liability to the Company in the event it does not so consult the Company. All costs to repair or replace the System, or parts thereof, damaged or removed as a result of such activity, must be borne by the Company; provided, however, that the foregoing obligations of the Company pursuant to this Section 8.2 will not apply to any gross negligence or willful misconduct of the City, its officials, employees, servants, agents, attorneys, consultants or independent contractors.

8.3 Limitation on Liability for Damages None of the City, its officials, agents, servants, employees, attorneys, consultants and independent contractors have any liability to the Company for any special, incidental, consequential, punitive, or other damages as a result of the lawful exercise of any right of the City pursuant to this Agreement or applicable law; provided, however, that the foregoing limitation on liability pursuant to this Section 8.3 will not apply to any gross negligence or willful misconduct of the City, its officials, employees, servants, agents, attorneys, consultants or independent contractors.

8.4 Defense of Claim, etc. If any claim, action or proceeding is made or brought against any of the Indemnitees by reason of any event to which reference is made in Section 8.1 hereof, then upon demand by the City, the Company shall either resist, defend or satisfy such claim, action or proceeding in such Indemnitee's name, by the attorneys for, or approved by, the Company's insurance carrier (if such claim, action or proceeding is covered by insurance) or by the Company's attorneys. The foregoing notwithstanding, upon a showing that the Indemnitee reasonably requires additional representation, such Indemnitee may engage its own attorneys to defend such Indemnitee, or to assist such Indemnitee in such Indemnitee's defense of such claim, action or proceeding, as the case may be, and the Company shall pay the reasonable fees and disbursements of such attorneys of such Indemnitee.

8.5 Liability for Damages to City Property The Company shall reimburse, indemnify and hold harmless the City for any and all loss or damage to any municipal structure, Inalienable Property or other property of the City occurring during the course of any construction, operation, maintenance, upgrade, repair, relocation or removal of the System. This Section 8.5 will not apply to loss or damage which is the result of the gross negligence or willful misconduct of the City.

8.6 Insurance. The Company shall, on the Effective Date, have all insurance required by this Section 8.6 and the Company shall ensure continuous insurance coverage in the manner, form



and limits required by this Section 8.6 throughout the Term and so long as the Company has facilities within the Inalienable Property.

8.6.1 Commercial General Liability Insurance. (a) The Company shall maintain Commercial General Liability insurance covering the Company as a named insured in the minimum amount of \$10,000,000 per occurrence and a minimum of \$10,000,000 aggregate. The use of an excess or umbrella policy is allowable to meet the limit. Such insurance shall protect the Company, and the City, its officials and employees, from claims of property damage and bodily injury, including death, that may arise from any of the operations under this Agreement. Such insurance shall cover, inter alia, products liability. Coverage under this insurance shall be at least as broad as that provided by the most recently issued Insurance Services Office (“ISO”) Form CG 0001, and shall be occurrence based rather than “claims-made”. Such policy shall include an endorsement providing that no cancellation or non-renewal of such policy will be effective without at least thirty (30) days prior written notice to the City delivered by either registered mail or other delivery method that provides proof of receipt.

(b) Such Commercial and General Liability insurance and any Umbrella and Excess Insurance shall name the City, together with its officials and employees, as an additional insured with coverage at least as broad as the most recently issued ISO Form CG 20 26.

8.6.2 Workers’ Compensation, Disability Benefits and Employer’s Liability Insurance. The Company shall maintain Workers’ Compensation Insurance, Disability Benefits Insurance and Employer’s Liability Insurance, in accordance with laws of the State of New York, on behalf of, or with regard to, all employees undertaking activities pursuant to or authorized by this Agreement.

8.6.3 Unemployment Insurance. To the extent required by law, the Company shall provide Unemployment Insurance for its employees.

8.6.4 Business Automobile Liability Insurance. (a) If vehicles are used in the provision of services under this Agreement, then the Company shall maintain Business Automobile Liability insurance in the amount of at least \$1,000,000 each accident combined single limit for bodily injury and property damage and Excess or Umbrella Liability insurance to raise the aggregate coverage to a minimum of \$2,000,000 per accident for liability arising out of ownership, maintenance or use of any owned, non-owned or hired vehicles to be used in connection with this Agreement; and such coverage shall be at least as broad as the most recently issued ISO Form CA0001.

(b) If vehicles are used for transporting hazardous materials, then the Business Automobile Liability insurance shall be endorsed to provide pollution liability broadened coverage for covered vehicles (endorsement CA 99 48), as well as proof of MCS-90.

8.6.5 General Requirements for Insurance Coverage and Policies

(a) All required insurance policies shall be maintained with companies that may lawfully issue the required policy and that have an A.M. Best rating of at least A- / “VII” or a Standard and Poor’s rating of at least A, unless prior written approval is obtained from the City’s Law Department;

(b) All insurance policies shall be primary (and non-contributing) to any insurance or self-insurance maintained by the City;

(c) The Company shall be solely responsible for the payment of all premiums for all required insurance policies and all deductibles or self-insured retentions to which such policies are subject, whether or not the City is an insured under the policy;

(d) There shall be no self-insurance program with regard to any insurance required under this Section 8.6, unless approved in writing by the Commissioner. Any such self-insurance program shall provide the City with all rights that would be provided by traditional insurance required under this Section 8.6, including, but not limited to, the defense obligations that insurers are required to undertake in liability policies; and

(e) The City's limits of coverage for all types of insurance required under this Section 8.6 shall be the greater of (i) the minimum limits set forth in this Section 8.6.1, or (ii) the limits provided to the Company as a named insured under all primary, excess, and umbrella policies of that type of coverage.

#### 8.6.6 Proof of Insurance

(a) For Workers' Compensation Insurance, Disability Benefits Insurance, and Employer's Liability Insurance, the Company shall provide as a condition to the occurrence of the Effective Date one of the following (ACORD forms are not acceptable proof of workers' compensation coverage):

C-105.2 Certificate of Workers' Compensation Insurance;

U-26.3 -- State Insurance Fund Certificate of Workers' Compensation Insurance;

Request for WC/DB Exemption (Form CE-200);

Equivalent or successor forms used by the New York State Workers' Compensation Board; or

Other proof of such insurance in a form acceptable to the City;

(b) For each policy required under this Agreement, except for Workers' Compensation Insurance, Disability Benefits Insurance, Employer's Liability Insurance, and Unemployment Insurance, the Company shall, as a condition to the occurrence of the Effective Date, file a certificate of insurance with DoITT. All certificates of insurance shall be (a) in a form acceptable to the City and certify the issuance and effectiveness of such policies of insurance, each with the specified minimum limits; and (b) accompanied by the endorsement in the Company's general liability policy by which the City has been made an additional insured pursuant to Section 8.6.1 above. All certificates of insurance shall also be accompanied by either a duly executed "Certification by Insurance Broker or Agent" in the form attached as Appendix E or copies of all policies referenced in the certificate of insurance. If complete policies have not yet been issued, binders are acceptable, until such time as the complete policies have been issued, at which time such policies shall be submitted;

(c) Certificates of insurance confirming renewals of insurance shall be submitted to the Commissioner prior to the expiration date of coverage of policies required under this Section 8.6. Such certificates of insurance shall comply with the requirements of this Section 8.6 as applicable;

(d) The Company shall provide the City with a copy of any policy required under this Section 8.6 upon the demand for such policy by the Commissioner or the City's Law Department;

(e) Acceptance by the Commissioner of a certificate or a policy does not excuse the Company from maintaining policies consistent with all provisions of this Section or from any liability arising from its failure to do so; and

(f) In the event the Company receives any notice from an insurance company or other person that any insurance policy required under this Section shall expire or be cancelled or terminated for any reason, the Company shall immediately forward a copy of such notice to the City.

#### 8.6.7 Miscellaneous Insurance Matters

(a) Whenever any notice of any loss, damage, occurrence, accident, claim or suit is required under a general liability policy maintained in accordance with this Section, the Company shall provide the insurer with timely notice thereof on behalf of the City. Such notice shall be given even where the Company may not have coverage under such policy (for example, where one of the Company's employees was injured). Such notice shall expressly specify that "this notice is being given on behalf of the City of New York as Additional Insured" and contain the following information: the number of the insurance policy; the name of the named insured; the date and location of the damage, occurrence, or accident; the identity of the persons or things injured, damaged, or lost; and the title of the claim or suit, if applicable. The Company shall simultaneously send a copy of such notice to the "City of New York c/o Insurance Claims Specialist, Affirmative Litigation Division, New York City Law Department, 100 Church Street, New York, New York 10007". If the Company fails to comply with the requirements of this paragraph, then the Company shall indemnify the City for all losses, judgments, settlements and expenses, including reasonable attorneys' fees, arising from an insurer's disclaimer of coverage citing late notice by or on behalf of the City;

(b) The Company's failure to maintain any of the insurance required by this Section shall constitute a material breach of this Agreement. Such breach shall not be waived or otherwise excused by any action or inaction by the City at any time;

(c) Insurance coverage in the minimum amounts required in this Section shall not relieve the Company of any liability under this Agreement, nor shall it preclude the City from exercising any rights or taking such other actions as are available to it under any other provisions of this Agreement or applicable law;

(d) The Company waives all rights against the City, including its officials and employees, for any damages or losses that are covered under any insurance required under this Section (whether or not such insurance is actually procured or claims are paid thereunder) or any other insurance applicable to the operations of the Company in connection with this Agreement.

(e) the Company will be responsible for providing continuous insurance coverage in the manner, form, and limits required by this Agreement and is authorized to provide service pursuant to this Agreement and the franchise granted hereunder only during the effective period of all required coverage (in the event authorization to provide service hereunder ceases by reason of the non-effectiveness of any such required insurance coverage, such authorization to provide

service will be automatically restored, without any additional required action by any party, upon the effectiveness of all required insurance coverage being restored).

## **SECTION 9 BREACHES AND REMEDIES**

9.1 Not Exclusive The Company agrees that the City will have the specific rights and remedies set forth in this Section 9 to the fullest extent permitted by law. These rights and remedies are in addition to and cumulative of any and all other rights or remedies, existing or implied, now or hereafter available to the City at law or in equity in order to enforce the provisions of this Agreement. Such rights and remedies will not be exclusive, but each and every right and remedy specifically provided or otherwise existing or given may be exercised from time to time and as often and in such order as may be deemed expedient by the City, except as provided herein. The exercise of one or more rights or remedies by the City will not be deemed a waiver by the City of the right to exercise at the same time or thereafter any other right or remedy nor will any delay in, or omission of, the exercise of any remedy be construed to be a waiver by the City of or acquiescence to any default. The exercise of any such right or remedy by the City will not release the Company from its obligations or any liability under this Agreement, provided, however, that the City will in no case be entitled to duplicate recoveries from different sources.

### **9.2 Default**

#### **9.2.1 Events of Default**

(a) Any of the following will constitute an Event of Default:

(i) any breach, not cured within fifteen (15) days after notice pursuant to Section 9.2.2 below, of a provision of this Agreement requiring the Company (x) to make any payment to the City when due, or (y) to maintain a liability insurance policy as set forth in Section 8.6, or (z) to maintain, renew and/or replenish the Security Fund as required pursuant to this Agreement; or

(ii) any other breach of this Agreement by the Company that is not cured within thirty (30) days (or such longer period as DoITT may deem appropriate in its discretion) after notice pursuant to Section 9.2.2 below (provided, however, that no Event of Default will exist pursuant to this clause (ii) if a breach is curable but work to be performed, acts to be done, or conditions to be removed cannot, by their nature, reasonably be performed, done or removed within the required thirty (30)-day cure period, so long as the Company has commenced curing the same within said thirty (30)-day cure period and shall diligently and continuously prosecute the same promptly to completion).

(b) Notice and cure periods provided in this Section 9.2.1, or elsewhere in this Agreement, during which a failure to make a payment to the City when due does not mature into an Event of Default shall not be construed as deferring the accrual of interest on the amount unpaid as set forth in Section 3.10 hereof, which interest shall accrue from the date was payment

was due and not from the date (if any) the failure to make timely payment matured into an Event of Default.

#### 9.2.2 Notice and Cure Procedures

(a) The Commissioner will notify the Company, in writing, of any breach by the Company of an obligation under this Agreement, in accordance with Section 10.4 hereof. The notice will specify the alleged breach(es) with reasonable particularity. The Company shall either (i) if applicable, within the period of time specified in (as applicable) Section 9.2.1(a) hereof, or such longer period of time as the Commissioner may in his or her discretion specify in such notice, cure such alleged breach(es); or (ii) in a written response submitted to the Commissioner within fifteen (15) days after the notice of breach, present facts and arguments refuting that a breach has occurred. The submission of such a response, provided there is a bona fide, reasonable basis for such response, will toll the running of the applicable cure period provided for in Section 9.2.1(a) hereof, such tolling to be effective until the City responds in writing to such submission.

(b) If the Company fails to cure the breach within the applicable cure period and fails to submit a response to the Commissioner pursuant to Section 9.2.2(a) hereof within the period provided herein for submitting such response, an Event of Default will be deemed to have occurred.

(c) If, after the Company makes a response to the Commissioner pursuant to Section 9.2.2(a) hereof, the Commissioner determines, in his or her reasonable discretion, that a breach under this Agreement has occurred, the Company must cure such breach within the balance of the time period to cure that remained when the submission was made. If the Company fails to cure within the remaining time, the breach will be deemed to be an Event of Default, provided, however, that no Event of Default will exist if a breach for which a cure period is provided herein is curable, but work to be performed, acts to be done, or conditions to be removed cannot, by their nature, reasonably be performed, done or removed within the cure period remaining, so long as the Company has commenced curing the same within the cure period provided and shall diligently and continuously prosecute the same promptly to completion. For purposes of this Section 9, “cure” includes not only the Company coming into compliance with this Agreement on a going-forward basis, but also compensating the City for any injury or damages it has suffered during the period of non-compliance directly as a result of such non-compliance, unless such non-compliance resulted from events beyond the Company’s reasonable control.

#### 9.3 Remedies of the City

(a) Subject to Section 9.3(b), upon an Event of Default (or upon any act or failure to act by the Company, or the occurrence of a set of circumstances relating to the Company or its activities, which under common law principles would constitute an anticipatory breach of this Agreement), DoITT may at its option take any one or more of the following actions: cause a withdrawal from the Security Fund; seek money damages (and if such damages are awarded collect such) from the Company as compensation for the breach of this Agreement; seek to restrain by injunction the Event of Default (or in the case of anticipatory breach the

anticipated Event of Default); and/or invoke any other available remedy that would be permitted by law. DoITT will give the Company notice in writing when it determines to pursue one or more such remedies, but nothing herein will prevent DoITT from electing more than one remedy, simultaneously or consecutively, for any breach, provided, however, that the City will in no case be entitled to duplicate recoveries from different sources.

(b) DoITT shall have the right to terminate this Agreement prior to its scheduled expiration only in connection with an Event of Default which (i) remains uncured after the expiration of the applicable cure period provided for in Section 9.2.1 and (ii) constitutes a material breach of this Agreement that has deprived the City from receiving a significant portion of the rights or other entitlements, as expressly set forth in this Agreement, bargained for by the City (a “material and significant breach”), examples, without limitation, of a “material and significant breach” being (1) failure to maintain in effect the Security Fund as set forth in Section 5 hereof, (2) if the Company intentionally makes a material false or misleading statement or representation to the City relating to the documentation of Franchisee’s compliance with its obligations under this Agreement, (3) if the Company fails to maintain the insurance coverage required by or otherwise materially breaches Section 8 of this Agreement, (4) if the Company engages in a course of conduct intentionally designed to practice fraud or deceit upon the City, (5) if the Company intentionally engages or has intentionally engaged in any material misrepresentation with respect to any representation or warranty contained herein, and (6) any Event of Default which constitutes part of a persistent pattern of material failures by the Company to abide by one or more of its obligations under this Agreement, even if a single such failure might not by itself constitute a “material and significant breach”.

## **SECTION 10 MISCELLANEOUS**

10.1 Appendices The Appendices to this Agreement, attached hereto, and all portions thereof and exhibits thereto, are, except as otherwise specified in said Appendices, incorporated herein by reference and expressly made a part of this Agreement.

10.2 Entire Agreement This Agreement, including all Appendices hereto, embodies the entire understanding and agreement of the City and the Company with respect to the subject matter hereof and merges and supersedes all prior representations, agreements and understandings, whether oral or written, between the City and the Company with respect to the subject matter hereof, including, without limitation, all prior drafts of this Agreement and any and all written or oral statements or representations by any official, employee, agent, attorney, consultant or independent contractor of the City or the Company.

10.3 Delays and Failures Beyond Control of Company Notwithstanding any other provision of this Agreement, the Company will not be liable for delay in the performance of, or failure to perform, in whole or in part, its obligations pursuant to this Agreement due to strike, war or act of war (whether an actual declaration of war is made or not), insurrection, riot, act of public enemy, accident, fire, flood or other act of God, technical failure where the Company has exercised all due care in the prevention thereof, or other causes or events, to the extent that such causes or events are beyond the control of the Company (provided that mere financial incapacity will not constitute a cause or event beyond the control of the Company for purposes of this Section 10.3). In the event that any such delay in performance or failure to perform affects only

part of the Company's capacity to perform, the Company shall perform to the maximum extent it is able to do so and shall take all steps within its power to correct said cause(s). The Company agrees that in correcting said cause(s), it shall take all reasonable steps to do so in as expeditious a manner as possible. The Company shall notify DoITT in writing of the occurrence of an event covered by this Section 10.3 within five (5) business days of the date upon which the Company learns or should have learned of its occurrence.

10.4 Notices Every notice, order, petition, document, or other direction or communication to be served upon the City or the Company must be in writing and be sent by registered or certified mail, return receipt requested or by a recognized overnight delivery service such as Federal Express. Every such communication to the Company must be sent to its office located at 305 Broadway, New York, NY 10007, or to such other location in New York City as the Company may designate by notice hereunder to the City from time to time. A copy of each communication covered by the immediately preceding sentence shall be sent to Pilot Fiber, attention President, [ADDRESS TO BE INSERTED CONSISTANT WITH ABOVE.]. Every communication from the Company must be sent to the individual, agency or department designated in the applicable Section of this Agreement, unless it is to "the City," or to "DoITT" in which case such communication must be sent to DoITT at 255 Greenwich Street, Ninth Floor, New York, New York 10007 Attention: General Counsel or to such other location in New York City as the City may designate by notice hereunder to the Company from time to time. A required copy of each communication from the Company must be sent to New York City Law Department, 100 Church Street, New York, New York 10007, Attention: Chief, Economic Development Division, or to such other location in New York City as the City may designate by notice hereunder to the Company from time to time. Except as otherwise provided herein, the mailing of such notice, direction, or order is equivalent to direct personal notice and will be deemed to have been given when received.

#### 10.5 General Representations, Warranties and Covenants

(a) In addition to the representations, warranties, and covenants of the Company to the City set forth elsewhere herein, the Company represents and warrants to the City and covenants and agrees (which representations, warranties, covenants and agreements will not be affected or waived by any inspection or examination made by or on behalf of the City), that, as of the Effective Date:

(i) The Company is a limited liability company duly organized, validly existing and in good standing under the laws of the State of New York and is duly authorized to do business in the State of New York. The Company has all requisite power and authority to execute, deliver and perform this Agreement and all other agreements entered into or delivered in connection with or as contemplated hereby. Certified copies of the Company's organizational and governing documents, as amended to date, have been delivered to the Commissioner, and are complete and correct. The description of the ownership of the Company in Appendix D attached hereto is accurate and complete as of the Effective Date.

(ii) The execution, delivery and performance of this Agreement and all other agreements, if any, entered into in connection with the transactions contemplated hereby have been duly, legally and validly authorized by all necessary action on the part of the Company and

the Company has furnished the City with a certified copy of authorizations for the execution and delivery of this Agreement. This Agreement and all other agreements, if any, entered into in connection with the transactions contemplated hereby have been duly executed and delivered by the Company and constitute (or upon execution and delivery by the Company and the City will constitute) the valid and binding obligations of the Company, and are enforceable (or upon execution and delivery will be enforceable) in accordance with their respective terms (provided, however, that such warranty and covenant by the Company will not constitute a waiver of any right, claim or matter that is not waivable by the Company under federal law). The Company has obtained the requisite authority to authorize, execute and deliver this Agreement and to consummate the transactions contemplated hereby and no other proceedings or other actions are necessary on the part of the Company to authorize the execution and delivery of this Agreement and the consummation of the transactions contemplated hereby.

(iii) No material misrepresentation has been made, either oral or written, intentionally or negligently, by or on behalf of the Company in this Agreement, or in connection with any submission to the City in connection with the Company's request for the franchise granted hereunder or the preparation of this Agreement.

## 10.6 Additional Covenants

10.6.1 In order to assure that the Inalienable Property and the use by the public thereof is adequately protected, the Company agrees that it will, prior to any construction, operation, maintenance, upgrade, repair or removal of the System in the Inalienable Property, secure all necessary permits, licenses and authorizations in connection with the construction, operation, maintenance, upgrade, repair or removal of the System, or any part thereof. The Company will not permit to occur, or will promptly take corrective action if any event does occur, that could result in the revocation or termination of any such permit, license or authorization or, after notice or lapse of time or both, would permit revocation or termination of any such permit, license or authorization.

10.6.2 In order to assure that the Company is able to comply with the lawful terms of this Agreement, the Company will (a) preserve and maintain its existence, its business, and all of its rights and privileges necessary or desirable in the normal operation of the System in the Inalienable Property and (b) maintain its good standing in its state of organization and continue to qualify to do business and remain in good standing in the State of New York.

10.6.3 All of the properties, assets and equipment used as part of the System will be maintained at a level of good repair, working order and good condition that is necessary to assure the safety and protection of the Inalienable Property and the safe and efficient use of said Inalienable Property.

10.7 Binding Effect This Agreement will be binding upon, and inure to the benefit of, the parties hereto and their respective successors and permitted transferees and assigns. All of the provisions of this Agreement will apply to the Company, its successors, and assigns.

## 10.8 Rights Upon Termination



(a) Upon the termination of this Agreement, whether at its scheduled expiration or otherwise, the Company shall at the City's election (i) remove the System located on, over or under the Inalienable Property at the Company's own cost and expense, pursuant to subsection (e) hereof, and/or (ii) sell to the City or to the City's designee the portions of the System within the Inalienable Property (subject to the continuing right of the Company, on terms to be negotiated between the City and the company each acting in good faith, to use the System to support operations outside New York City) .

(b) The price to be paid to the Company upon an acquisition pursuant to the preceding subsection (a) will be the fair value of the System within the Inalienable Property, with no value allocable to the terminated or expired franchise itself, which price (as determined by the appraisal procedure as described hereafter in this subsection (b)) will be the fair value as that term is used in Section 363(h)(5) of the City Charter, as it may be amended, or under any successor provision. Subject to the limitations found in the next sentence, to the extent the City effects an acquisition pursuant to clause (ii) of Section 10.8(a) above herein and within one year thereafter sells that portion of the System acquired to a third party, and the amount received by the City from such sale exceeds the price paid by the City to the Company pursuant to this Section 10.8, the City will pay such excess amount to the Company after deducting all reasonable expenses incurred by the City in connection with such acquisition, interim operation and sale. The preceding sentence will apply only in cases where the Agreement has not terminated by reason of termination for breach or default of this Agreement by the Company. The date of valuation for purposes of setting the price referred to in the first sentence of this subsection (b) will be the date of termination of the Agreement. For the purpose of determining such valuation, the parties will select a mutually agreeable independent appraiser to compute the purchase price in accordance with industry practice and the aforementioned standards. If they cannot agree on an appraiser in ten (10) days, the parties will seek an appraiser from the American Arbitration Association. The parties will instruct the appraiser to make the appraisal as expeditiously as possible, but in no more than sixty (60) days and to submit to both parties a written appraisal. The Company will provide the appraiser with access to the Company's books and records as necessary to make the appraisal. Notwithstanding anything to the contrary in this Agreement, the parties will share equally the costs and expenses of the appraiser.

(c) The City will notify the Company, within thirty (30) days after receipt of the appraisal described in the preceding subsection (b) of this Section 10.8, of its election pursuant to subsection (a) above of this Section 10.8. If it elects to make the purchase permitted under (a)(ii) above, the City will purchase the same at a closing to occur within a reasonable time (not to exceed twelve months) after its election. The Company agrees, at the request of the City, to continue to provide service to its then-existing customers to the extent required by any applicable FCC or PSC rules regarding termination or continuity of service and, to the extent not inconsistent with such rules, (i) to operate the System within the Inalienable Property pursuant to the provisions of this Agreement for a period of up to twelve (12) months after the termination of this Agreement, until the City either elects not to purchase any portion of the System within the Inalienable Property, or closes on such a purchase, or (ii) to cease all construction and operational activities affecting the portion of the System to be purchased in a prompt and workmanlike manner,.

(d) In the event of any acquisition by the City or the City's designee pursuant to this Section 10.8 hereof, the Company shall:

(i) cooperate with the City to effectuate an orderly transfer of all necessary or appropriate records and information concerning the assets to be transferred to the City;

(ii) promptly execute all appropriate documents to transfer to the City, subject to any liabilities, title to the assets being transferred as well as any lawfully assignable contracts, leases, licenses, permits, rights-of-way, and any other rights, contracts or understandings necessary to maintain and operate such assets, as appropriate; provided, that such transfers will be made subject to the rights, under Article 9 of the Uniform Commercial Code as in effect in the State of New York and, to the extent that any collateral consists of real property, under the New York Real Property Law, of banking or any other lending institutions which are secured creditors or mortgagees of the Company at the time of such transfers; and provided, that, with respect to such creditors or mortgagees, the City will have no obligation following said transfers to pay, pledge, or otherwise commit in any way any general or any other revenues or funds of the City, other than the gross operating revenues received by the City from its operation of the assets purchased, in order to repay any amounts outstanding on any debts secured by such assets which remain owing to such creditors or mortgagees; and provided, finally, that the total of such payments by the City to such creditors and mortgagees, from the gross operating revenues received by the City from its operation of the such purchased assets, may in no event exceed the lesser of: (i) the fair market value of such assets on the date of the transfer of title to the City or (ii) the outstanding debt owed to such creditors and mortgagees on said date (nothing in this Section 10.8 may be construed to limit the rights of any such secured creditors to exercise its or their rights as secured creditors or mortgagees at any time prior to the payment of all amounts due pursuant to the applicable debt instruments); and

(iii) promptly supply the City with all necessary records (i) to reflect the City's ownership of the System within the Inalienable Property; and (ii) to operate and maintain the System within the Inalienable Property including, without limitation, plant and equipment layout documents.

(e) In the event of an election by the City of the alternative set forth in clause (i) of subsection (a)(i) of this Section 10.8 upon any termination of this Agreement, the City may, but will not be obligated to, direct the Company to remove, at the Company's sole cost and expense, all, or any portion designated by the City, of the System from the Inalienable Property in accordance with all applicable requirements of the City and subject to the following:

(i) this provision will not apply to any portion of the System (whether buried or unburied) which, in the reasonable and informed judgment of the City, either (a) cannot be removed without undue adverse effect on the public or (b) would result in the Company incurring removal costs and expenses that are in excess of or otherwise disproportionate to any public benefit or use of the Inalienable Property reasonably expected by the City to be derived from the removal of such portion of the System;

(ii) in removing System facilities and equipment from the Inalienable Property the Company shall refill and compact, at its own cost and expense, any excavation that it makes and shall leave, in all material aspects, all Inalienable Property and other property in as good condition as that prevailing prior to the Company's removal of the System from the Inalienable Property and without affecting, altering or disturbing in any way any electric, telephone or other cables, wires, structures or attachments owned by the City or any Person other than the Company;

(iii) the City will have the right to inspect and approve the condition of such Inalienable Property after removal and, to the extent that the City reasonably determines that said Inalienable Property has not been left in materially as good condition as that prevailing prior to the Company's removal of the System therefrom, the Company will be liable to the City for the cost of restoring the Inalienable Property and other property to said condition;

(iv) the Security Fund, liability insurance and indemnity provisions of this Agreement will remain in full force and effect during the entire period of removal and associated repair of all affected Inalienable Property, and for not less than one hundred twenty (120) days after final completion thereof; and

(v) removal must be commenced within thirty (30) days of the removal order by the City and must be substantially completed within twelve (12) months thereafter including all reasonably associated repair of the Inalienable Property.

(f) If, in the reasonable judgment of the Commissioner, the Company fails to commence removal of the System from the Inalienable Property as designated by DoITT, within thirty (30) days after DoITT's removal order, or if the Company fails to substantially complete such removal, including all associated repair of the Inalienable Property, within twelve (12) months thereafter, then, to the extent not inconsistent with applicable law, the City will have the right to either:

(i) remove all or part of the System located within the Inalienable Property at the Company's cost and expense, such removal to be performed by City personnel or, at the City's option, by another Person; or at the City's option

(ii) take ownership of any portion of the Company's System within the Inalienable Property designated by the City for removal and not timely removed by the Company, which portion will belong to and become the property of the City without payment to the Company (notwithstanding the provisions of subsections (a)(ii), (b), (c) and (d) of this Section 10.8) and the Company shall execute and deliver such documents, as the Commissioner requests, in form and substance acceptable to the Commissioner, to evidence such ownership by the City (although failure by the Company to execute and/or deliver such documents will not limit, compromise or affect the City's ownership of the applicable facilities).

(g) None of the decisions, directions or actions of the City pursuant to this Section 10.8 will constitute a condemnation by the City or a sale or dedication under threat or in lieu of condemnation.

(h) Upon the later of the date one hundred and twenty (120) days after the termination of this Agreement for any reason or the date of the completion of removal of the System from and associated repair of the Inalienable Property pursuant to this Section 10.8 (or in the case of portions of the System that are, pursuant to a City decision under this Section 10.8, not being removed from the Inalienable Property, the date on which the Company delivers documentation confirming transfer of such portion of the System to the City), the Company will be entitled to the return of the Security Fund deposited pursuant to Section 5 hereof, or such portion thereof as remains on deposit with the City at said termination, provided that all offsets necessary (i) to reflect any withdrawals by the City from the Security Fund permitted pursuant to this Agreement, (ii) to cover any costs, loss or damage incurred by the City as a result of any Event of Default, and (iii) to reimburse the City for any and all costs and expenses incurred by the City related to removal of the System from the Inalienable Property pursuant to this Section 10.

(i) The City and the Company shall negotiate in good faith all other terms and conditions of any acquisition or transfer of the System located within the Inalienable Property, except that the Company hereby waives its rights (to the fullest extent such rights are lawfully waivable), if any, to relocation costs arising out of the termination of this Agreement pursuant to this Section 10.8 that may be provided by law and except that, in the event of any acquisition of the System within the Inalienable Property by the City: (i) the City will not be required to assume any of the obligations of any collective bargaining agreements or any other employment contracts held by the Company or any other obligations of the Company or its officers, employees, or agents, including, without limitation, any pension or other retirement, or any insurance obligations; and (ii) the City may lease, sell, operate, or otherwise dispose of all or any part of the System acquired by it in any manner.

**10.9 No Waiver; Cumulative Remedies** No failure on the part of the City to exercise, and no delay in exercising, any right hereunder may operate as a waiver thereof, nor will any single or partial exercise of any such right preclude any other right, except as provided herein, subject to the conditions and limitations established in this Agreement. The rights and remedies provided herein are cumulative and not exclusive of any remedies provided by law, and nothing contained in this Agreement will impair any of the rights of the City under applicable law, subject in each case to the terms and conditions of this Agreement. A waiver of any right or remedy by the City at any one time will not affect the exercise of such right or remedy or any other right or other remedy by the City at any other time. In order for any waiver of the City to be effective, it must be in writing. The failure of the City to take any action regarding a breach or default of this Agreement or an Event of Default hereunder by the Company shall not be deemed or construed to constitute a waiver of or otherwise affect the right of the City to take any action permitted by this Agreement at any other time regarding such breach, default or Event of Default which has not been cured, or with respect to any other breach, default or Event of Default by the Company.

**10.10 Partial Invalidity**. Except as expressly set forth otherwise in this Agreement, if any Section, subsection, sentence, clause, phrase, or other portion of this Agreement is, for any

reason, declared invalid or unenforceable, in whole or in part, by any court, agency, commission, legislative body, or other authority of competent jurisdiction, then the party which had been the beneficiary of such invalidated portion will have the right (except as may be limited by law), at its option, to terminate this Agreement (as if the scheduled expiration of the Term had occurred pursuant to Section 2.1 hereof) and invoke the termination provisions hereof as set forth in Sections 2.3.2 and 10.8 hereof, except that if the other party waives such invalidity and continues to comply voluntarily with such invalidated portion then so long as such voluntary compliance continues the right to terminate described in this Section 10.10 shall not apply. To the extent this Section 10.10 is itself determined to be inconsistent with law, it shall be deemed to be narrowed in its scope to the extent necessary to render it lawful.

10.11 Headings The headings contained in this Agreement are to facilitate reference only, do not form a part of this Agreement, and will not in any way affect the construction or interpretation hereof. Terms such as “hereby,” “herein,” “hereof,” “hereinafter,” “hereunder,” and “hereto” refer to this Agreement as a whole and not to the particular sentence or paragraph where they appear, unless the context otherwise requires. The terms “shall” and “will” are mandatory, not merely directive. All references to any gender shall be deemed to include both the male and the female, and any reference by number shall be deemed to include both the singular and the plural, as the context may require. Terms used in the plural include the singular, and vice versa, unless the context otherwise requires.

10.12 No Agency The Company shall conduct any work to be performed pursuant to this Agreement as an independent contractor and not as an agent of the City.

10.13 Governing Law This Agreement will be deemed to be executed in the City of New York and State of New York, and to be governed in all respects, including validity, interpretation and effect, and construed in accordance with the laws of the State of New York, as applicable to contracts entered into and to be performed entirely within that State.

10.14 Survival of Representations and Warranties All representations and warranties contained in this Agreement will survive the end of the Term.

10.15 Delegation of City Rights The City reserves the right to delegate and redelegate, from time to time and to the extent permitted by law, any of its rights or obligations under this Agreement to any governmental body or organization, or official of any other governmental body or organization, and to revoke any such delegation or redelegation. Any such delegation or redelegation by the City will be effective upon written notice by the City to the Company of such delegation or redelegation. Upon receipt of such notice by the Company, the Company will be bound by all terms and conditions of the delegation or redelegation not in conflict with this Agreement. Any such delegation, revocation or redelegation, no matter how often made, will not be deemed an amendment to this Agreement or require the Company’s consent.

10.16 Claims Under Agreement The City and the Company agree and intend that, except to the extent such agreement would be impermissible under applicable law, any and all claims asserted by or against the City arising under this Agreement or related thereto will be heard and determined either in a court of the United States (“Federal Court”) located in New York City or

in a court of the State of New York (“New York State Court”) located in the City and County of New York. To effect this agreement and intent, the Company agrees that:

(a) If the City initiates any action against the Company in Federal Court or in New York State Court, service of process may be made on the Company as provided in Section 10.18 hereof;

(b) With respect to any action between the City and the Company in New York State Court, the Company hereby expressly waives and relinquishes any rights it might otherwise have (i) to move or dismiss on grounds of forum non conveniens; (ii) to remove to Federal Court outside of the City of New York; and (iii) to move for a change of venue to a court of the State of New York outside New York County;

(c) With respect to any action between the City and the Company in Federal Court, the Company expressly waives and relinquishes any right it might otherwise have to move to transfer the action to a Federal Court outside the City of New York; and

(d) If the Company commences any action against the City in a court located other than in the City and State of New York, then, upon request of the City, the Company shall either consent to a transfer of the action to a court of competent jurisdiction located in the City and State of New York or, if the court where the action is initially brought will not or cannot transfer the action, the Company shall consent to dismiss such action without prejudice and may thereafter reinstitute the action in a court of competent jurisdiction in the City of New York. When the Company either gives such consent or dismisses such action, to allow for such reinstitution, the City agrees, where it is able, to waive any statute of limitation, provided the Company has brought such action at least three (3) months prior to the expiration of the statute of limitation and has provided the City with notice pursuant to this Agreement.

10.17 Modification Except as otherwise provided in this Agreement, any Appendix to this Agreement or applicable law, no provision of this Agreement nor any Appendix to this Agreement may be amended or otherwise modified, in whole or in part, except by a written instrument, duly executed by the City and the Company, and approved as required by applicable law.

10.18 Service of Process Process may be served on the Company either in person, wherever the Company may be found, or by registered mail addressed to the Company at its office in the City, or as set forth in Section 10.4 of this Agreement, or to such other location as the Company may provide to the City in writing, or to the Secretary of State of the State of New York.

10.19 Matching Provision In the event that the City, after the date that this Agreement has been fully executed, enters into a binding, written franchise agreement granting a franchisee other than the Company authority to use the Inalienable Property to provide facilities and services in a manner comparable to that authorized hereunder after a renewal pursuant to section 2.3.3 has been granted, and such franchise agreement contains provisions imposing lesser obligations on the franchisee thereunder than are imposed by the provisions of this Agreement, then the Company may petition DoITT for a reduction in its obligations hereunder, which petition DoITT will not unreasonably delay or deny if DoITT, acting reasonably, determines

(i) that the reduction in obligations sought by the Company must be granted in order to ensure fair and equal treatment between the Company and the other franchisee, and

(ii) that the Company is in compliance with this its obligations under this Agreement, and

(iii) that the obligations imposed on the Company under this Agreement, taken as a whole, place the Company at a substantial competitive disadvantage in relation to the obligations imposed on the other franchisee, and

(iv) that the reason for the City's imposition of lesser obligations on the other franchisee are not the result of the differing nature of the City's legal authority with respect to such other franchisee or its activities, and

(v) that the City's imposition lesser obligations on the other franchisee are not justified by other benefits to the City or its citizens that are being received in connection with such other franchisee's services and are not being received in connection with the Company's services.

[DOCUMENT CONTINUES ON NEXT PAGE]

(vi) The City shall promptly provide the Company with a copy of each franchise agreement covered by this Section 10.19 which is not otherwise publicly available.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the Execution Date.

THE CITY OF NEW YORK

By: \_\_\_\_\_  
Deputy Mayor

By: \_\_\_\_\_  
Department of Information Technology and  
Telecommunications

Approved as to form and certified as to legal authority:

\_\_\_\_\_  
Acting Corporation Counsel

PILOT FIBER NY LLC

By: \_\_\_\_\_

\_\_\_\_\_  
City Clerk



State of New York                    )  
  )ss.:  
County of \_\_\_\_\_                )

On the \_\_ day of \_\_\_\_\_, 2017, before me personally came \_\_\_\_\_, to me known, who, being by me duly sworn, did depose and say that he/she is \_\_\_\_\_ of [COMPANY], the entity described in and which executed the above instrument; and that he/she signed his/her name thereto in his/her capacity as \_\_\_\_\_ of [COMPANY], authorized to thus execute said instrument.

\_\_\_\_\_  
Notary Public

State of New York                    )  
  )ss.:  
County of New York                )

On the \_\_ day of \_\_\_\_\_, 2017, before me personally came \_\_\_\_\_, to me known, who, being by me duly sworn, did depose and say that he/she is Deputy Mayor of the City of New York, the entity described in and which executed the above instrument; and that he/she signed his/her name thereto in his/her capacity as Deputy Mayor of the City of New York authorized to thus execute said instrument.

\_\_\_\_\_  
Notary Public

State of New York                    )  
  )ss.:  
County of New York                )

On the \_\_ day of \_\_\_\_\_, 2017, before me personally came \_\_\_\_\_, to me known, who, being by me duly sworn, did depose and say that he/she is \_\_\_\_\_ of the Department of Information Technology and Telecommunications of the City of New York, the entity described in and which executed the above instrument; and that he/she signed his/her name thereto in such capacity being authorized to thus execute said instrument on behalf of the City of New York.

\_\_\_\_\_  
Notary Public

## **APPENDIX A**

### **CONSTRUCTION TERMS**

#### **A. Location of Cable**

1. In order to assure efficient management and use of the City's public rights-of-way, the Company shall install all cables and other equipment located within the Inalienable Property in a manner consistent with existing telephone or public utility lines, which general requirement will include, without limitation, the following specific obligations:

(a) If and when the Company seeks to install cables and related equipment in an area of the City in which lines within the Inalienable Property are installed within the duct and conduit facilities of Empire City Subway Company, Ltd. (ECS) or Consolidated Edison Company of New York Inc. (CECONY), or their successors, the Company shall install its cables and related equipment that are to be located within the Inalienable Property within the duct and conduit facilities of ECS or CECONY (and if no space is available within the facilities of ECS or CECONY, the Company shall apply to either ECS or CECONY for construction of new facilities necessary to support the Company's installation). The selection of which entity to use, ECS or CECONY, will be at the Company's discretion wherever a choice is available. If the City's contractual arrangements with ECS and CECONY as they exist as of the Effective Date should change in a material manner or be replaced during the term of this franchise, the terms of this subsection (a) will be deemed adjusted to reflect such reasonable new arrangements regarding management and use of common duct and conduit facilities as may be adopted by the City.

(b) In any area of the City where existing landline communications cables within the Inalienable Property are located underground, the Company shall install its cable and related facilities underground, except as otherwise provided in this Agreement or as otherwise approved by the agencies of the City having jurisdiction over such matters (it is understood that among other conditions that an agency of the City may place on the granting of any such approval may be, to the fullest extent permitted by law, a requirement of additional compensation for use of the Inalienable Property in addition to and not in lieu of that contemplated in Section 3 of this Agreement, which Section 3 compensation is only intended to cover compensation for use of the Inalienable Property in a manner that does not require such additional approval).

2. Whenever possible, the Company shall, in order to minimize the burden on the public rights-of-way, install its cables and other equipment (not otherwise covered by Section 1(a) above of this Appendix) using existing telephone or utility (as that term is defined in 47 USC § 224 in effect as of the Effective Date) ducts, conduits, poles or similar facilities. If and when space for the Company to install its cables and related equipment using such existing ducts, conduits, poles or similar facilities cannot be obtained, the Company may install its own such facilities, provided that:

(a) The Company shall first obtain all necessary permits from the City's Department of Transportation and/or other applicable City agencies, including, without limitation, with respect to additional above ground poles or similar facilities, possible land use review pursuant to Department of City Planning requirements and possible requirement of additional compensation in a manner comparable to that referred to in the parenthetical in Section 1(b) above of this Appendix (in addition, prior to applying for any such permit, the Company must submit to DoITT for DoITT's approval, and receive DoITT's approval of, a plan indicating all anticipated requests for permits to be made pursuant to this provision, which plan may be updated from time to time by submission and approval of an updated plan);

(b) all above-ground facilities will be maintained in accordance with such maintenance standards applicable to such facilities as are or may hereafter be established by the City .

3. In the event of any inconsistency between this Appendix A and applicable provisions of the New York City Administrative Code or rules of the New York City Department of Transportation (the "Department of Transportation"), or other rules of the City, such provisions and rules will prevail.

4. Notwithstanding any provisions to the contrary set forth in this Appendix A or in this Agreement, the Company will be authorized pursuant to this Agreement to install, operate and/or maintain equipment pedestal boxes above ground on the surface of City sidewalks *only* if (a) the Company abides by the requirements of Attachment 1 attached to and made a part of this Appendix A and the Agreement and (b) such boxes are used to provide Cable Television Service pursuant to a Cable Television Franchise and/or to provide residential switched telephone service connecting to the public switched telephone network, and (c) such boxes are not located in those portions of the City in which Empire City Subway, Ltd. is required by contract with the City to construct and maintain conduits for communications lines.

#### B. Additional Construction Terms

1. The Company shall comply with all applicable federal, state and City laws, rules, codes, and other requirements, in connection with the construction, repair, upgrade and maintenance of the System within the Inalienable Property of the City, now or hereafter in effect, provided such are lawful and not preempted.

2. The installation of all cables, wires, or other component parts of the System in or on any structure within the Inalienable Property shall be undertaken in a manner which does not interfere with the operation or use of any existing conduit or preexisting system or facility of any third party.

3. The Company shall comply with, and shall ensure that its subcontractors comply with, all applicable lawful rules, regulations and standards of the Department of Transportation provided such are lawful and not preempted. If the construction, upgrade, repair, maintenance or operation of the System does not comply with such lawful, non-preempted rules, regulations and standards, the Company must, at its sole cost, remove and reinstall such cables,

wires or other component parts of the System to ensure compliance with such rules, regulations and standards.

4. The Company shall comply with requirements as may be adopted from time to time by the City regarding the periodic inspection by the Company of any of its facilities that are located within the Inalienable Property and which are on the surface of the ground or above ground, provided such requirements are reasonable for the purpose of assuring compliance with reasonable safety and esthetic standards for such facilities.

5. (a) The Company shall provide, in a format acceptable to the Commissioner, and to the extent (pursuant to subparagraph (c) below) different from the requirements set forth in subparagraph (b) below, consistent with industry standards, maps and other information detailing the location of the System installed in the streets of the City pursuant to this Agreement.

(b) As of the Effective Date, the following format is acceptable to the Commissioner:

(i) For any installation where the Company initiated a street cut and installed its own duct and cable, wire, fiber optic telecommunications cable or other closed-path transmission medium that may be used in lieu of cable, wire or fiber optic telecommunications cable for the same purposes, all locations of such infrastructure elements must be produced utilizing the City's accurate physical base map (NYCMAP). The Company shall also indicate what type of cable, wire, fiber optic telecommunications cable or other closed-path transmission medium that may be used in lieu of cable, wire or fiber optic telecommunications cable it is using in each location, including above and below ground locations and for both microtrenching and traditional trenching. The submission must be digital – provided on a CD, DVD or external hard drive and the infrastructure elements depicted must be accurate within two feet vertically and six inches horizontally, to match with the NYCMAP.

(ii) For any installation where the Company used the ducts of a third party, the Company shall use its best efforts to create maps using such specific source information, datapoints and detail as may have been made available to the Company upon the Company's request from the third party owning the underlying facilities where the System is installed.

(iii) The data, both graphical and attribute, must be formatted so that it can be easily read into a database. Line styles and symbols must conform to DoITT standards and all data must be structured according to DoITT specifications. Acceptable formats include, but are not limited to: ESRI shapefiles (preferred) and drawing interchange file.

(c) Upon written notice to the Company, the Commissioner may reasonably change the format requirements described in (b) above. Annually, simultaneously with the first payment due during each calendar year pursuant to Section 3.3.2, the Company shall submit to DoITT a certification representing that the most recently submitted mapping information submitted pursuant to this Section 5 of this Appendix A is accurate and current as a description of the System installed in the streets of the City pursuant to this Agreement and including a statement of the Company's calculation of its Installation Area as defined in Section 3.2.3 of this Agreement, such calculation to include a level of detail reasonably satisfactory to the City. Such

certification shall be signed by a licensed professional engineer, except that if the compensation due pursuant to Section 3.2 of this agreement with respect to any calendar year is less than the product of \$280,000 multiplied by the CPI Adjustment the annual certification to be made during the following calendar year may, at the option of the Company, be signed by the chief executive officer of the Company (or if there is no chief executive officer, the individual of equivalent responsibility in the Company) in lieu of a professional engineer. The Company shall submit to DoITT updates of the mapping information described in this Section 5 of this Appendix A promptly upon the completion of construction of each addition or change to the System which results in a change in the Installation Area as defined in Section 3.2.3 of this Agreement, which update shall include a calculation of the resulting changes in the Company's Installation Area and the dates such changes became effective, such calculation to include a level of detail reasonably satisfactory to the City. At the City's option, the Franchisee will bear the costs for the City to retain a professional engineering firm to verify footage reports submitted by the Franchisee.

## **ATTACHMENT 1 TO APPENDIX A**

### **STANDARDS FOR ON-STREET TELECOMMUNICATIONS PEDESTAL STRUCTURES**

#### **1. APPLICABILITY**

The standards described in this Attachment 1 shall apply, unless and until revised as described in Section 10 of this Attachment 1, to all “On-Street Pedestal Structures” (hereinafter referred to as “Pedestal Structures”), for which sidewalk opening permits are granted by the Department of Transportation (DOT) after November 13, 2000, defined as any communication utility box and related construction, such as foundations and bollards, which are located, in whole or in part, above grade and within the right-of-way of a public street, except when such box is located on a pole.

#### **2. LOCATION STANDARDS**

##### **a. Clearance**

- i. Corner Clearance Policy: Pedestal Structures shall comply with Executive Order #22 of April 13, 1995, plus an additional ten feet clearance; that is, there shall be a minimum distance of 20 feet between the “corner,” as defined in Executive Order #22 (attached) or any superseding Executive Orders, and any Pedestal Structure.
- ii. The edge of any Pedestal Structure nearest the curb shall be a minimum of 18 inches and a maximum of 24 inches from the curb.
- iii. A minimum clear path of 8 feet or one-half the width of the sidewalk width, whichever is less, shall be maintained. However, in no case shall the minimum clear path be less than 4 feet.
- iv. Minimum Distance between Pedestal Structures and Other Street Furniture: Varies depending on adjoining furniture; see attached Table 1.

##### **b. Required Distance from other Pedestal Structures**

- i. A minimum distance of 100 feet shall be maintained between any two Pedestal Structures, regardless of ownership, along any block-front; and
- ii. A maximum of three Pedestal Structures shall be permitted on any single block-front.

#### **3. DIMENSIONAL STANDARDS**

- a. **Height:** 2 feet-3 inches minimum and 4 feet maximum (excluding supporting base). The maximum height of any base structure, separate from the Pedestal Structure shall be 4 inches.
- b. **Length (dimension parallel to curb):** 6 feet maximum
- c. **Width (dimension perpendicular to curb):** 2 feet-4inches maximum
- d. **Area:**
  - i. Pedestal Structures greater than 3 feet in height shall have a maximum area as follows:
    - (1) 7 square feet if the width is less than or equal to 18 inches;
    - (2) 4.25 square feet if the width is greater than 18 inches
  - ii. Pedestal Structures less than or equal to 3 feet in height shall have a maximum area of 14 square feet.

#### 4. GENERAL DESIGN STANDARDS

- a. All Pedestal Structures shall be constructed of steel or similar durable, vandal resistant materials.
- b. Materials shall have a low degree of light reflectivity.
- c. Pedestal Structures shall have no sharp edges or protuberances.
- d. Advertising Prohibited: No advertising shall appear on any Pedestal Structure.
- e. Identifying Information: Each Pedestal Structure shall have the following information permanently displayed on its surface.
  - i. Name of the telecommunications service provider; and
  - ii. The name, address and phone number of the telecommunications service provider contact for complaints regarding the pedestal Structure and a statement that the structure is subject to City jurisdiction and that complaints may be made by calling 311.

The required information shall be placed in an easily visible location facing the pedestrian pathway and appear in clearly legible letters a minimum of ½ inch in height. The logo of the telecommunications service provider may be included with the required information provided that the maximum coverage of all such information, including the logo, shall not exceed 48 square inches.

#### 5. COMPANY MANAGEMENT STATEMENT

The following information shall be provided to the New York City Department of Information Technology and Telecommunications (DoITT) with respect to a proposed on-street Pedestal Structure:

- a. Description of potential off-street and pole-mounted locations and reason(s) for their rejection.
- b. The address and owner(s) name(s) where the telecommunications service provider has been refused off-street access to install equipment to be placed in the Pedestal Structure;
- c. Description of alternate on-street locations which are consistent with these standards and reason(s) for their rejection;
- d. When the telecommunications service provider is utilizing more than one size Pedestal Structure within the City, explanation of the technical and/or engineering requirements for proposal to install other than the smallest Pedestal Box in current use by the provider; and
- e. Where the proposed on-street location is determined to be unsatisfactory DoITT may require additional information as to the actions taken pursuant to sections (a), (b) and (c) above as well as to require consideration of additional off-street locations or the installation of a pole-mounted structure.

## **6. COMPANY ENGINEERING PLANS: SUBMISSION REQUIREMENTS**

Concurrent with submission of the Company Management Statement, drawings showing the following information shall be provided to DoITT:

- a. Exact location and size of the proposed Pedestal Structure;
- b. Placement and distance of nearest Pedestal Structures;
- c. Placement and distance of other street furniture at and adjoining the proposed location;
- d. Number and location of homes served by the equipment to be installed in the proposed Pedestal Structure;
- e. List of the electronics to be placed in the Pedestal Structure; and
- f. A completed DOT permit form for sidewalk opening.

## **7. CITY AGENCY APPROVAL**

- a. DoITT: documentary and on-site review.



- b. Landmarks Preservation Commission approval, as necessary for Pedestal Structures to be located in historic districts
- c. DOT (following DoITT sign-off): review and issuance of sidewalk opening permit.

## **8. MAINTENANCE**

Pedestal Structures, including any supporting base, shall be maintained in accordance with the following:

- a. Any individual Pedestal Structure reported to a telecommunications service provider contact for complaints (identified pursuant to section 4(e)(ii) above) as having, graffiti or stickers shall be cleaned within 5 working days;
- b. The telecommunications service provider shall establish a regular 30 day cleaning cycle, or such other schedule as may be acceptable to DoITT, to ensure that the Pedestal Structure is maintained in a clean condition, free of litter, rust, debris, stickers, graffiti and grime; and
- c. The quarterly preventive maintenance report to DoITT must include certification that all Pedestal Structures were cleaned in accordance with the regular cleaning cycle, as well as a log showing dates of receipt of complaints with regard to individual Pedestal Structures and date of response.

## **9. WAIVER**

The Commissioner of DoITT may, in his or her sole discretion waive or modify these standards in specific cases when 1) compliance with the standards is impossible or impracticable, and precludes the petitioner from providing its standard telecommunications services and 2) when, in the Commissioner's sole opinion, the public health, safety and general welfare will not be endangered thereby. The petitioner shall request such waiver in writing and shall provide any information requested by DoITT, which may assist the Commissioner in his or her determination.

## **10. REVISION OF STANDARDS**

The standards set forth in Sections 2, 3 and 4, and Table 1, of this Attachment 1 shall be subject to revision by the City's Department of City Planning ("DCP") as follows, and to the extent such standards are thus revised, the Company shall thereafter be subject to such revised standards as if they had been expressly set forth herein: DCP may adopt such revised standards provided such revised standards (i) reflect streetscape and urban design considerations, (ii) are arrived at after the Company is given 30 days notice and opportunity to comment in person and in writing and such comments, including any comments with respect to the cost of implementation, are duly considered, (iii) are consistent with the ability of the Company to provide the services authorized by the

Franchise Agreement of which this Attachment is a part, and (iv) do not limit the continued operation and maintenance of facilities installed pursuant to a franchise agreement, if any, previously executed by the City and the Company (“maintenance” as that term is used in this clause (iv) is understood to include, without limitation, replacement in kind of individual units as they are damaged or malfunction or otherwise reach the end of their useful life).

**TABLE 1:****Minimum Distances between Street Furniture (from DOT Revocable Consents)**

<b>Street Furniture</b>	<b>Minimum Clearance (feet)</b>
Subway Entrance (open side)	15
Sidewalk Cafes	15
Newsstand	15
Bus Stop (with/without shelter)	15
Fire Hydrant/Standpipe	10
Driveway	10
Bicycle Rack (including bicycles)	8
Street Tree	5
Bench	5
Principal Building Entrance	5
Ramp intended to provide access for people with disabilities	5
Subway Entrance (closed end or side)	5
Public Telephone	5
Planters on the sidewalk not adjacent to the building façade	5
Mail Box	4
Street Lights	4
Parking Meters	4
Edge of Tree Pit	3
Street Signs	3
Utility Hole Covers, Cellar Doors, Areaways	3
Transformer Vault <sup>1</sup> , Sidewalk Grates	3
All Other Legal Street Furniture	5

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<sup>1</sup> This restriction does not apply to vaults owned by the Company or its affiliates.

## **APPENDIX B**

### **IN-KIND COMPENSATION**

The Company will provide the City, for the City's use, with ten percent (10%) of the capacity of the backbone of the Company's fiber optic network, but in no event more than six (6) fiber strands within such backbone. Franchisee also shall provide the City with additional capacity, equivalent to two (2) fiber strands in addition to the six (6) fiber strands, where the backbone consists of more than 80 strands of fiber. (The term "backbone" as used in this Appendix B will mean any portion of Franchisee's fiber optic network that contains twenty-four (24) or more fiber strands.

The fiber strands provided to the City in accordance with this Appendix B must be of the same type, quality and capacity standard as the other fiber strands installed. In the event of the use of a technology other than fiber optic strands, reasonably equivalent in-kind compensation will be provided to the City. The fiber strands provided to the City as in-kind compensation hereunder will be owned by the City and the City will hold title to such strands, which title must be free of encumbrance by actions of the Company. Upon termination of this Agreement, the City's title to such strands will remain in effect, except that if the City directs the removal of all or part of the Company's facilities from the Inalienable Property after termination under Section 10.8 of this Agreement, then the City's title to such strands will terminate upon the removal by the Company of those cables removed pursuant to such City direction. The Company shall, as part of its in-kind compensation to the City for use of the public right-of-way maintain and keep in good repair (or provide for the maintenance and good repair of) the fiber strands set aside for the City hereunder to the same standard as it applies to strands used by the Company's customers or by the Company to provide service to its customers. The parties agree that it is not the intention of this Exhibit B to require the Company to provide "drops" (i.e., electronics and internal wiring located within or serving particular buildings) to the City, although the Company acknowledges that as a necessary element of its obligation to make the capacity described above available to the City as described herein, the Company will provide at no charge reasonable access and assistance as needed to allow the City to connect the City's facilities and equipment to the fiber strands being provided.

Notwithstanding anything to the contrary in the preceding two paragraphs or this Agreement, to the extent that the Company is providing the in-kind compensation described in the first two paragraphs of Appendix B of the Telecommunications Services Franchise held by the Company, and the fiber capacity thus provided to the City is located within the facilities also being used to provide services under this Agreement, such provision of fiber capacity shall be a credit against the fiber capacity required hereunder.

## **APPENDIX C**

### **STANDARD CITY CONTRACT PROVISIONS**

The following standard City contract provisions are applicable to this Agreement and thus absent any state or federal law to the contrary shall be binding on the Company. However, to the extent it is determined by a court of competent jurisdiction and after all appeals have been exhausted that any one or more such provisions are beyond the City's authority to enforce or to require in the context of this Agreement, then each such provision that is the subject of such a determination shall be treated, as the case may be, as either unenforceable or as excised from this Agreement and not applicable hereunder. All the provisions set forth in this Appendix C are intended to be severable, and thus any such unenforceability or excision and nonapplicability as described in the preceding sentence shall (notwithstanding anything to the contrary stated within such provisions) not result in the termination of this Agreement generally or of any provisions of this Agreement that remain enforceable or that are not thus excised and rendered nonapplicable.

#### **A. INVESTIGATIONS CLAUSE**

1.1 The parties to this agreement agree to cooperate fully and faithfully with any investigation, audit or inquiry conducted by a State of New York ("State") or City of New York ("City") governmental agency or authority that is empowered directly or by designation to compel the attendance of witnesses and to examine witnesses under oath, or conducted by the Inspector General of a governmental agency that is a party in interest to the transaction, submitted bid, submitted proposal, contract, lease, permit, or license that is the subject of the investigation, audit or inquiry.

1.2 (a) If any person who has been advised that his or her statement, and any information from such statement, will not be used against him or her in any subsequent criminal proceeding refuses to testify before a grand jury or other governmental agency or authority empowered directly or by designation to compel the attendance of witnesses and to examine witnesses under oath concerning the award of or performance under any transaction, agreement, lease, permit, contract, or license entered into with the City, the State, or any political subdivision or public authority thereof, or the Port Authority of New York and New Jersey, or any local development corporation within the City, or any public benefit corporation organized under the laws of the State of New York, or;

1.2 (b) If any person refuses to testify for a reason other than the assertion of his or her privilege against self-incrimination in a investigation, audit or inquiry conducted by a City or State governmental agency or authority empowered directly or by designation to compel the attendance of witnesses and to take testimony under oath, or by the Inspector General of the governmental agency that is a party in interest in, and is seeking testimony concerning the award of, or performance under, any transaction, agreement, lease, permit, contract, or license entered into with the City, the State, or any political subdivision thereof or any local development corporation within the City, then;

1.3 (a) The commissioner or agency head whose agency is a party in interest to the transaction, submitted bid, submitted proposal, contract, lease, permit, or license shall convene a hearing, upon not less than five (5) days written notice to the parties involved to determine if any penalties should attach for the failure of a person to testify.

1.3 (b) If any non-governmental party to the hearing requests an adjournment, the commissioner or agency head who convened the hearing may, upon granting the adjournment, suspend any contract, lease, permit, or license pending the final determination pursuant to paragraph 1.5 below without the City incurring any penalty or damages for delay or otherwise.

1.4 The penalties which may attach after a final determination by the commissioner or agency head may include but shall not exceed:

- (a) The disqualification for a period not to exceed five (5) years from the date of an adverse determination for any person, or any entity of which such person was a member at the time the testimony was sought, from submitting bids for, or transacting business with, or entering into or obtaining any contract, lease, permit or license with or from the City; and/or
- (b) The cancellation or termination of any and all such existing City contracts, leases, permits or licenses that the refusal to testify concerns and that have not been assigned as permitted under this agreement, nor the proceeds of which pledged, to an unaffiliated and unrelated institutional lender for fair value prior to the issuance of the notice scheduling the hearing, without the City incurring any penalty or damages on account of such cancellation or termination; monies lawfully due for goods delivered, work done, rentals, or fees accrued prior to the cancellation or termination shall be paid by the City.

1.5 The commissioner or agency head shall consider and address in reaching his or her determination and in assessing an appropriate penalty the factors in paragraphs (a) and (b) below. He or she may also consider, if relevant and appropriate, the criteria established in paragraphs (c) and (d) below in addition to any other information which may be relevant and appropriate:

- (a) The party's good faith endeavors or lack thereof to cooperate fully and faithfully with any governmental investigation or audit, including but not limited to the discipline, discharge, or disassociation of any person failing to testify, the production of accurate and complete books and records, and the forthcoming testimony of all other members, agents, assignees or fiduciaries whose testimony is sought.
- (b) The relationship of the person who refused to testify to any entity that is a party to the hearing, including, but not limited to, whether the person whose testimony is sought has an ownership interest in the entity and/or the degree of authority and responsibility the person has within the entity.
- (c) The nexus of the testimony sought to the subject entity and its contracts, leases, permits or licenses with the City.

- (d) The effect a penalty may have on a unaffiliated and unrelated party or entity that has a significant interest in an entity subject to penalties under 1.4 above, provided that the party or entity has given actual notice to the commissioner or at the hearing called for in 1.3(a) above gives notice and proves that such interest was previously acquired. Under either circumstance the party or entity must present evidence at the hearing demonstrating the potential adverse impact a penalty will have on such person or entity.

1.6 (a) The term “license” or “permit” as used herein shall be defined as a license, permit, franchise or concession not granted as a matter of right.

(b) The term “person” as used in this Section A. of Appendix C shall be defined as any natural person doing business alone or associated with another person or entity as a partner, director, officer, principal or employee.

(c) The term “entity” as used herein shall be defined as any firm, partnership, corporation, association, or person that receive monies, benefits, licenses, leases, or permits from or through the City or otherwise transacts business with the City.

(d) The term “member” as used herein shall be defined as any person associated with another person or entity as a partner, director, officer, principal or employee.

1.7 In addition to and notwithstanding any other provision of this agreement the Commissioner or agency head may in his or her sole discretion terminate this agreement upon not less than three (3) days written notice in the event contractor fails to promptly report in writing to the Commissioner of Investigation of the City of New York any solicitation of money, goods, requests for future employment or other benefit or things of value, by or on behalf of any employee of the City or other person, firm, corporation or entity for any purpose which may be related to the procurement or obtaining of this agreement by the contractor, or affecting the performance of this contract.

## **B. MACBRIDE PRINCIPLES PROVISIONS**

### **ARTICLE I. MACBRIDE PRINCIPLES**

#### **NOTICE TO ALL PROSPECTIVE CONTRACTORS**

Local Law No. 34 of 1991 became effective on September 10, 1991 and added Section 6-115.1 to the Administrative Code of the City of New York. The local law provides for certain restrictions on City contracts to express the opposition of the people of the City of New York to employment discrimination practices in Northern Ireland and to encourage companies doing business in Northern Ireland to promote freedom of workplace opportunity.

Pursuant to Section 6-115.1, prospective contractors for contracts to provide goods or services involving an expenditure of an amount greater than ten thousand dollars, or for construction involving an amount greater than fifteen thousand dollars, are asked to sign a rider in which they covenant and represent, as a material condition of their contract, that any business in Northern Ireland operations conducted by the contractor and any individual or legal entity in which

the contractor holds a ten percent or greater ownership interest and any individual or legal entity that holds a ten percent or greater ownership interest in the contractor will be conducted in accordance with the MacBride Principles of nondiscrimination in employment.

Prospective contractors are not required to agree to these conditions. However, in the case of contracts let by competitive sealed bidding, whenever the lowest responsible bidder has not agreed to stipulate to the conditions set forth in this notice and another bidder who has agreed to stipulate to such conditions has submitted a bid within five percent of the lowest responsible bid for a contract to supply goods, services or construction of comparable quality, the contracting entity shall refer such bids to the Mayor, the Speaker of the City Council or other officials, as appropriate, who may determine, in accordance with applicable law and rules, that it is in the best interest of the City that the contract be awarded to other than the lowest responsible bidder pursuant to Section 313(b)(2) of the City Charter.

In the case of contracts let by other than competitive sealed bidding, if a prospective contractor does not agree to these conditions, no agency, elected official or the Council shall award the contract to that bidder unless the entity seeking to use the goods, services or construction certifies in writing that the contract is necessary for the entity to perform its functions and there is no other responsible contractor who will supply goods, services or construction of comparable quality at a comparable price.

## **PART A**

In accordance with Section 6-115.1 of the Administrative Code of the City of New York, the contractor stipulates that such contractor and any individual or legal entity in which the contractor holds a ten percent or greater ownership interest and any individual or legal entity that holds a ten percent or greater ownership interest in the contractor either (a) have no business operations in Northern Ireland, or (b) shall take lawful steps in good faith to conduct any business operations they have in Northern Ireland in accordance with the MacBride Principles, and shall permit independent monitoring of their compliance with such principles.

## **PART B**

For purposes of this section, the following term shall have the following meaning:

“MacBride Principles” shall mean those principles relating to nondiscrimination in employment and freedom of workplace opportunity which require employers doing business in Northern Ireland to:

- (1) increase the representation of individuals from underrepresented religious groups in the work force, including managerial, supervisory, administrative, clerical and technical jobs;
- (2) take steps to promote adequate security for the protection of employees from underrepresented religious groups both at the workplace and while traveling to and from work;
- (3) ban provocative religious or political emblems from the workplace;



- (4) publicly advertise all Job openings and make special recruitment efforts to attract applicants from underrepresented religious groups;
- (5) establish layoff, recall and termination procedures which do not in practice favor a particular religious group;
- (6) abolish all job reservations, apprenticeship restrictions and different employment criteria which discriminate on the basis of religion;
- (7) develop training programs that will prepare substantial numbers of current employees from underrepresented religious groups for skilled jobs, including the expansion of existing programs and the creation of new programs to train, upgrade and improve the skills of workers from underrepresented religious groups;
- (8) establish procedures to assess, identify and actively recruit employees from underrepresented religious groups with potential for further advancement; and
- (9) appoint a senior management staff member to oversee affirmative action efforts and develop a timetable to ensure their full implementation.

## **ARTICLE II. ENFORCEMENT OF ARTICLE I.**

The contractor agrees that the covenants and representations in Article I above are material conditions to this contract, unless otherwise expressly set forth herein. In the event the contracting entity receives information that the contractor who made the stipulation required by this section is in violation thereof, the contracting entity shall review such information and give the contractor an opportunity to respond. If the contracting entity finds that a violation has occurred, the entity shall have the right to declare the contractor in default and/or terminate this contract for cause and procure the supplies, services or work from another source in any manner the entity deems proper. In the event of such termination, the contractor shall pay to the entity, or the entity in its sole discretion may withhold from any amounts otherwise payable to the contractor, the difference between the contract price for the uncompleted portion of this contract and the cost to the contracting entity of completing performance of this contract either itself or by engaging another contractor or contractors. In the case of a requirements contract, the contractor shall be liable for such difference in price for the entire amount of supplies required by the contracting entity for the uncompleted term of its contract. In the case of a construction contract, the contracting entity shall also have the right to hold the contractor in partial or total default in accordance with the default provisions of this contract, and/or may seek debarment or suspension of the contractor. The rights and remedies of the entity hereunder shall be in addition to, and not in lieu of, any rights and remedies the entity has pursuant to this contract or by operation of law.

### **C. EMPLOYMENT AND PURCHASING**

1. Right to Bargain Collectively The Company agrees to recognize the right of its employees to bargain collectively through representatives of their own choosing in accordance with applicable law. The Company shall recognize and deal with the representatives duly designated or selected by a majority of its employees for the purpose of collective bargaining with respect to rates of pay, wages, and hours of employment or any other terms, conditions or privileges of employment. The

Company shall not dominate, interfere with, participate in the management or control of, or give financial support to any union or association of its employees.

2. Local Preference The Company shall, at its own cost and expense, develop and maintain a plan for the recruitment, education, training and employment of residents of the City, for the opportunities to be created by the construction, operation, marketing and maintenance of the System within the Inalienable Property. Such recruitment activities shall include provisions for the posting of employment and training opportunities at appropriate City agencies responsible for encouraging employment of City residents. Such plan shall be designed so as to ensure the promotion of equal employment opportunity for all qualified Persons employed by, or seeking employment with, the Company. Such plan shall be updated from time to time as the City deems reasonably necessary. The Company shall, throughout the Term, implement such plan, at its own cost and expense, by ensuring, to the maximum feasible extent, the recruitment, education, training, and employment of City residents.

3. City Vendors To the maximum feasible extent, after taking into account price and quality considerations, the Company shall utilize vendors located in the City in connection with the construction, operation, marketing and maintenance of the System. The Company shall, after taking into account price and quality considerations, in the purchase of comparable materials, equipment, services or supplies of any nature, give effect to a preference for such items which are assembled, manufactured, or otherwise produced, in whole or in part, within the City.

4. Equal Employment Opportunity The Company agrees to comply with the provisions of Mayor's Executive Order No. 50 (April 25, 1980) (codified at Title 10 Sections 1-14 of the Rules of the City of New York) and City Administrative Code 6-108 and all rules and regulations promulgated thereunder (collectively, the "EEO Requirements"), as such EEO Requirements may be amended, modified or superseded throughout the Term. Notwithstanding that the EEO Requirements may not apply on their face to the Company based solely on its status as a party to this Agreement, the Company shall comply in all respects with the provisions of such EEO Requirements and successor and replacement laws, orders and regulations adopted following the Effective Date. As required by said Executive Order No. 50, the provisions of Sections 50.30 and 50.31 of the Final Rule implementing said Order are incorporated herein by this reference. The Company agrees to make a reasonable inquiry and to engage in reasonable compliance monitoring efforts with all unions to ensure that all contractors and subcontractors comply with the required contractual language in Paragraph 5 of this Section C. of this Appendix C. The Company shall not contract with and shall discontinue any contract entered into after the Effective Date with any union, contractor or subcontractor that refuses to agree to or fails to comply with the contractual language in said Section 5.

5. Enforcement The Company shall take steps to ensure that the requirements of the preceding Paragraph 4 are adhered to by each union with which the Company deals, each officer, employee, agent, contractor or subcontractor of the Company, and each Person performing work pursuant to this Agreement with respect to the System for, on behalf of, or at the discretion of, the Company. The requirements of said Paragraph 4 hereof shall apply to every contract relating to the System between the Company and: (i) any union; (ii) any contractor; (iii) any subcontractor; or (iv) any Person with which any of the foregoing Persons has a relationship in connection with any aspect of the System. To comply with the obligations of said Paragraph 4 and this Paragraph 5, the Company shall include, in all contracts described in the foregoing sentence which are entered into

following the Effective Date (which shall include any renewals, amendments and modifications of existing contracts), the following language, stating that such party: “has received a copy of Section C of Appendix B of a certain agreement by and between the City of New York and the Company dated as of **[insert Effective Date]** pursuant to which the Company agreed to comply with each term, condition and requirement of said Section C, which terms, conditions and requirements are deemed to be incorporated herein by this reference.”

**D. ADDITIONAL COVENANTS**

Until the termination of this Agreement and the satisfaction in full by the Company of its obligations under this Agreement, the Company agrees that it will comply with the following affirmative covenants, unless the City otherwise consents in writing:

The Company shall comply with: (a) all laws, rules, regulations, orders, writs, decrees and judgments applicable to the System within the Inalienable Property (including, but not limited to, those of the PSC and the FCC and any other federal or state agency or authority of competent jurisdiction); and (b) all local laws and all rules, regulations, orders, or other directives of the City, DoITT, and the Commissioner related to management of the Inalienable Property to the extent lawful and not preempted.

The Company agrees to comply in all respects with the City’s Vendor Information Exchange System, as the same may be amended from time to time.

## **APPENDIX D**

### **COMPANY CONTROL AS OF THE EFFECTIVE DATE AND PERMITTED TRANSFERS**

Full list of 10% or more direct or indirect interests in the franchise assets as of the Effective Date (hereinafter, the “Approved Interest Holders”):

Joseph Fasone  
RRE Ventures VI, LP  
USV 2014, LP

#### **Permitted Transfers**

1. Any transaction the result of which is that both (1) Control of the Company, the System and the franchise granted hereunder is exercised by one or more of the Approved Interest Holders listed above and (2) no Person other than an Approved Interest Holder holds an interest which gives it Control of the Company, the System or the franchise granted hereunder.
2. Any transfer, directly or indirectly, by any individual Approved Interest Holder of all or any portion of his or her direct or indirect equity interest in the Company, the System and the franchise granted hereunder, outright or in trust, to or for the benefit of the spouse, a sibling, parent or any lineal descendant of such individual Approved Interest Holder or a lineal descendant of a sibling of such individual Approved Interest Holder (each, a “Relative”) or any personal representative, estate or executor under any will of such individual Approved Interest Holder or pursuant to the laws of intestate succession, so long as the final recipient from any personal representative, estate or executor under any will or pursuant to the laws of intestate succession is a Relative of such individual Approved Interest Holder.
3. Any transaction (an “intra-corporate transaction”) in which an interest of one or more entity or entities which is an Approved Interest Holder is transferred to an entity which wholly owns, directly or indirectly, such Approved Interest Holder(s), or an entity which is, directly or indirectly, wholly owned by such Approved Interest Holder(s), or an entity which is, directly or indirectly, under wholly common ownership with such Approved Interest Holder(s).

## **APPENDIX E**

### **CERTIFICATES OF INSURANCE**

#### **Instructions to New York City Agencies, Departments, and Offices**

All certificates of insurance (except certificates of insurance solely evidencing Workers' Compensation Insurance, Employer's Liability Insurance, and/or Disability Benefits Insurance) must be accompanied by one of the following:

- (1) the Certification by Insurance Broker or Agent on the following page setting forth the required information and signatures;

-- OR --

- (2) copies of all policies as certified by an authorized representative of the issuing insurance carrier that are referenced in such certificate of insurance. If any policy is not available at the time of submission, certified binders may be submitted until such time as the policy is available, at which time a certified copy of the policy shall be submitted.

CITY OF NEW YORK

CERTIFICATION BY INSURANCE BROKER OR AGENT

The undersigned insurance broker or agent represents to the City of New York that the attached Certificate of Insurance is accurate in all material respects.

\_\_\_\_\_  
[Name of broker or agent (typewritten)]

\_\_\_\_\_  
[Address of broker or agent (typewritten)]

\_\_\_\_\_  
[Email address of broker or agent (typewritten)]

\_\_\_\_\_  
[Phone number/Fax number of broker or agent  
(typewritten)]

\_\_\_\_\_  
[Signature of authorized official, broker, or agent]

\_\_\_\_\_  
[Name and title of authorized official, broker, or agent  
(typewritten)]

State of .....)

)

ss.: County of  
.....  
....)

Sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_ 20 \_\_\_\_

\_\_\_\_\_  
NOTARY PUBLIC FOR THE STATE OF \_\_\_\_\_



**RESOLUTION**

**FRANCHISE AND CONCESSION REVIEW COMMITTEE**

**CITY OF NEW YORK**

**Cal. No. 2**

In the matter of approval of a proposed telecommunications services franchise agreement ("the Franchise Agreement") between the City of New York and Pilot Fiber NY, LLC ("Pilot").

WHEREAS, pursuant to Authorizing Resolution 1909,( adopted by New York City Council on August 22, 2013), the New York City Department of Information Technology and Telecommunications ("DoITT") issued a solicitation on April 13 2015 for franchises for the provision of telecommunications services, as permitted by said Authorizing Resolution; and

WHEREAS, Pilot responded to said solicitation; and

WHEREAS, the FCRC held a public hearing regarding the proposed Franchise Agreement on March 6, 2017 and said hearing was closed on that date.

NOW, THEREFORE, BE IT

RESOLVED, that the Franchise and Concession Review Committee does hereby approve the proposed Franchise Agreement between the City of New York and Pilot Fiber NY, LLC.

THIS IS A TRUE COPY OF THE RESOLUTION ADOPTED BY THE  
FRANCHISE AND CONCESSION REVIEW COMMITTEE ON:

**March 8, 2017**

Date:\_\_\_\_\_

Signed\_\_\_\_\_

Title: Director of the Mayor's Office of Contract Services



**RECOMMENDATION FOR AWARD OF FRANCHISE AGREEMENT MEMORANDUM COVER SHEET**  
*(Attach, in the following order, FRFA Checklist and Narrative and "Responsibility Determination" form)*

<b>AGENCY</b> Department of Information Technology & Telecommunications	<b>RECOMMENDED FRANCHISEE</b> <b>Name</b> Pilot Fiber NY LLC <b>Address:</b> 305 Broadway FL 7, New York, NY 10007 <b>Telephone #</b> 646-844-8308 <input checked="" type="checkbox"/> EIN <input type="checkbox"/> SSN #46-5345047	<b>FRANCHISE I.D. #</b> 8582017FRAN2 TELECOMMUNICATION SERVICES
# VOTES required for proposed action = 5		
DESCRIPTION OF FRANCHISE (Attach Proposed Resolution and Proposed Agreement)		
Borough(s) Location of Franchise: Citywide C.B.(s) All		
PUBLIC SERVICE TO BE PROVIDED Telecommunications services.		
SELECTION PROCEDURE <input checked="" type="checkbox"/> Request for Proposals <input type="checkbox"/> Other		
FRANCHISE AGREEMENT TERM Initial Term From Effective Date To 06/30/2021 Renewal Option(s) Term Possible renewal extension to the 15 <sup>th</sup> anniversary of the effective date		SUBSIDIES TO FRANCHISEE <input type="checkbox"/> N/A  \$
DCP determined the franchise would have land use impacts or implications. <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO If YES, proposed franchise reviewed and approved pursuant to Sections 197-c and 197-d of the City Charter.  <input type="checkbox"/> CPC approved on ____/____/____ <input type="checkbox"/> City Council approved on ____/____/____ <input type="checkbox"/> N/A		
<input checked="" type="checkbox"/> Law Department determined RFP/other solicitation document consistent with adopted authorizing resolution on 4/8/15.  <input type="checkbox"/> Law Department approved franchise agreement on ____ / ____ / ____		
AUTHORIZED AGENCY STAFF  This is to certify that the information presented herein is accurate and that I find the proposed franchisee to be responsible and approve of the award of the subject franchise agreement. This is to further certify that the subject franchise agreement was approved by the FCRC on ____/____/____ by a vote of ____ to ____.  Name _____ Title _____  Signature _____ Date ____ / ____ / ____		
CERTIFICATE OF PROCEDURAL REQUISITES  This is to certify that the agency has complied with the prescribed procedural requisites for award of the subject franchise agreement.  Signature _____ Date ____ / ____ / ____ City Chief Procurement Officer		

## **RECOMMENDATION FOR AWARD OF FRANCHISE AGREEMENT MEMORANDUM**

***Instructions:*** Check all applicable boxes and provide all applicable information requested below. If any requested date or information is unavailable, describe the reason it cannot be ascertained.

### **A. AUTHORIZING RESOLUTION (Attach copy)**

1. Mayor's Office of Legislative Affairs transmitted proposed authorizing resolution to City Council.
2. City Council conducted public hearing on 05/13/2013.
3. City Council adopted authorizing resolution on 08/22/2013.

### **B. SOLICITATION/EVALUATION/AWARD**

1. RFP/solicitation document issued on 04/13/2015. (Attach copy)
2. ☒ The Agency certifies that it complied with all the procedures for the solicitation, evaluation and/or award of the subject franchise as set forth in the applicable authorizing resolution and request for proposals, if applicable.

#### **Basis for Award:**

***Instructions:*** Check applicable box below; attach a list of proposed franchisee's Board of Directors.

- ☐ Recommended franchisee is highest rated proposer and offered highest amount of revenue (overall or for the competition pool).
- ☐ Recommended franchisee was sole proposer or was determined to be only responsive proposer (overall or for the competition pool), and the and agency certifies that a sufficient number of other entities had a reasonable opportunity to propose, the recommended franchisee meets the minimum requirements of the RFP or other solicitation and award is in the best interest of the City. ***Explain:***
- ☒ The subject franchise is a non-exclusive franchise and the recommended franchisee has been determined to be both technically qualified and responsible.
- ☐ Other ***Describe:***

**C. PUBLIC HEARING & APPROVAL**

1. Agency filed proposed agreement with FCRC on 02/21/2017.

2. Public Hearing Notice

- ☒ a. Agency published, for at least 15 business days immediately prior to the public hearing, a public hearing notice and summary of the terms and conditions of the proposed agreement in the City Record from 02/08/2017 - 03/06/2017.
- ☒ b. Agency provided written notice containing a summary of the terms and conditions of the proposed agreement to each affected CB and BP by 02/07/2017. (Check the applicable box below and provide the requested information)

☐ Franchise relates to property in one borough only and, as such, agency additionally published a public hearing notice and summary of the terms and conditions of the proposed agreement twice in \_\_\_\_\_, a NYC daily, citywide newspaper on \_\_\_/\_\_\_/\_\_\_ and \_\_\_/\_\_\_/\_\_\_, and in \_\_\_\_\_, a NYC weekly, local newspaper published in the affected borough on \_\_\_/\_\_\_/\_\_\_ and \_\_\_/\_\_\_/\_\_\_ . A copy of each such notice containing a summary of the terms and conditions of the proposed agreement was sent to each affected CB and the affected BP by \_\_\_/\_\_\_/\_\_\_.

☒ Franchise relates to property in more than one borough and, as such, agency additionally published a public hearing notice and summary of the terms and conditions of the proposed agreement twice in NY Post a NYC daily, citywide newspaper on 02/16/2017 and 02/17/2017, and in Metro, also a NYC daily, citywide newspaper on 02/16/2017 and 02/17/2017. A copy of each such notice containing a summary of the terms and conditions of the proposed agreement was sent to each affected CB, each affected BP and each affected Council Member by 02/07/17.

☐ Franchise relates to a bus route contained within one borough only and, as such, agency additionally published a public hearing notice and summary of the terms and conditions of the proposed agreement twice in \_\_\_\_\_, a NYC daily, citywide newspaper on \_\_\_/\_\_\_/\_\_\_ and \_\_\_/\_\_\_/\_\_\_, and in \_\_\_\_\_, a NYC weekly, local newspaper published in the affected borough on \_\_\_/\_\_\_/\_\_\_ and \_\_\_/\_\_\_/\_\_\_ . A copy of each such notice containing a summary of the terms and conditions of the proposed agreement was sent to each affected CB and the affected BP by \_\_\_/\_\_\_/\_\_\_.

☐ Franchise relates to a bus route that crosses one or more borough boundaries and, as such, agency additionally published a public hearing notice and summary of the terms and conditions of the proposed agreement twice in \_\_\_\_\_, a NYC daily, citywide newspaper on \_\_\_/\_\_\_/\_\_\_ and \_\_\_/\_\_\_/\_\_\_, and in \_\_\_\_\_, also a NYC daily, citywide newspaper on \_\_\_/\_\_\_/\_\_\_ and \_\_\_/\_\_\_/\_\_\_ . A copy of each such notice containing a summary of the terms and conditions of the proposed agreement was sent to each affected CB, each affected BP and each affected Council Member by \_\_\_/\_\_\_/\_\_\_ . A notice was posted in the buses operating upon the applicable route.

- ☐ b. Franchise relates to extension of the operating authority of a private bus company that receives a subsidy from the City and, as such, at least 1 business day prior to the public hearing the Agency published a public hearing notice in the City Record on \_\_\_/\_\_\_/\_\_\_.

3. FCRC conducted a public hearing within 30 days of filing on 03/06/2017.

## NOTICE OF PUBLIC HEARING

NOTICE OF A FRANCHISE AND CONCESSION REVIEW COMMITTEE ("FCRC") PUBLIC HEARING to be held on Monday March 6, 2017 commencing at 2:30 PM at 2 Lafayette Street, 14th Floor Auditorium, Borough of Manhattan on the following items: 1) a proposed information services franchise agreement between the City of New York and Pilot Fiber NY, LLC; and 2) a proposed telecommunications services franchise agreement between the City of New York and Pilot Fiber NY, LLC. The proposed franchise agreements authorize the franchisees to install, operate and maintain facilities on, over and under the City's inalienable property to provide, respectively, information services and telecommunications services, each as defined in the respective franchise agreements. The proposed franchise agreements have a term ending June 30, 2021, subject to possible renewal to the fifteenth anniversary of the date the agreements become effective, and provide for compensation to the City to begin at 56 cents per linear foot in Manhattan and 51 cents per linear foot in other boroughs, escalating two cents a quarter thereafter, subject to certain adjustments.

A copy of the proposed franchise agreements may be viewed at the Department of Information Technology and Telecommunications, 2 Metrotech Center, 4th Floor, Brooklyn, New York 11201, commencing February 17, 2017 through March 6, 2017, between the hours of 9:30 AM and 3:30 PM, excluding Saturdays, Sundays and holidays. Hard copies of the proposed franchise agreements may be obtained, by appointment, at a cost of \$.25 per page. All payments shall be made at the time of pickup by check or money order made payable to the New York City Department of Finance. The proposed franchise agreements may also be obtained in PDF form at no cost, by email request. Interested parties should contact James Icobelli at 718-403-8042 or by email at [jicobelli@doitt.nyc.gov](mailto:jicobelli@doitt.nyc.gov).

NOTE: Individuals requesting sign language interpreters at the public hearing should contact the Mayor's Office of Contract Services, Public Hearing Unit, 253 Broadway, 9<sup>th</sup> Floor, New York, New York 10007, (212) 788-7490, no later than SEVEN (7) BUSINESS DAYS PRIOR TO THE PUBLIC HEARING. TDD users should call Verizon relay service.

The Hearing may be cablecast on NYCMedia channels.

**FRANCHISE AGREEMENT**

Between

**THE CITY OF NEW YORK**

And

**PILOT FIBER NY LLC**

Telecommunications Services Franchise

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## **APPENDICES**

APPENDIX A	CONSTRUCTION TERMS
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APPENDIX E	CERTIFICATION BY INSURANCE BROKER OR AGENT



THIS AGREEMENT, dated as of the \_\_\_\_ day of \_\_\_\_, 2017 (the “Execution Date”), is by and between THE CITY OF NEW YORK (as defined in Section 1 hereof, the “City”) and Pilot Fiber NY LLC, a New York limited liability company whose principal place of business is located at 305 Broadway, New York, NY 10007 (as defined in Section 1 hereof, the “Company”), (each, a “party” and collectively, the “parties”).

W I T N E S S E T H :

WHEREAS, the New York City Department of Information Technology and Telecommunications (as defined in Section 1 hereof, “DoITT”), on behalf of the City, has the authority to grant franchises (“Franchises”) involving the occupation or use of the Inalienable Property (as defined in Section 1 hereof) of the City in connection with the provision of Telecommunications Services (as defined in Section 1 hereof); and

WHEREAS, the Company has submitted to DoITT its proposal to obtain a Franchise in response to a solicitation issued by DoITT pursuant to Resolution Number 1909 (adopted by the New York City Council on August 22, 2013); and

WHEREAS, on \_\_\_\_\_, 2017 the New York City Franchise and Concession Review Committee (as defined in Section 1 hereof, the “FCRC”) held a public hearing on a proposed Franchise to install, operate and maintain cable, wire, fiber optic telecommunications cable (or other closed-path transmission medium that may be used in lieu of cable, wire or fiber optic telecommunications cable for the same purposes) and related equipment and facilities within the City’s Inalienable Property to be used in providing Telecommunications Services, which hearing was a full public proceeding affording due process in compliance with the requirements of Chapter 14 of the City Charter; and

WHEREAS, DoITT has with respect to the proposed Franchise complied with the New York State Environmental Quality Act (“SEQRA”) (Section 8-010 et. seq.) of the New York State Environmental Conservation Law), the SEQRA regulations set forth at Part 617 of Title 6 of the New York Code of Rules and Regulations, and the City Environmental Quality Review process (Chapter 5 of Title 62 and Chapter 6 of Title 43 of the Rules of the City of New York); and

WHEREAS, the New York City Department of City Planning determined that the proposed Franchise would not have land use impacts or implications and that therefore the proposed Franchise is not subject to the Uniform Land Use Review Procedure set forth in Section 197-c of the New York City Charter;

NOW, THEREFORE, in consideration of the foregoing clauses, which clauses are hereby made a part of this Agreement, the mutual covenants and agreements herein contained, and other good and valuable consideration, the parties hereby covenant and agree as follows:

## SECTION 1 DEFINED TERMS

For purposes of this Agreement, the following terms, phrases, words, and their derivatives will have the meanings set forth in this Section, unless the context clearly indicates that another meaning is intended.

1.1 “Affiliate” means each Person who directly or indirectly owns or controls, or is owned or controlled by, or is under common ownership or control with, the Company.

1.2 “Agreement” means this agreement, together with the Appendices attached hereto and all amendments, modifications or renewals hereof or thereof.

1.3 “Block” has the meaning set forth therefor in Section 3.2 hereof.

1.4 “Block Linear Feet” has the meaning set forth therefor in Section 3.2 hereof.

1.5 “Cable Television Service” means “cable service” as that term is defined, as of the Effective Date, in 47 USC Section 522 (6).

1.6 “Cable Television Franchise” means a franchise granted by the City expressly authorizing the use of the Inalienable Property for the provision of Cable Television Service to Residents.

1.7 “City” means the City of New York or, as appropriate in the case of specific provisions of this Agreement, any board, bureau, authority, agency, commission, department or any other entity of the City of New York, or any authorized officer, official, employee or agent thereof, or any successor thereto.

1.8 “Commissioner” means the Commissioner of DoITT, or his or her designee, or any successor in function to the Commissioner.

1.9 **“Company” means Pilot Fiber NY LLC, a limited liability company organized and existing under the laws of the State of New York and authorized to do business in the State of New York, whose principal place of business is located at 305 Broadway, New York, NY 10007, or a successor entity thereto permitted as provided in Section 7 hereof.**

1.10 “Comptroller” means the Comptroller of the City, the Comptroller’s designee, or any successor in function to the Comptroller.

1.11 “Control” of an entity, business or asset means the power (de facto or de jure) to direct or cause the direction of the management and policies of or related to such entity, business or asset, whether such power is exercisable directly or through intermediate entities.

1.12 “CPI Adjustment” applied to a dollar amount for purposes of calculating a payment means an adjustment in which said dollar amount is multiplied by a fraction, the numerator of which is the Consumer Price Index (All Urban Consumers, All Items, New York-Northern New Jersey-Long Island, NY-NJ-CT-PA, 1982-84=100) announced by the U.S.

Department of Labor for the month prior to the month in which said payment is to be made and the denominator of which is the same index announced by the U.S. Department of Labor for the month in which the Effective Date occurred. If the U.S. government no longer announces an index as described in the preceding sentence, the City will select an alternative index that is expected to be as comparable as practicable in its effect as the index described in the preceding sentence would have been.

1.13 “Credit Support” means a letter of credit, security deposit, or comparable form of equivalent financial assurance.

1.14 “DoITT” means the Department of Information Technology and Telecommunications of the City of New York, or any successor thereto.

1.15 “Effective Date” means the date stated in a notice issued by the City to the Company, which date will be ten (10) days after the first date on which all of the following conditions have been met: (a) this Agreement has been registered with the Comptroller as provided in Sections 375 and 93.p. of the City Charter, (b) all documents have been submitted as required by Section 2.2 hereof, (c) the City’s Vendex review process (if lawfully applicable to franchises of the type covered by this Agreement) with respect to the Company has been completed without disqualifying information having arisen, (d) the Initial Payment described in Section 3.3 hereof has been paid to the City, (e) the Credit Support has been arranged by the Company and is available to the City in accordance with the terms and conditions of this Agreement and (f) payment has been made of an amount sufficient to pay, or reimburse the City for, all costs incurred in publishing the legally required notice(s) with respect to the FCRC’s hearing regarding the Franchise granted by this Agreement.

1.16 “FCC” means the Federal Communications Commission, or any successor thereto.

1.17 “FCRC” means the Franchise and Concession Review Committee of the City of New York, or any successor thereto.

1.18 “Franchise Area” means the City of New York.

1.19 “Inalienable Property” means that property of the City which is inalienable pursuant to Section 383 of the New York City Charter or a successor provision thereto. References to the Inalienable Property in this Agreement will be deemed to include the space on, over and under the surface of the Inalienable Property (except that where the City’s property rights to such Inalienable Property is expressly limited in a particular case to specified dimensional boundaries then such references shall be limited, in regard to such particular property, as thus expressly limited).

1.20 “Indemnitees” has the meaning set forth therefor in Section 8.1 hereof.

1.21 “Information Services” has the meaning set forth therefor in 47 USC Section 153 (24) as of the Effective Date.

1.22 “Initial Payment” means the payment due as provided in Section 3.3.1 hereof.

1.23 “Installation Area” has the meaning set forth therefor in Section 3.2.3 hereof.

1.24 “Mayor” means the chief executive officer of the City, the designee thereof, or any successor to the executive powers thereof.

1.25 “New Franchisee” means an entity that is not, as of the Effective Date and for three years after the Effective Date, operating under the Franchise granted by this Agreement any facilities which have been installed in the Inalienable Property prior to the Effective Date either pursuant to a previous or other franchise from the City or otherwise which have been transferred to the Franchisee’s ownership.

1.26 “Person” means any natural person or any association, firm, partnership, joint venture, corporation, or other legally recognized entity, whether for profit or not for profit, but shall not mean the City.

1.27 “Phased Adjustment” has the meaning set forth therefor in Section 3.2.4 hereof.

1.28 “Pre-Credit Amount” has the meaning set forth therefor in Section 3.2 hereof.

1.29 “PSC” means the New York State Public Service Commission or any successor thereto.

1.30 “Resident” means an occupant who: (i) resides in a dwelling which has or is entitled to receive from the City a residential certificate of occupancy, including, without limitation, a private dwelling, class A multiple dwelling, or an interim multiple dwelling or (ii) has continuously resided in the same buildings as a permanent resident and who takes occupancy pursuant to a lease (or other similar arrangement) of at least six (6) months duration. For purposes of this Agreement, the terms “private dwelling,” “class A multiple dwelling,” and “interim multiple dwelling” shall have the same meaning as they may have in the New York State Multiple Dwelling Law, as such law may from time to time be amended.

1.31 “Security Fund” has the meaning set forth therefor in Section 5.1 hereof.

1.32 “Service” or “Telecommunications Service” means “telecommunications service” as that term is defined, as of the Effective Date, in 47 USC Section 153(53).

1.33 “Stub Adjustment” has the meaning set forth therefor in Section 3.2.2(b) hereof.

1.34 “System” means the cable, wire, fiber optic telecommunications cable (or other closed-path transmission medium that may be used in lieu of cable, wire or fiber optic telecommunications cable for the same purposes), and related equipment and facilities, within the Inalienable Property, used by the Company to provide the Telecommunications Services.

1.35 “Telecommunications Service” means “telecommunications service” as that term is defined, as of the Effective Date, in 47 USC Section 153 (53).

1.36 “Information Service Franchise” means a franchise granted by the City expressly authorizing the use of the Inalienable Property for the provision of Information Service.

1.37 “Term” has the meaning set forth therefor in Section 2.1 hereof.

## **SECTION 2 GRANT OF AUTHORITY**

2.1 Term This Agreement and the franchise granted hereunder, will commence upon the Effective Date, and will continue until and including June 30, 2021, unless earlier terminated as described herein. The period of time that this Agreement remains in effect is herein referred to as the “Term.”

### **2.2 Conditions to Effectiveness**

2.2.1 Certain Actions by the Company Before Effective Date As provided in Section 1.15 above, the occurrence of the Effective Date is conditional on, among other things, the submission to the City by the Company of certain documents as described in this Section 2.2. Said documents are (a) evidence as described in Section 8.6.1 below of the Company’s liability insurance coverage pursuant to Section 8 hereof; (b) an opinion of the Company’s counsel dated as of the date this Agreement is executed by the Company, in form reasonably satisfactory to the City, (c) an affirmation signed by an authorized officer or representative of the Company in the form set forth in the solicitation issued by DoITT seeking a proposal from the Company for the Franchise granted hereunder; (d) an IRS W-9 form certifying the Company’s tax identification number; (e) organizational and authorizing documents as described in Sections 10.5.1 and 10.5.2 hereof; (f) documentation verifying that the Company has completed all required submissions under the City’s VENDEX process, and the City’s review thereof has been completed; and (g) documentation verifying that the City’s review of the Company’s submissions pursuant to Local Law 34 of 2007 has been completed and the City has found that the Company is in compliance with the requirements of said Local Law 34. The City will issue a notice to the Company setting forth the Effective Date, such notice to be issued within ten (10) days of the first date on which all required conditions to occurrence of the Effective Date, as set forth in this Section 2.2 and in Section 1.14 above, have been met.

### **2.3 Nature of Franchise, Effect of Termination and Renewal**

2.3.1 Nature of Franchise The City hereby grants the Company, subject to the terms and conditions of this Agreement, a nonexclusive franchise providing the Company with the right and the City’s consent to install, operate, repair, maintain, remove and replace the System (authorization to install non-closed path transmission facilities, such as antennae and similar equipment which transmits or receives information wirelessly, within the Inalienable Property is not granted pursuant to this Agreement, although the Company is permitted to separately seek a franchise granting such authorization). The Franchise granted hereunder does not include the right or consent to install, maintain or operate any computer kiosks or other similar facilities within the Inalienable Property of the City the purpose of which is the reception and use of Telecommunications Services, or any other service, by pedestrians, vehicles or other users or occupants of the Inalienable Property, although the Company is permitted to separately seek authority from the City granting such authorization. The Franchise granted hereunder does not include the right or consent to use the Inalienable Property of the City for the transmission of Cable Television Service or Information Service, unless such authority is expressly granted

hereinafter, although to the extent not thus expressly granted hereinafter, the Company is permitted to separately seek authority from the City granting such authorization.

**2.3.2 Effect of Termination** Upon termination of this Agreement, the Franchise granted hereunder will expire; all rights of the Company in such Franchise will cease, with no value allocable to such Franchise; and the rights of the City and the Company to the System, or any part thereof, will be determined as provided in Section 10.8 hereof. The termination of this Agreement and the Franchise granted hereunder may not, for any reason, operate as a waiver or release of any obligation of the Company or any other Person, as applicable, for any liability (i) pursuant to Section 8.1 hereof, which arose or arises out of any act or failure to act required hereunder prior to the termination; (ii) which exists pursuant to Sections 3 (“Compensation”), 6.5.2 (“Right of Inspection”), 10.8 (“Rights Upon Termination”), 10.13 (“Governing Law”) and 10.16 (“Claims Under Agreement”) hereof; and (iii) to maintain in full force and effect the Security Fund described in Section 5 hereof and the coverage under the liability insurance policies required under and in accordance with Section 8 hereof.

**2.3.3 Renewal Option.** (a) For purposes of this Section 2.3.3, the following terms shall be defined as follows: A “Recent Franchise Agreement” shall mean any written franchise agreement entered into by the City and authorizing a franchisee to use the Inalienable Property for purposes comparable to those described in Section 2.3.1 provided that the date on which such agreement first became effective is between July 1, 2019 and the date the Company chooses to exercise the option which is described in this Section 2.3.3 below. A “Recent Franchisee” is a franchisee under a Recent Franchise Agreement. If there are no Recent Franchise Agreements in existence as of January 1, 2021, then the period during which a franchise agreement falls within the definition of a Recent Franchise Agreement shall be deemed to extend back in time an additional one year (to July 1, 2018), and if that still does not result in at least one Recent Franchise Agreement, then that time period shall further extend back in additional one-year increments until at least one franchise agreement falls within the definition of a Recent Franchise Agreement, except that in no event will a Recent Franchise Agreement go back further in time than this Agreement. A franchise agreement may be considered a Recent Franchise Agreement even if it is entered into with a franchisee that held a previous franchise from the City and even if the facilities in the Inalienable Property authorized thereby were previously authorized under a previous franchise from the City.

(b) During the period beginning October 1, 2020 and ending April 1, 2021, the Company shall (provided it is not then in default of any of its material obligations under this Agreement) have the option to extend the scheduled end date of the Term from June 30, 2021 to the fifteenth (15<sup>th</sup>) anniversary of the Effective Date (along with a comparable extension of the term of the Company’s Information Service Franchise as described therein), provided that if the Company exercises such option, then beginning July 1, 2021, the terms and conditions of this Agreement shall, at the City’s option, be deemed to be revised to match those of that Recent Franchise Agreement the Recent Franchisee under which most closely most matches the Company, based on the standards set forth in clauses (i) through (viii) below of this subsection (b). Failure to exercise such option by the Company shall not bar the Company and the City (each acting with the fullest amount of discretion authorized by applicable law) from reaching a mutual agreement to authorize the Company to continue to use the City’s rights of way for the

provision of Telecommunications Services after July 1, 2021 upon terms and conditions agreed to by the City and the Company.

The standards to be applied in determining which Recent Franchisee most closely matches the Company shall be as follows:

- (i) the degree to which the purposes described in Section 2.3.1, or provision of comparable effect, in the Recent Franchisee's Recent Franchise Agreement matches the purposes described in Section 2.3.1 hereof;
- (ii) the length of time the Recent Franchisee, or its affiliates or predecessors in interest, have had to amortize its or their investment in the facilities installed in the Inalienable Property pursuant to franchise rights granted by the City;
- (iii) the size of the Recent Franchisee, measured on an invested-capital basis;
- (iv) the extent of the installation by the Recent Franchisee in the Inalienable Property of cable, wire, fiber optic telecommunications cable or other closed-path transmission medium as part of its Telecommunications Services system;
- (v) the types and forms of Telecommunications Services being generally offered by the Recent Franchisee and the type of ultimate end-user customer base and mix of customers for such services;
- (vi) the percentage of the Recent Franchisee's Telecommunications Services provided on a wholesale basis to third-party providers of retail services;
- (vii) the degree to which the provision of Telecommunications Services constitutes the primary business activity of the Recent Franchisee; and
- (viii) the degree to which there are material extrinsic circumstances (e.g., governmental grant, subsidy or other assistance, or tax exemption) existing in favor of the Recent Franchisee.

If the Company and the City cannot agree which Recent Franchisee most closely matches the Company, then an arbitrator shall make such determination, such arbitrator to be selected by the City with the approval of the Company not to be unreasonably withheld, which arbitrator shall make such determination following procedures of the American Arbitration Association.

2.3.4 Other Renewal. Except as expressly set forth in the preceding Section 2.3.3, this Agreement does not grant to the Company any right to renewal of this Agreement or the franchise granted hereunder. At the end of the Term, the City will have the discretion to renew this Agreement, or not, subject only to such limitations on such discretion as may exist under applicable state and/or federal law.

## 2.4 Conditions and Limitations on Franchise.

2.4.1 Not Exclusive. Nothing in this Agreement affects the right of the City to grant to any Person a franchise, consent or right to occupy and use Inalienable Property, or any part thereof, for the construction, operation and/or maintenance of a system in order to provide Telecommunications Services in the City for any purpose, or the right of the City (i) to construct, operate and/or maintain a system to provide Telecommunications Services in the City or (ii) to acquire, in accordance with Section 10.08 below, and operate the System.

### 2.4.2 Construction of System

- (a) The Company shall use commercially reasonable efforts to coordinate (and in any event comply with all legal requirements, if any, to so coordinate) its construction schedule with the appropriate City agencies, including, without limitation, the Department of Transportation, the appropriate Borough Engineer and the Office of Construction, to minimize unnecessary disruption.
- (b) The Company shall obtain all construction, building, street opening or other permits or approvals necessary before installing the System. The Company shall provide copies of any such permits and approvals to DoITT promptly following receipt of a request therefor.
- (c) Construction within the Inalienable Property which falls within the boundaries of New York City park land will be subject to the approval of the City's Department of Parks and Recreation (or successor agency), acting with the fullest discretion permitted by law, and such discretion is a limit on the scope of the Franchise covered hereby. Construction within the Inalienable Property which falls within the boundaries of New York City waterfront or wharf property as defined in Section 1150 of the New York City Charter will be subject to the approval of the City's Department of Transportation or Department of Small Business Services, whichever has jurisdiction over the particular property under City law, or the appropriate successor agency, acting with the fullest discretion permitted by law, and such discretion is a limit on the scope of the Franchise covered hereby. To the extent that such construction activity within park, wharf or waterfront property would temporarily materially interfere with the use of such property for park, wharf or waterfront use, as the case may be, the responsible agency may require reasonable compensation to the City for such interference (in addition to, and not in lieu of, the reasonable compensation for use of the Inalienable Property generally under this Agreement as set forth in Section 3 hereof) to the fullest extent permitted by law.

## **SECTION 3 COMPENSATION**



3.1 Compensation. The Company agrees to provide reasonable compensation to the City, in return for the benefit conferred by the City of the Franchise to use the Inalienable Property for the purpose of offering and providing Telecommunications Services, to be as described in this Section 3.

3.2 Monetary Compensation.

3.2.1 As a Franchise fee to be paid as compensation in exchange for the benefit and privilege of using the Inalienable Property for the purpose of offering and providing Telecommunications Services, the Company shall pay to the City the following amount per calendar quarter or portion thereof:

(a) the excess, if any, of the applicable Pre-Credit Amount (as calculated pursuant to Sections 3.2.2(a) and 3.2.2(b) hereof), over any amounts paid by the Company to the City, with respect to the facilities over which Telecommunications Services are being offered to the public pursuant to this Agreement, as franchise compensation under any Information Services Franchise held by the Company which compensation is attributable to the same calendar quarter or portion thereof, but

(b) in no event less than the product of \$70,000 multiplied by the CPI Adjustment (except that if the Company is a New Franchisee said \$70,000 figure shall be reduced to \$5,000 until but not including the first anniversary of the Effective Date, \$15,000 from the first anniversary of the Effective Date until but not including the second anniversary of the Effective Date, and \$35,000 from the second anniversary of the Effective Date until but not including the third anniversary of the Effective Date).

Notwithstanding the preceding however, if the Company is a New Franchisee, then the amount payable under this Section 3.2.1 with respect to the first eighteen months of the Term shall not be, as to any calendar quarter, greater than the amount described in paragraph (b) above with respect to that quarter (even if the amount described in paragraph (a) above for such quarter would be greater the paragraph (b) amount for such quarter).

3.2.2 (a) The Pre-Credit Amount with respect to any full calendar quarter equals fifty-six (56) cents (adjusted each quarter by the Phased Adjustment as defined below) per calendar quarter per foot of Installation Area, as that term is defined below, with respect to Installation Area located in the borough of Manhattan and equals fifty-one (51) cents (adjusted each quarter by the Phased Adjustment as defined below) per calendar quarter per foot of Installation Area, as that term is defined below, with respect to Installation Area located in the boroughs of the Bronx, Brooklyn, Queens and Staten Island. The references to fifty-six (56) cents and fifty-one (51) cents in this paragraph are based on the assumption that this Franchise Agreement first becomes effective during the second quarter of calendar year 2017. Should this Franchise Agreement first become effective after June 30, 2017, said references to fifty-six (56) cents and fifty-one (51) cents in this subsection shall each be deemed increased by two cents for each full calendar quarter, beginning with the third calendar quarter of calendar year 2017, which has elapsed prior to this Franchise Agreement becoming effective.

(b) The Pre-Credit Amount with respect to any period of less than a full quarter shall be calculated by multiplying the Pre-Credit Amount for a full calendar quarter by the Stub Adjustment. The Stub Adjustment for any period less than a full calendar quarter is the percentage equal to the number of days in the applicable period divided by 90. The Stub Adjustment is not applicable to Installation Area adjustments and may only be used as a prorating factor with regards to the first and last quarter of the Term.

3.2.3 The “Installation Area” is defined pursuant to the following provisions:

(a) Unless the Company submits documentation as described in Section 3.2.3(b) below, the Installation Area in each borough or portion thereof will be calculated by adding together the Block Linear Feet applicable to every Block in such borough or portion thereof in which the Company has the System within the Inalienable Property. “Block Linear Feet” applicable to any Block in the City means the number of feet (rounded to the nearest foot) that results by measuring a straight line along the surface of the street from the midpoint of the intersection at one end of the block to the midpoint of the intersection at the other end of the block. A “Block” means a mapped street of the City running from one intersection with another mapped street of the City to the next intersection with another mapped street of the City.

(b) If the Company submits documentation to the City showing to the City’s reasonable satisfaction that, with respect to any particular Block, the portion of the System located therein is located underground and that in length run less than the full Block Linear Feet of such Block, then the Installation Area with respect to the Block will be adjusted to the actual length of such facilities in lieu of the full Block Linear Feet of the Block.

(c) If the Company maintains multiple systems at any Block, as a result of, for example, multiple systems having been originally constructed for different owners which have come or hereafter subsequently come under the common ownership of the Company, then the Installation Area will be calculated separately with respect to each such system, and the sum of the multiple Installation Areas is to be applied in the calculation of the Pre-Credit Amount as described above.

(d) To the extent the Company installs or has installed facilities on a bridge or in a tunnel which is part of the Inalienable Property, the Installation Area shall include the length of the bridge or tunnel, or portion thereof, in which the Company’s facilities run and which are within the Inalienable Property. If such bridge or tunnel connects between the borough of Manhattan and another borough, the Installation Area with respect to the bridge or tunnel shall be deemed to be within Manhattan up to the geographic midpoint between the bulkhead line on the Manhattan side and the bulkhead line on the other borough side when run along the line of the bridge or tunnel.

3.2.4 The “Phased Adjustment” means an increase, with respect to each calendar quarter after the first calendar quarter to occur during the Term, in the amount of two cents (\$.02), such that, for example, with respect to the (i) second full quarter to occur during the Term, the Pre-Credit Amount will be fifty-eight (58) cents per calendar quarter per foot of Installation Area in Manhattan and fifty-three (53) cents per calendar quarter per foot of

Installation Area in Staten Island, Queens, Brooklyn and the Bronx, (ii) the third full quarter to occur during the Term, the Pre-Credit Amount will be sixty (60) cents per calendar quarter per foot of Installation Area in Manhattan and fifty-five (55) cents per calendar quarter per foot of Installation Area in Staten Island, Queens, Brooklyn and the Bronx, with each Phased Adjustment becoming applicable at the beginning of each calendar quarter throughout the Term. The illustrative references in the preceding sentence to fifty-eight (58) cents, fifty-three (53) cents, sixty (60) cents and fifty-five (55) cents are based on the assumption that this Agreement first becomes effective during the second quarter of calendar year 2017. Should this Agreement first become effective after June 30, 2017, each of said references in the preceding sentence shall be deemed increased by two cents for each full calendar quarter, beginning with the third calendar quarter of calendar year 2017, which has fully elapsed prior to this Franchise Agreement becoming effective.

The application of the Phased Adjustment increases quarterly through June 30, 2021 as described in this Section 3.2.4 is not intended to suggest that further such quarterly increases will continue to be added in the event either the Term is extended beyond June 30, 2021 as contemplated in Section 2.3.3 above or if the term of the franchise granted hereunder is otherwise renewed, it being the current intention of the parties that franchise compensation during any term beyond June 30, 2021 will be determined pursuant to the process provided for in Section 2.3.3 if applicable, or otherwise pursuant to negotiation and applicable law, without reference to any assumption that there would be further application of similar additional phased adjustments that would continue to similarly increase franchise compensation after June 30, 2021.

### 3.3 Timing

3.3.1 Initial Payment. As a condition of the occurrence of the Effective Date, the Company shall make an Initial Payment which shall represent the sum of (x) the Company's good faith estimate regarding the amount due under Section 3.2 hereof attributable to the initial partial calendar quarter to occur within the Term, plus (y) the Company's good faith estimate regarding the amount due under Section 3.2 hereof attributable to the first full calendar quarter to occur within the Term.

3.3.2 Subsequent Payments. All payments made pursuant to Section 3.2 after the Initial Payment hereof must be made in advance on a quarterly basis no later than forty-five (45) days prior to the beginning of each calendar quarter with respect to which payment has not yet been made. The Company shall in good faith estimate each such quarterly payment based on the Installation Area expected to be applicable to the next quarter. Within one hundred twenty (120) days following the end of each calendar year, the Company shall calculate the exact monetary compensation due to the City pursuant to Section 3.2 hereof for all the calendar quarters of said calendar year. Should the total monetary compensation for such calendar year thus calculated be found to have exceeded the estimated quarterly payments made by the Company for such calendar year, the Company shall, within the 120-day period following the end of the calendar year, remit to the City any balance due. Should the estimated quarterly payments made by the Company for the calendar year be found to have exceeded the total calculated monetary compensation for the year, the overpayment will constitute a credit against the next payment or

payments due from the Company hereunder. However, notwithstanding anything to the contrary in the preceding sentences of this Section 3.3.2, if the Company is a New Franchisee, then the Company may at its option defer payment (interest-free) of up to one-half of the amount due hereunder with respect to each of the first six quarterly payments to be made pursuant to this Section 3.3.2. In the event of such deferral, the deferred amount with respect to each such quarter shall be due and payable on the third anniversary of the date the deferred amount would have been due had it not been deferred, but in no event later than the last day of the Term.

3.4 Non-Monetary Compensation. As further compensation in exchange for the benefit and privilege of using the Inalienable Property for the purpose of offering and providing Telecommunications Services, the Company shall provide (in addition to and not in lieu of the monetary compensation required pursuant to Section 3.2 above) facilities and services constituting non-monetary compensation to the City as follows:

the Company shall provide the facilities and services described in Appendix B;

3.5 Records. The Company shall keep comprehensive itemized records of the relevant aspects of its operations in sufficient detail to enable the City to determine whether all compensation owed to the City pursuant to this Section 3 is being paid to the City.

3.6 Reservation of Rights. No acceptance of any compensation payment by the City may be construed as an accord and satisfaction that the amount paid is in fact the correct amount, nor may such acceptance of any payment be construed as a release of any claim that the City may have for further or additional sums payable under the provisions of this Agreement. All amounts paid, and all representations by the Company as to amounts due hereunder, will be subject to audit by the City.

3.7 Ordinary Business Expense. Nothing contained in this Section 3 or elsewhere in this Agreement is intended to prevent the Company from treating the compensation that it pays pursuant to this Agreement as an ordinary expense of doing business and, accordingly, from deducting said payments from gross income in any City, state, or federal income tax return.

3.8 Costs Related to Company-Sought Transactions. The Company shall, as part of the reasonable compensation payable to the City for use of the Inalienable Property, pay, in addition to and not in lieu of all other reasonable compensation due hereunder, to the City or to third parties, at the direction of DoITT, an amount equal to the reasonable costs and expenses which the City incurs for the services of third parties (including, but not limited to, attorneys, arbitrators, and other consultants) in connection with any Company-sought renegotiation, transfer, amendment or other modification of this Agreement or the Franchise granted hereunder during the Term, provided the City has given the Company notice in advance of any work being performed by such third party. Such modifications shall not include the renegotiation, renewal or other modifications that take place at the end of the Term in the normal course of dealing between the City and the Company in anticipation of a possible extension or renewal of the Company's rights. The Company expressly agrees that the payments made pursuant to this Section 3.8 are in addition to and not in lieu of, and may not be offset against, the compensation to be paid to the City by the Company pursuant to other provisions of this Section 3.

3.9 No Credits or Deductions.

(a) The Company, as part and parcel of its agreement hereunder to pay reasonable compensation for the use of the Inalienable Property, expressly acknowledges and agrees that:

(i) the compensation to be provided pursuant to this Section 3 may not be deemed to be in the nature of a tax, and is in addition to any and all taxes or other fees or charges which the Company or any Affiliate must pay to the City or to any state or federal agency or authority, all of which are separate and distinct obligations of the Company; and

(ii) with respect to the Franchise granted pursuant to this Agreement, the Company expressly relinquishes and waives its rights and the rights of any Affiliate to a deduction or other credit pursuant to Section 626 of the New York State Real Property Tax Law and any successor or amendment thereto, and (to the extent such waiver is permitted by law) to any subsequent law, rule, regulation, or order which would purport to permit any of the acts prohibited by this Section 3.9; and

(iii) except as might be permitted by Section 3.7, the Company may not, and may not otherwise support any attempt by an Affiliate to, make any claim for any deduction of, or other credit for, all or any part of the amount of the compensation (whether monetary or in-kind), or other consideration to be provided pursuant to this Agreement from or against any City or other governmental taxes of general applicability or other fees or charges which the Company or any Affiliate is required to pay to the City or other governmental agency; and

(iv) except as might be permitted by Section 3.7, the Company may not, and may not otherwise support any attempt by an Affiliate to, apply or seek to apply all or any part of the amount of the compensation (whether monetary or in-kind) or other consideration to be provided pursuant to this Agreement as a deduction or other credit from or against any City or other government taxes of general applicability (other than income taxes) or other fees or charges, each of which are hereby deemed to be separate and distinct obligations of the Company and the Affiliates; and

(v) except as might be permitted by Section 3.7, the Company may not, and may not otherwise support any attempt by an Affiliate to, apply or seek to apply all or any part of the amount of any City or other governmental taxes or other fees or charges of general applicability as a deduction or other credit from or against any of the consideration to be provided pursuant to this Agreement, each of which are hereby deemed to be separate and distinct obligations of the Company and the Affiliates.

(b) In any situation where the Company believes the effect of this Section 3.9 is unduly harming, in a manner inconsistent with the intent of this Section 3.9, an Affiliate of the Company or the Company may petition the Commissioner for relief, and such relief will not be unreasonably withheld.

3.10 Interest on Late Payments. In the event that any payment required by this Agreement is not actually received by the City on or before the applicable date fixed in this Agreement,

interest thereon will accrue from such date until received at a rate equal to the rate of interest then in effect that would be charged by the City for late payments of water charges of a comparable amount.

3.11 Method of Payment. Except as provided elsewhere in this Agreement, all payments made by the Company to the City pursuant to this Agreement must be paid to the City's Department of Finance and must be sent to DoITT, c/o Director of Franchise Audits and Revenue, 2 Metrotech Center, 4<sup>th</sup> Floor, Brooklyn, New York 11201, or to such alternative payee and/or address as DoITT may designate by written notice to the Company from time to time.

3.12 Continuing Obligation and Holdover. In the event the Company continues to operate within the Inalienable Property all or any part of the System after the Term for the purpose of providing Telecommunications Services, then (a) the Company shall continue to comply with all applicable provisions of this Agreement, including, without limitation, all compensation and other payment provisions of this Agreement, throughout the period of such continued operation, provided that any such continued operation may not be construed as a renewal or other extension of this Agreement or the Franchise granted pursuant to this Agreement, nor as a limitation on the remedies, if any, available to the City as a result of such continued operation after the Term, including, but not limited to, damages and restitution and (b) in addition to all other remedies available to the City under this Agreement or by law, the Company shall also pay to the City all payments that the City is entitled to receive under this Agreement including, but not limited to, the compensation set forth in this Section 3 as if the Term remained in effect.

3.13 Company's Right to Recover Fee. Nothing in this Agreement shall be construed to prohibit the Company from itemizing or passing through the Franchise fee payable pursuant to Section 3.2 hereof in the form of a line item on its bills to its end users.

#### **SECTION 4 CONSTRUCTION AND MAINTENANCE REQUIREMENTS**

4.1 Generally The Company agrees to exercise its right described in Section 2.3.1 above in accordance with the standards of work and operation as set forth in this Section 4 and Appendix A attached hereto and incorporated herein. The facilities to be installed in the Inalienable Property pursuant to this Agreement are not to materially exceed in size or otherwise differ in the nature of the imposition placed on the Inalienable Property from that which is standard in the industry with respect to the provision of the Telecommunications Services. To the extent that the Company seeks to install or maintain facilities that exceed such standard, the City reserves the right to require the Company to obtain additional authority from the City to do so as such authority is not being granted by the Franchise covered hereby.

4.2 Quality In order to assure that the Inalienable Property and its continuing use by the public is adequately protected, all work involved in the construction, operation, maintenance, repair, upgrade and removal of the System located within the Inalienable Property must be performed in a safe, thorough and reliable manner using materials of good and durable quality. If, at any time, it is determined by any entity with applicable authority or jurisdiction that any part of the System located within the Inalienable Property is harmful to the public health or

safety, then the Company shall, at its own cost and expense, take all steps necessary to correct all such conditions.

4.3 Licenses and Permits In order to assure that the Inalienable Property and its continuing use by the public is adequately protected, the Company has the sole responsibility for diligently obtaining, at its own cost and expense, and thereafter complying with, at its own cost and expense, all permits, licenses or other forms of approval or authorization necessary to construct, operate, maintain, upgrade or repair the System located within the Inalienable Property, including, but not limited to, any necessary approvals from Persons to use any privately-owned equipment or other property (including, without limitation, any privately-owned easements, poles and conduits) located within the Inalienable Property.

4.4 Public Works and Improvements Nothing in this Agreement shall, and nothing in this Agreement is intended to, abrogate the right of the City to perform, or to arrange to have performed, any public works or public improvements of any description or change, or to arrange to have changed, the grades, lines or boundaries of any Inalienable Property. In the event that the System interferes with the installation, upgrade, construction, operation, maintenance, repair, relocation or removal of such public works or public improvements, or such change in grades, lines or boundaries, then Section 4.7 of this Agreement will apply.

4.5 No Waiver Nothing in this Agreement may be construed as a waiver of any codes, ordinances or regulations of the City or of the City's right to require the Company, or other Persons using, constructing or maintaining the System, to secure the appropriate permits or authorizations for such use, provided that (except as set forth in to Section 2.4.2(c)) no fee or charge may be imposed for any such permit or authorization, other than the standard fees or charges generally applicable to all Persons for such permits or authorizations. Any such standard fee or charge may not be an offset against, or in lieu of, the amounts the Company has agreed to pay to the City pursuant to Section 3 of this Agreement.

4.6 Eliminated, Discontinued, Closed Or Demapped Streets Or Other Inalienable Property In the event that all or any part of the Inalienable Property is eliminated, discontinued, closed or demapped, or the status of such property otherwise changes so that it is no longer to be included in the category of Inalienable Property, all rights and privileges of the Company acknowledged and recognized pursuant to this Agreement with respect to said (formerly) Inalienable Property, or any part thereof, so eliminated, discontinued, closed, demapped or otherwise recategorized, will cease upon the effective date of such elimination, discontinuance, closing, demapping or other such recategorization and the Company shall at the direction of the City and upon reasonable notice from the City remove any and all or any portion of the System located within such property by a date not later than the effective date of such elimination, discontinuance, closing, demapping or other recategorization or such later date as the City may direct.

4.7 Protection, Relocation, Alteration of the System In the event that the System interferes with the installation, construction, upgrade, operation, maintenance, repair, relocation or removal of public works or public improvements, or in the event the grades, lines or boundaries of any Inalienable Property are changed at any time during the Term in a manner affecting the System, then the Company shall, at its own cost and expense (unless dedicated funds have been provided to the City by another entity specifically for such purpose), upon reasonable notice from the City,

promptly protect or alter or relocate the System, or any part thereof, as directed by the City. In the event that the Company refuses or neglects to so protect, alter or relocate all or part of the System, the City has the right, upon notice by the City, to break through, remove, alter, or relocate all or any part of the System without any liability to the Company, and the Company shall pay to the City the costs incurred in connection with such breaking through, removal, alteration, or relocation.

4.8 City Authority to Move Facilities The City may, at any time, in case of fire, disaster or other emergency, as determined by the City in its reasonable discretion, cut or move any part of the System within the Inalienable Property, in which event the City will not be liable therefor to the Company. If practicable, the City will notify the Company in writing prior to such cutting or moving, but in any event will notify the Company in writing as soon as possible following any such action.

4.9 Company Required to Move Facilities The Company shall, upon prior written notice by the City or any Person holding a permit to move any structure, and within the time that is reasonable under the circumstances, temporarily move the System within the Inalienable Property to permit the moving of said structure (provided that for the duration of any period that any portion of the System moved pursuant to this Section 4.9 is out of service as a result of such action by the City, and such out of service status is documented by the Company to the reasonable satisfaction of DoITT, such facilities shall be treated as not “being used for the provision of Telecommunications Services” for purposes of the definition of Installation Area set forth in Section 3.2.3 hereof). The Company may impose a reasonable charge on any Person other than the City for any such movement of the System.

4.10 Protect Structures In connection with the construction, operation, maintenance, repair, upgrade or removal of the System within the Inalienable Property, the Company shall, at its own cost and expense, protect any and all existing structures belonging to the City and all designated landmarks and historic pavements, as well as all other structures within any designated landmark district. The Company shall obtain the prior approval of the City before undertaking any alteration of any water main, sewerage or drainage system, equipment or facility or any other municipal structure within the Inalienable Property, required because of the presence of the System. The Company shall make any such alteration at its own cost and expense and in a manner prescribed by the City. The Company agrees to be liable, at its own cost and expense, to replace or repair and restore to its prior condition in a manner as may be reasonably specified by the City, any municipal structure or any other Inalienable Property involved in the construction, operation, maintenance, repair, upgrade or removal of the System that may become disturbed or damaged as a result of any work thereon by or on behalf of the Company.

4.11 No Obstruction In connection with the construction, operation, maintenance, upgrade, repair or removal of the System, the Company may not, without the prior consent of the appropriate authorities, obstruct the Inalienable Property, or the subways, railways, passenger travel, river navigation, or other pedestrian or vehicular traffic that is using the Inalienable Property.

4.12 Safety Precautions



(a) The Company shall, at its own cost and expense, undertake all necessary and appropriate efforts to prevent accidents at its work sites within the Inalienable Property, including the placing and maintenance of proper guards, fences, barricades, security personnel and suitable and sufficient lighting.

(b) The Company agrees to apply for membership in the Mutual Aid and Restoration Consortium (“MARC”) and if accepted for such membership, to execute the then applicable MARC agreement, and be fully active in MARC activities, including participation in MARC alerts, drills and meetings. If it is determined by a court of competent jurisdiction after all appeals have been exhausted that the agreement by the Company described in the preceding sentence is, pursuant to federal law, not enforceable against the Company, then this provision will be severed from this Agreement, and this Agreement will remain in effect as if this provision had not been included.

## **SECTION 5 SECURITY FUND AND GUARANTY**

5.1 General Requirement Prior to or simultaneously with the execution and delivery of this Agreement, the Company shall have arranged for the Credit Support to be available to the City in an amount equal to the product of four times the portion of the Initial Payment described in Section 3.3.1 estimated to be attributable to the first full calendar quarter of the Term. The Credit Support must be in a form reasonably satisfactory to the City, and the Credit Support will serve as a security fund (the “Security Fund”), securing the Company’s full payment and performance of its obligations under this Agreement. Throughout the Term, and for one year thereafter, the Company shall maintain the Security Fund in the amount specified in this Section 5.1 provided that each time the monetary compensation payable by the Company to the City under Section 3.2 hereof exceeds the aggregate amount of the Credit Support by at least fifty thousand dollars (\$50,000) during any one calendar year then, within one hundred twenty (120) days of the end of such calendar year, the aggregate amount of the Credit Support must be increased to and maintained (until any future such increase) at an amount equal to said compensation for such year rounded up to the next non-fractional multiple of one hundred thousand dollars (\$100,000). Notwithstanding anything to the contrary in the preceding sentence, in no event shall the Security Fund in place after the one hundred twentieth (120<sup>th</sup>) day of any calendar year be less than the amount applicable to such calendar year under Section 3.2.1(b) above.

5.2 Purpose The Security Fund will serve as security for full payment and performance by the Company in accordance with this Agreement and any costs, losses or damages incurred by the City as a result of any failure by the Company to abide by any provision or provisions of this Agreement.

5.3 Withdrawals from the Security Fund In the circumstances described in Section 9.3 hereof, the City may withdraw from the Security Fund such amount as necessary to satisfy (to the degree possible) the Company’s obligations not otherwise met (and to reimburse the City for costs, losses or damages incurred as the result of the Company’s failure(s) to meet its obligations), provided, however, that the City may not make any withdrawal by reason of any breach or default of which the Company has not been given notice. The City may not seek

recourse against the Security Fund for any costs or damages for which the City has previously been compensated through a withdrawal from the Security Fund or otherwise by the Company.

5.4 Notice of Withdrawals Within one (1) week after any withdrawal from the Security Fund, the City shall notify the Company of the date and amount thereof. The withdrawal of amounts from the Security Fund will constitute a credit against the amount of the applicable liability of the Company to the City but only to the extent of said withdrawal.

5.5 Replenishment by the Company Within thirty (30) days after receipt of notice from the City that any amount has been withdrawn from the Security Fund, as provided in Section 5.4 hereof, the Company shall replenish the Security Fund to the amount specified in Section 5.1 hereof, by submitting such documentation as may be necessary to restore the Credit Support which constitutes the Security Fund to the full amount required by Section 5.1. If the Company has not made the required replenishment of the Security Fund within such thirty (30) day period, liquidated damages for such failure will accrue at the rate specified in Section 3.10 hereof, such accrual to commence at the end of such 30-day period, and which liquidated damages shall be payable to the City as reasonable compensation to the City for its loss of securitization for the Company's obligations hereunder.

5.6 Replenishment by the City If a court finally determines that a withdrawal from the Security Fund by the City was improper, the City shall refund the improperly withdrawn amount to the Company such that the balance in the Security Fund will not exceed the amount specified in Section 5.1 hereof.

5.7 Not a Limit on Liability The Company's obligations of payment and performance, and the liability of the Company pursuant to this Agreement, will not be limited by the amount of the Security Fund required by this Section 5.

5.8 Renewal Any letter of credit that is to constitute the Security Fund required hereunder must provide that it will not be cancelled, and will not expire without renewal, except after at least sixty (60) days' notice to the City of the impending cancellation, or expiration without renewal, of such letter of credit. Any failure to replace or renew a Security Fund letter of credit by a date which is thirty (30) days prior to the impending cancellation or expiration of such a letter of credit will constitute an Event of Default under this Agreement, which the City may cure by (a) drawing on the Security Fund and itself holding the proceeds as a replacement Security Fund (with all rights to draw on the proceeds for Security Fund purposes as provided under this Agreement) until such time as the Company completes the required letter of credit replacement or renewal or (b) exercising any other lawful remedy or remedies. Interest earned on proceeds held by the City as a replacement Security Fund will be retained by the City.

## **SECTION 6 RIGHT OF WAY MANAGEMENT IMPLEMENTATION MATTERS**

6.1 Protection from Disclosure To the extent permissible under applicable law, the City shall protect from disclosure any confidential, proprietary information submitted to or made available by the Company to the City under this Agreement, provided that the Company notifies the City of, and clearly labels, the information which the Company deems to be confidential, proprietary

information as such. Such notification and labeling will be the sole responsibility of the Company.

**6.2 Management and Records** To the extent necessary to preserve, protect and otherwise manage the Inalienable Property, the City will have the right to oversee, regulate and inspect periodically the construction, maintenance, operation and upgrade of the System located within the Inalienable Property, including any part thereof, in accordance with the provisions of this Agreement and applicable law. To the extent consistent with the City's right to thus preserve, protect and otherwise manage the Inalienable Property, and/or the City's right to assure that it is being and will be paid the compensation due under this Agreement, the Company shall establish and maintain managerial and operational records, standards, procedures and controls to enable the Company to prove, in reasonable detail, to the satisfaction of the City at all times throughout the Term, that the Company is complying with the terms of this Agreement. The Company shall retain such records for not less than six (6) years following their creation and for such additional period as DoITT may reasonably direct consistent with the goals of such record retention described in this Section 6.2. In order to support the City's ability to appropriately preserve, protect and otherwise manage the Inalienable Property, the Company shall on an annual basis provide DoITT with a report (in form and format reasonably acceptable to the Commissioner) describing any construction or installation of cable, wire, fiber optic telecommunications cable, or other closed-path transmission medium that may be used in lieu of cable, wire, fiber optic telecommunications cable, or other facilities and equipment within the Inalienable Property (phrases such as "within the Inalienable Property", "of the Inalienable Property", "manage the Inalienable Property" etc. as used in this Agreement will be deemed to refer to and include, in addition to the surface of the Inalienable Property, any space on, over and under the surface of the Inalienable Property, unless expressly stated otherwise) that has occurred during the previous twelve months, which report must include a map of such constructed or installed facilities that is consistent in form with the requirements of Section B.4. of Appendix A attached hereto. Each such report must include safety and compliance review and inspection documentation as required by law and as further reasonably required by DoITT. The Company must deliver the first such report no earlier than January 1 of the first full calendar year falling entirely within the Term and no later than the first anniversary of the Effective Date, with each successive report thereafter to be delivered annually between January 1 and the anniversary of the Effective Date. In order to further advance the City's ability to appropriately preserve, protect and otherwise manage the Inalienable Property, the Company shall on an annual basis, provide DoITT with a report describing the Company's reasonably anticipated plans for the coming twelve months for any construction or installation of the System within the Inalienable Property. The first such report must be delivered no earlier than January 1 of the first full calendar year falling entirely within the Term and no later than the first anniversary of the Effective Date, with each successive report thereafter to be delivered annually between January 1 and the anniversary of the Effective Date. The Company shall further provide to the City, upon the City's request, and within a reasonable period under the circumstances, any additional information, material and/or reports that the City reasonably deems necessary to the City's efforts to preserve, protect and otherwise manage the Inalienable Property or to assure that the City is being and will be paid the compensation due from the Company under this Agreement.

**6.3 Rules and Regulations** To the full extent permitted by applicable law either now or in the future, the City reserves the right to adopt or issue (in accordance with lawful procedures for

such adoption or issuance) such rules, regulations, orders, or other directives that are not inconsistent with the terms of this Agreement and are reasonably necessary or appropriate in the lawful exercise of the City's authority as manager of the Inalienable Property and its police powers, and the Company agrees to comply with all such lawful rules, regulations, orders, or other directives.

6.4 Ownership Reports In order to assist the City in determining whether the Company is capable of ongoing compliance with this Agreement, including, without limitation, ongoing payment of the amounts payable by the Company hereunder, the Company shall promptly report to the City any change in ownership of the Company which is inconsistent with the description of ownership set forth in Appendix D hereof or the most recently submitted previous such report.

#### 6.5 Books and Records/Audit

6.5.1 Records To the extent appropriate to assist the City in determining whether the Company is taking appropriate care of the Inalienable Property, complying with the terms of this Agreement, and paying the amounts payable by the Company hereunder, the Company shall throughout the Term maintain complete and accurate records of the operations of the Company with respect to the System in a manner that allows the City at all times to determine whether the Company is in compliance with this Agreement. All records required to be maintained hereunder must be retained for not less than six (6) years from the date of their creation.

6.5.2 Right of Inspection To the extent appropriate to assist the City in determining whether the Company is taking appropriate care of the Inalienable Property, complying with the terms of this Agreement, and paying the amounts payable by the Company hereunder, the Commissioner and the Comptroller, or their designated representatives, will have the right to inspect, examine or audit during normal business hours and upon reasonable notice to the Company under the circumstances, all documents, records or other information which pertain to the Company or any Affiliate with respect to the System and its operation or the Company's performance under this Agreement. All such documents must be made available within New York City or in such other place that the City may agree upon in writing in order to facilitate said inspection, examination, or audit, provided, however, that if such documents are located outside of the City, then, upon notice to the Company, the Company shall pay the reasonable expenses incurred by the Commissioner, the Comptroller or their designated representatives in traveling to such location. Access by the City to any of the documents covered by this Section 6.5.2 may not be denied by the Company on grounds that such documents are alleged by the Company to contain confidential, proprietary or privileged information, provided that this requirement will not be deemed to constitute a waiver of the Company's right to assert that confidential, proprietary or privileged information contained in such documents should not be disclosed by the City as described in Section 6.1 above.

### **SECTION 7 TRANSFERS AND ASSIGNMENTS**

7.1 City Approval Required. The ownership and control structure of the Company as of the date of execution of this Agreement is set forth in Appendix D hereof. Subject to the provisions of this Article, each of the following shall be subject to the prior approval of the City: (i) any sale, assignment or transfer of the franchisee's interest in this Agreement, the System or the

franchise granted hereunder, (ii) any transaction in which any change is proposed, which would result, directly or indirectly, in a change in the ownership of twenty percent (20%) or more of the voting interests or thirty-three percent (33%) or more of the non-voting interests of the ownership of the Company or the System assets or the franchise granted hereunder, and (iii) any other transaction in which a change in “Control” (as defined in Section 1.11 above) of the Company, the System or the franchise granted hereunder would occur; provided, however, that the foregoing requirements of this Section 7.1 will not be applicable with respect to transfers of any ownership interests expressly permitted in the “Permitted Transfers” section, if any, of Appendix D. To the fullest extent practical under the circumstances, application to the City for any approval required hereunder must be made at least one hundred twenty (120) calendar days prior to the contemplated effective date of the transaction. Such application must contain complete information on the proposed transaction, including details of the legal, financial, technical, and other qualifications of the transferee. At a minimum, the following information must be included in the application:

- (a) any shareholder reports or filings with the Securities and Exchange Commission that pertain to the transaction;
- (b) a report detailing any changes in ownership of voting or non-voting interests of over five percent (5%);
- (c) other information necessary to provide an accurate understanding of the financial position of the Company and the System before and after the proposed transaction;
- (d) information regarding any potential impact of the transaction on rates and service of subscribers; and
- (e) any material contracts that relate to the proposed transaction as it affects the City and, upon reasonable request by the City, all material documents and other information related or referred to therein and which are necessary to understand the proposed transaction;

provided, however, that if the Company believes that the requested information is confidential and proprietary, then the Company must provide the following documentation to the City: (i) specific identification of the information; (ii) a statement attesting to the reason(s) the Company believes the information is confidential; and (iii) a statement that the documents are available at the Company’s designated offices for inspection by the City.

**7.2 City Action on Transfer.** To the extent not prohibited by federal law, the City may, with respect to any transaction covered by Section 7.1: (i) grant; (ii) grant subject to conditions directly related to concerns relevant to such transaction; or (iii) deny its approval of the transaction.

**7.3 Waiver of Transfer Application Requirements.** To the extent consistent with federal law, the City may waive in writing any requirement that information be submitted as part of the transfer application covered by Section 7.1, without thereby waiving any rights the City may have to request such information after the application is filed.

7.4 Subsequent Approvals. The City's approval of a transaction described in Section 7.1 in one instance will not render unnecessary approval of any subsequent transaction.

7.5 Approval Does Not Constitute Waiver. Approval by the City of a transfer described in Section 7.1 will not constitute a waiver or release of any of the rights of the City under this Agreement, whether arising before or after the date of the transfer, except that upon full assumption of the terms of this Agreement by an approved transferee, the transferor shall be fully released from any obligations accruing after the date of such assumption.

7.6 No Consent Required For Transfers Securing Indebtedness. The Company will not be required to file an application or obtain the consent or approval of the City for a transfer in trust, by mortgage, by other hypothecation, by assignment of any rights, title, or interest of the Company in the System, system assets or the Franchise granted hereunder in order to secure indebtedness. However, the Company will notify the City within ten (10) days if at any time there is a mortgage or security interest granted on the System, the Franchise granted hereunder or substantially all of the assets of the System. To the extent applicable, the submission of the Company's audited financial statements prepared for the Company's bondholders will constitute such notice.

7.7 Preliminary Determination Procedure. In the event that a change in direct or indirect ownership interest or interests in the Company, the System or the Franchise granted hereunder, is planned and the Company seeks the City's view of whether such transaction is one that would require the City's approval as described in Section 7.1 above, the Company may submit a written request to the Commissioner (in accordance with the notice requirements of Section 10.4 hereof) describing the proposed transaction and seeking a determination as to whether such approval is required and including any arguments the Company wishes to make that the consent of the City is not required. Upon review of such written request, the Commissioner will notify the Company in writing of the Commissioner's determination whether such approval by the City is required, provided that prior to such determination, if the Commissioner reasonably requests any information relevant to such determination, the Company shall provide such information.

## **SECTION 8 LIABILITY AND INSURANCE**

8.1 Liability and Indemnification The Company will be liable for, and the Company and each Affiliate (but not including any member of the Company or any owner of such member) will indemnify, defend and hold the City, its officials, agents, servants, employees, attorneys, consultants and independent contractors (the "Indemnitees") harmless from, any and all liabilities, suits, obligations, fines, damages, penalties, claims, costs, charges and expenses (including, without limitation, reasonable attorneys' fees and disbursements) (collectively "Liabilities" and each individually a "Liability", and including, without limitation, damages or loss to any real or personal property of, or any injury to or death of, any Person or the City), that may be imposed upon or incurred by or asserted against any of the Indemnitees arising out of the construction, operation, maintenance, upgrade, repair, removal or relocation of the System or otherwise arising out of or related to this Agreement; provided, however, that the foregoing liability and indemnity obligation of the Company pursuant to this Section 8.1 will not apply to any gross negligence or willful misconduct of the City, its officials, employees, servants, agents, attorneys, consultants or independent contractors. Further, it is a condition of this Agreement

that the City assumes no liability for any Liability or Liabilities to either Persons or property on account of the same, except as expressly provided herein.

8.2 Limitation on Liability for Public Work, etc. None of the City, its officials, agents, servants, employees, attorneys, consultants or independent contractors will have any liability to the Company for any damage as a result of or in connection with the protection, breaking through, movement, removal, alteration, or relocation of any part of the System by or on behalf of the Company or the City in connection with any emergency, public work, public improvement, alteration of any municipal structure, any change in the grade or line of any Inalienable Property, or the elimination, discontinuation, closing or demapping of any Inalienable Property. When reasonably possible, the Company will be consulted prior to any such activity and given the opportunity to perform such work itself, but the City will have no liability to the Company in the event it does not so consult the Company. All costs to repair or replace the System, or parts thereof, damaged or removed as a result of such activity, must be borne by the Company; provided, however, that the foregoing obligations of the Company pursuant to this Section 8.2 will not apply to any gross negligence or willful misconduct of the City, its officials, employees, servants, agents, attorneys, consultants or independent contractors.

8.3 Limitation on Liability for Damages None of the City, its officials, agents, servants, employees, attorneys, consultants and independent contractors have any liability to the Company for any special, incidental, consequential, punitive, or other damages as a result of the lawful exercise of any right of the City pursuant to this Agreement or applicable law; provided, however, that the foregoing limitation on liability pursuant to this Section 8.3 will not apply to any gross negligence or willful misconduct of the City, its officials, employees, servants, agents, attorneys, consultants or independent contractors.

8.4 Defense of Claim, etc. If any claim, action or proceeding is made or brought against any of the Indemnitees by reason of any event to which reference is made in Section 8.1 hereof, then upon demand by the City, the Company shall either resist, defend or satisfy such claim, action or proceeding in such Indemnitee's name, by the attorneys for, or approved by, the Company's insurance carrier (if such claim, action or proceeding is covered by insurance) or by the Company's attorneys. The foregoing notwithstanding, upon a showing that the Indemnitee reasonably requires additional representation, such Indemnitee may engage its own attorneys to defend such Indemnitee, or to assist such Indemnitee in such Indemnitee's defense of such claim, action or proceeding, as the case may be, and the Company shall pay the reasonable fees and disbursements of such attorneys of such Indemnitee.

8.5 Liability for Damages to City Property The Company shall reimburse, indemnify and hold harmless the City for any and all loss or damage to any municipal structure, Inalienable Property or other property of the City occurring during the course of any construction, operation, maintenance, upgrade, repair, relocation or removal of the System. This Section 8.5 will not apply to loss or damage which is the result of the gross negligence or willful misconduct of the City.

8.6 Insurance. The Company shall, on the Effective Date, have all insurance required by this Section 8.6 and the Company shall ensure continuous insurance coverage in the manner, form

and limits required by this Section 8.6 throughout the Term and so long as the Company has facilities within the Inalienable Property.

8.6.1 Commercial General Liability Insurance. (a) The Company shall maintain Commercial General Liability insurance covering the Company as a named insured in the minimum amount of \$10,000,000 per occurrence and a minimum of \$10,000,000 aggregate. The use of an excess or umbrella policy is allowable to meet the limit. Such insurance shall protect the Company, and the City, its officials and employees, from claims of property damage and bodily injury, including death, that may arise from any of the operations under this Agreement. Such insurance shall cover, inter alia, products liability. Coverage under this insurance shall be at least as broad as that provided by the most recently issued Insurance Services Office (“ISO”) Form CG 0001, and shall be occurrence based rather than “claims-made”. Such policy shall include an endorsement providing that no cancellation or non-renewal of such policy will be effective without at least thirty (30) days prior written notice to the City delivered by either registered mail or other delivery method that provides proof of receipt.

(b) Such Commercial and General Liability insurance and any Umbrella and Excess Insurance shall name the City, together with its officials and employees, as an additional insured with coverage at least as broad as the most recently issued ISO Form CG 20 26.

8.6.2 Workers’ Compensation, Disability Benefits and Employer’s Liability Insurance. The Company shall maintain Workers’ Compensation Insurance, Disability Benefits Insurance and Employer’s Liability Insurance, in accordance with laws of the State of New York, on behalf of, or with regard to, all employees undertaking activities pursuant to or authorized by this Agreement.

8.6.3 Unemployment Insurance. To the extent required by law, the Company shall provide Unemployment Insurance for its employees.

8.6.4 Business Automobile Liability Insurance. (a) If vehicles are used in the provision of services under this Agreement, then the Company shall maintain Business Automobile Liability insurance in the amount of at least \$1,000,000 each accident combined single limit for bodily injury and property damage and Excess or Umbrella Liability insurance to raise the aggregate coverage to a minimum of \$2,000,000 per accident for liability arising out of ownership, maintenance or use of any owned, non-owned or hired vehicles to be used in connection with this Agreement; and such coverage shall be at least as broad as the most recently issued ISO Form CA0001.

(b) If vehicles are used for transporting hazardous materials, then the Business Automobile Liability insurance shall be endorsed to provide pollution liability broadened coverage for covered vehicles (endorsement CA 99 48), as well as proof of MCS-90.

8.6.5 General Requirements for Insurance Coverage and Policies

(a) All required insurance policies shall be maintained with companies that may lawfully issue the required policy and that have an A.M. Best rating of at least A- / “VII” or a Standard and Poor’s rating of at least A, unless prior written approval is obtained from the City’s Law Department;



(b) All insurance policies shall be primary (and non-contributing) to any insurance or self-insurance maintained by the City;

(c) The Company shall be solely responsible for the payment of all premiums for all required insurance policies and all deductibles or self-insured retentions to which such policies are subject, whether or not the City is an insured under the policy;

(d) There shall be no self-insurance program with regard to any insurance required under this Section 8.6, unless approved in writing by the Commissioner. Any such self-insurance program shall provide the City with all rights that would be provided by traditional insurance required under this Section 8.6, including, but not limited to, the defense obligations that insurers are required to undertake in liability policies; and

(e) The City's limits of coverage for all types of insurance required under this Section 8.6 shall be the greater of (i) the minimum limits set forth in this Section 8.6.1, or (ii) the limits provided to the Company as a named insured under all primary, excess, and umbrella policies of that type of coverage.

#### 8.6.6 Proof of Insurance

(a) For Workers' Compensation Insurance, Disability Benefits Insurance, and Employer's Liability Insurance, the Company shall provide as a condition to the occurrence of the Effective Date one of the following (ACORD forms are not acceptable proof of workers' compensation coverage):

C-105.2 Certificate of Workers' Compensation Insurance;

U-26.3 -- State Insurance Fund Certificate of Workers' Compensation Insurance;

Request for WC/DB Exemption (Form CE-200);

Equivalent or successor forms used by the New York State Workers' Compensation Board; or

Other proof of such insurance in a form acceptable to the City;

(b) For each policy required under this Agreement, except for Workers' Compensation Insurance, Disability Benefits Insurance, Employer's Liability Insurance, and Unemployment Insurance, the Company shall, as a condition to the occurrence of the Effective Date, file a certificate of insurance with DoITT. All certificates of insurance shall be (a) in a form acceptable to the City and certify the issuance and effectiveness of such policies of insurance, each with the specified minimum limits; and (b) accompanied by the endorsement in the Company's general liability policy by which the City has been made an additional insured pursuant to Section 8.6.1 above. All certificates of insurance shall also be accompanied by either a duly executed "Certification by Insurance Broker or Agent" in the form attached as Appendix E or copies of all policies referenced in the certificate of insurance. If complete policies have not yet been issued, binders are acceptable, until such time as the complete policies have been issued, at which time such policies shall be submitted;

(c) Certificates of insurance confirming renewals of insurance shall be submitted to the Commissioner prior to the expiration date of coverage of policies required under this Section 8.6. Such certificates of insurance shall comply with the requirements of this Section 8.6 as applicable;

(d) The Company shall provide the City with a copy of any policy required under this Section 8.6 upon the demand for such policy by the Commissioner or the City's Law Department;

(e) Acceptance by the Commissioner of a certificate or a policy does not excuse the Company from maintaining policies consistent with all provisions of this Section or from any liability arising from its failure to do so; and

(f) In the event the Company receives any notice from an insurance company or other person that any insurance policy required under this Section shall expire or be cancelled or terminated for any reason, the Company shall immediately forward a copy of such notice to the City.

#### 8.6.7 Miscellaneous Insurance Matters

(a) Whenever any notice of any loss, damage, occurrence, accident, claim or suit is required under a general liability policy maintained in accordance with this Section, the Company shall provide the insurer with timely notice thereof on behalf of the City. Such notice shall be given even where the Company may not have coverage under such policy (for example, where one of the Company's employees was injured). Such notice shall expressly specify that "this notice is being given on behalf of the City of New York as Additional Insured" and contain the following information: the number of the insurance policy; the name of the named insured; the date and location of the damage, occurrence, or accident; the identity of the persons or things injured, damaged, or lost; and the title of the claim or suit, if applicable. The Company shall simultaneously send a copy of such notice to the "City of New York c/o Insurance Claims Specialist, Affirmative Litigation Division, New York City Law Department, 100 Church Street, New York, New York 10007". If the Company fails to comply with the requirements of this paragraph, then the Company shall indemnify the City for all losses, judgments, settlements and expenses, including reasonable attorneys' fees, arising from an insurer's disclaimer of coverage citing late notice by or on behalf of the City;

(b) The Company's failure to maintain any of the insurance required by this Section shall constitute a material breach of this Agreement. Such breach shall not be waived or otherwise excused by any action or inaction by the City at any time;

(c) Insurance coverage in the minimum amounts required in this Section shall not relieve the Company of any liability under this Agreement, nor shall it preclude the City from exercising any rights or taking such other actions as are available to it under any other provisions of this Agreement or applicable law;

(d) The Company waives all rights against the City, including its officials and employees, for any damages or losses that are covered under any insurance required under this Section (whether or not such insurance is actually procured or claims are paid thereunder) or any other insurance applicable to the operations of the Company in connection with this Agreement.

(e) the Company will be responsible for providing continuous insurance coverage in the manner, form, and limits required by this Agreement and is authorized to provide service pursuant to this Agreement and the franchise granted hereunder only during the effective period of all required coverage (in the event authorization to provide service hereunder ceases by reason of the non-effectiveness of any such required insurance coverage, such authorization to provide

service will be automatically restored, without any additional required action by any party, upon the effectiveness of all required insurance coverage being restored).

## **SECTION 9 BREACHES AND REMEDIES**

9.1 Not Exclusive The Company agrees that the City will have the specific rights and remedies set forth in this Section 9 to the fullest extent permitted by law. These rights and remedies are in addition to and cumulative of any and all other rights or remedies, existing or implied, now or hereafter available to the City at law or in equity in order to enforce the provisions of this Agreement. Such rights and remedies will not be exclusive, but each and every right and remedy specifically provided or otherwise existing or given may be exercised from time to time and as often and in such order as may be deemed expedient by the City, except as provided herein. The exercise of one or more rights or remedies by the City will not be deemed a waiver by the City of the right to exercise at the same time or thereafter any other right or remedy nor will any delay in, or omission of, the exercise of any remedy be construed to be a waiver by the City of or acquiescence to any default. The exercise of any such right or remedy by the City will not release the Company from its obligations or any liability under this Agreement, provided, however, that the City will in no case be entitled to duplicate recoveries from different sources.

### **9.2 Default**

#### **9.2.1 Events of Default**

(a) Any of the following will constitute an Event of Default:

(i) any breach, not cured within fifteen (15) days after notice pursuant to Section 9.2.2 below, of a provision of this Agreement requiring the Company (x) to make any payment to the City when due, or (y) to maintain a liability insurance policy as set forth in Section 8.6, or (z) to maintain, renew and/or replenish the Security Fund as required pursuant to this Agreement; or

(ii) any other breach of this Agreement by the Company that is not cured within thirty (30) days (or such longer period as DoITT may deem appropriate in its discretion) after notice pursuant to Section 9.2.2 below (provided, however, that no Event of Default will exist pursuant to this clause (ii) if a breach is curable but work to be performed, acts to be done, or conditions to be removed cannot, by their nature, reasonably be performed, done or removed within the required thirty (30)-day cure period, so long as the Company has commenced curing the same within said thirty (30)-day cure period and shall diligently and continuously prosecute the same promptly to completion).

(b) Notice and cure periods provided in this Section 9.2.1, or elsewhere in this Agreement, during which a failure to make a payment to the City when due does not mature into an Event of Default shall not be construed as deferring the accrual of interest on the amount unpaid as set forth in Section 3.10 hereof, which interest shall accrue from the date was payment

was due and not from the date (if any) the failure to make timely payment matured into an Event of Default.

#### 9.2.2 Notice and Cure Procedures

(a) The Commissioner will notify the Company, in writing, of any breach by the Company of an obligation under this Agreement, in accordance with Section 10.4 hereof. The notice will specify the alleged breach(es) with reasonable particularity. The Company shall either (i) if applicable, within the period of time specified in (as applicable) Section 9.2.1(a) hereof, or such longer period of time as the Commissioner may in his or her discretion specify in such notice, cure such alleged breach(es); or (ii) in a written response submitted to the Commissioner within fifteen (15) days after the notice of breach, present facts and arguments refuting that a breach has occurred. The submission of such a response, provided there is a bona fide, reasonable basis for such response, will toll the running of the applicable cure period provided for in Section 9.2.1(a) hereof, such tolling to be effective until the City responds in writing to such submission.

(b) If the Company fails to cure the breach within the applicable cure period and fails to submit a response to the Commissioner pursuant to Section 9.2.2(a) hereof within the period provided herein for submitting such response, an Event of Default will be deemed to have occurred.

(c) If, after the Company makes a response to the Commissioner pursuant to Section 9.2.2(a) hereof, the Commissioner determines, in his or her reasonable discretion, that a breach under this Agreement has occurred, the Company must cure such breach within the balance of the time period to cure that remained when the submission was made. If the Company fails to cure within the remaining time, the breach will be deemed to be an Event of Default, provided, however, that no Event of Default will exist if a breach for which a cure period is provided herein is curable, but work to be performed, acts to be done, or conditions to be removed cannot, by their nature, reasonably be performed, done or removed within the cure period remaining, so long as the Company has commenced curing the same within the cure period provided and shall diligently and continuously prosecute the same promptly to completion. For purposes of this Section 9, “cure” includes not only the Company coming into compliance with this Agreement on a going-forward basis, but also compensating the City for any injury or damages it has suffered during the period of non-compliance directly as a result of such non-compliance, unless such non-compliance resulted from events beyond the Company’s reasonable control.

#### 9.3 Remedies of the City

(a) Subject to Section 9.3(b), upon an Event of Default (or upon any act or failure to act by the Company, or the occurrence of a set of circumstances relating to the Company or its activities, which under common law principles would constitute an anticipatory breach of this Agreement), DoITT may at its option take any one or more of the following actions: cause a withdrawal from the Security Fund; seek money damages (and if such damages are awarded collect such) from the Company as compensation for the breach of this Agreement; seek to restrain by injunction the Event of Default (or in the case of anticipatory breach the

anticipated Event of Default); and/or invoke any other available remedy that would be permitted by law. DoITT will give the Company notice in writing when it determines to pursue one or more such remedies, but nothing herein will prevent DoITT from electing more than one remedy, simultaneously or consecutively, for any breach, provided, however, that the City will in no case be entitled to duplicate recoveries from different sources.

(b) DoITT shall have the right to terminate this Agreement prior to its scheduled expiration only in connection with an Event of Default which (i) remains uncured after the expiration of the applicable cure period provided for in Section 9.2.1 and (ii) constitutes a material breach of this Agreement that has deprived the City from receiving a significant portion of the rights or other entitlements, as expressly set forth in this Agreement, bargained for by the City (a “material and significant breach”), examples, without limitation, of a “material and significant breach” being (1) failure to maintain in effect the Security Fund as set forth in Section 5 hereof, (2) if the Company intentionally makes a material false or misleading statement or representation to the City relating to the documentation of Franchisee’s compliance with its obligations under this Agreement, (3) if the Company fails to maintain the insurance coverage required by or otherwise materially breaches Section 8 of this Agreement, (4) if the Company engages in a course of conduct intentionally designed to practice fraud or deceit upon the City, (5) if the Company intentionally engages or has intentionally engaged in any material misrepresentation with respect to any representation or warranty contained herein, and (6) any Event of Default which constitutes part of a persistent pattern of material failures by the Company to abide by one or more of its obligations under this Agreement, even if a single such failure might not by itself constitute a “material and significant breach”.

## **SECTION 10 MISCELLANEOUS**

10.1 Appendices The Appendices to this Agreement, attached hereto, and all portions thereof and exhibits thereto, are, except as otherwise specified in said Appendices, incorporated herein by reference and expressly made a part of this Agreement.

10.2 Entire Agreement This Agreement, including all Appendices hereto, embodies the entire understanding and agreement of the City and the Company with respect to the subject matter hereof and merges and supersedes all prior representations, agreements and understandings, whether oral or written, between the City and the Company with respect to the subject matter hereof, including, without limitation, all prior drafts of this Agreement and any and all written or oral statements or representations by any official, employee, agent, attorney, consultant or independent contractor of the City or the Company.

10.3 Delays and Failures Beyond Control of Company Notwithstanding any other provision of this Agreement, the Company will not be liable for delay in the performance of, or failure to perform, in whole or in part, its obligations pursuant to this Agreement due to strike, war or act of war (whether an actual declaration of war is made or not), insurrection, riot, act of public enemy, accident, fire, flood or other act of God, technical failure where the Company has exercised all due care in the prevention thereof, or other causes or events, to the extent that such causes or events are beyond the control of the Company (provided that mere financial incapacity will not constitute a cause or event beyond the control of the Company for purposes of this Section 10.3). In the event that any such delay in performance or failure to perform affects only

part of the Company's capacity to perform, the Company shall perform to the maximum extent it is able to do so and shall take all steps within its power to correct said cause(s). The Company agrees that in correcting said cause(s), it shall take all reasonable steps to do so in as expeditious a manner as possible. The Company shall notify DoITT in writing of the occurrence of an event covered by this Section 10.3 within five (5) business days of the date upon which the Company learns or should have learned of its occurrence.

10.4 Notices Every notice, order, petition, document, or other direction or communication to be served upon the City or the Company must be in writing and be sent by registered or certified mail, return receipt requested or by a recognized overnight delivery service such as Federal Express. Every such communication to the Company must be sent to its office located at 305 Broadway, New York, NY 10007, or to such other location in New York City as the Company may designate by notice hereunder to the City from time to time. A copy of each communication covered by the immediately preceding sentence shall be sent to Pilot Fiber, attention President, [ADDRESS TO BE INSERTED CONSISTANT WITH ABOVE.]. Every communication from the Company must be sent to the individual, agency or department designated in the applicable Section of this Agreement, unless it is to "the City," or to "DoITT" in which case such communication must be sent to DoITT at 255 Greenwich Street, Ninth Floor, New York, New York 10007 Attention: General Counsel or to such other location in New York City as the City may designate by notice hereunder to the Company from time to time. A required copy of each communication from the Company must be sent to New York City Law Department, 100 Church Street, New York, New York 10007, Attention: Chief, Economic Development Division, or to such other location in New York City as the City may designate by notice hereunder to the Company from time to time. Except as otherwise provided herein, the mailing of such notice, direction, or order is equivalent to direct personal notice and will be deemed to have been given when received.

#### 10.5 General Representations, Warranties and Covenants

(a) In addition to the representations, warranties, and covenants of the Company to the City set forth elsewhere herein, the Company represents and warrants to the City and covenants and agrees (which representations, warranties, covenants and agreements will not be affected or waived by any inspection or examination made by or on behalf of the City), that, as of the Effective Date:

(i) The Company is a limited liability company duly organized, validly existing and in good standing under the laws of the State of New York and is duly authorized to do business in the State of New York. The Company has all requisite power and authority to execute, deliver and perform this Agreement and all other agreements entered into or delivered in connection with or as contemplated hereby. Certified copies of the Company's organizational and governing documents, as amended to date, have been delivered to the Commissioner, and are complete and correct. The description of the ownership of the Company in Appendix D attached hereto is accurate and complete as of the Effective Date.

(ii) The execution, delivery and performance of this Agreement and all other agreements, if any, entered into in connection with the transactions contemplated hereby have been duly, legally and validly authorized by all necessary action on the part of the Company and

the Company has furnished the City with a certified copy of authorizations for the execution and delivery of this Agreement. This Agreement and all other agreements, if any, entered into in connection with the transactions contemplated hereby have been duly executed and delivered by the Company and constitute (or upon execution and delivery by the Company and the City will constitute) the valid and binding obligations of the Company, and are enforceable (or upon execution and delivery will be enforceable) in accordance with their respective terms (provided, however, that such warranty and covenant by the Company will not constitute a waiver of any right, claim or matter that is not waivable by the Company under federal law). The Company has obtained the requisite authority to authorize, execute and deliver this Agreement and to consummate the transactions contemplated hereby and no other proceedings or other actions are necessary on the part of the Company to authorize the execution and delivery of this Agreement and the consummation of the transactions contemplated hereby.

(iii) No material misrepresentation has been made, either oral or written, intentionally or negligently, by or on behalf of the Company in this Agreement, or in connection with any submission to the City in connection with the Company's request for the franchise granted hereunder or the preparation of this Agreement.

## 10.6 Additional Covenants

10.6.1 In order to assure that the Inalienable Property and the use by the public thereof is adequately protected, the Company agrees that it will, prior to any construction, operation, maintenance, upgrade, repair or removal of the System in the Inalienable Property, secure all necessary permits, licenses and authorizations in connection with the construction, operation, maintenance, upgrade, repair or removal of the System, or any part thereof. The Company will not permit to occur, or will promptly take corrective action if any event does occur, that could result in the revocation or termination of any such permit, license or authorization or, after notice or lapse of time or both, would permit revocation or termination of any such permit, license or authorization.

10.6.2 In order to assure that the Company is able to comply with the lawful terms of this Agreement, the Company will (a) preserve and maintain its existence, its business, and all of its rights and privileges necessary or desirable in the normal operation of the System in the Inalienable Property and (b) maintain its good standing in its state of organization and continue to qualify to do business and remain in good standing in the State of New York.

10.6.3 All of the properties, assets and equipment used as part of the System will be maintained at a level of good repair, working order and good condition that is necessary to assure the safety and protection of the Inalienable Property and the safe and efficient use of said Inalienable Property.

10.7 Binding Effect This Agreement will be binding upon, and inure to the benefit of, the parties hereto and their respective successors and permitted transferees and assigns. All of the provisions of this Agreement will apply to the Company, its successors, and assigns.

## 10.8 Rights Upon Termination

(a) Upon the termination of this Agreement, whether at its scheduled expiration or otherwise, the Company shall at the City's election (i) remove the System located on, over or under the Inalienable Property at the Company's own cost and expense, pursuant to subsection (e) hereof, and/or (ii) sell to the City or to the City's designee the portions of the System within the Inalienable Property (subject to the continuing right of the Company, on terms to be negotiated between the City and the company each acting in good faith, to use the System to support operations outside New York City) .

(b) The price to be paid to the Company upon an acquisition pursuant to the preceding subsection (a) will be the fair value of the System within the Inalienable Property, with no value allocable to the terminated or expired franchise itself, which price (as determined by the appraisal procedure as described hereafter in this subsection (b)) will be the fair value as that term is used in Section 363(h)(5) of the City Charter, as it may be amended, or under any successor provision. Subject to the limitations found in the next sentence, to the extent the City effects an acquisition pursuant to clause (ii) of Section 10.8(a) above herein and within one year thereafter sells that portion of the System acquired to a third party, and the amount received by the City from such sale exceeds the price paid by the City to the Company pursuant to this Section 10.8, the City will pay such excess amount to the Company after deducting all reasonable expenses incurred by the City in connection with such acquisition, interim operation and sale. The preceding sentence will apply only in cases where the Agreement has not terminated by reason of termination for breach or default of this Agreement by the Company. The date of valuation for purposes of setting the price referred to in the first sentence of this subsection (b) will be the date of termination of the Agreement. For the purpose of determining such valuation, the parties will select a mutually agreeable independent appraiser to compute the purchase price in accordance with industry practice and the aforementioned standards. If they cannot agree on an appraiser in ten (10) days, the parties will seek an appraiser from the American Arbitration Association. The parties will instruct the appraiser to make the appraisal as expeditiously as possible, but in no more than sixty (60) days and to submit to both parties a written appraisal. The Company will provide the appraiser with access to the Company's books and records as necessary to make the appraisal. Notwithstanding anything to the contrary in this Agreement, the parties will share equally the costs and expenses of the appraiser.

(c) The City will notify the Company, within thirty (30) days after receipt of the appraisal described in the preceding subsection (b) of this Section 10.8, of its election pursuant to subsection (a) above of this Section 10.8. If it elects to make the purchase permitted under (a)(ii) above, the City will purchase the same at a closing to occur within a reasonable time (not to exceed twelve months) after its election. The Company agrees, at the request of the City, to continue to provide service to its then-existing customers to the extent required by any applicable FCC or PSC rules regarding termination or continuity of service and, to the extent not inconsistent with such rules, (i) to operate the System within the Inalienable Property pursuant to the provisions of this Agreement for a period of up to twelve (12) months after the termination of this Agreement, until the City either elects not to purchase any portion of the System within the Inalienable Property, or closes on such a purchase, or (ii) to cease all construction and operational activities affecting the portion of the System to be purchased in a prompt and workmanlike manner,.



(d) In the event of any acquisition by the City or the City's designee pursuant to this Section 10.8 hereof, the Company shall:

(i) cooperate with the City to effectuate an orderly transfer of all necessary or appropriate records and information concerning the assets to be transferred to the City;

(ii) promptly execute all appropriate documents to transfer to the City, subject to any liabilities, title to the assets being transferred as well as any lawfully assignable contracts, leases, licenses, permits, rights-of-way, and any other rights, contracts or understandings necessary to maintain and operate such assets, as appropriate; provided, that such transfers will be made subject to the rights, under Article 9 of the Uniform Commercial Code as in effect in the State of New York and, to the extent that any collateral consists of real property, under the New York Real Property Law, of banking or any other lending institutions which are secured creditors or mortgagees of the Company at the time of such transfers; and provided, that, with respect to such creditors or mortgagees, the City will have no obligation following said transfers to pay, pledge, or otherwise commit in any way any general or any other revenues or funds of the City, other than the gross operating revenues received by the City from its operation of the assets purchased, in order to repay any amounts outstanding on any debts secured by such assets which remain owing to such creditors or mortgagees; and provided, finally, that the total of such payments by the City to such creditors and mortgagees, from the gross operating revenues received by the City from its operation of the such purchased assets, may in no event exceed the lesser of: (i) the fair market value of such assets on the date of the transfer of title to the City or (ii) the outstanding debt owed to such creditors and mortgagees on said date (nothing in this Section 10.8 may be construed to limit the rights of any such secured creditors to exercise its or their rights as secured creditors or mortgagees at any time prior to the payment of all amounts due pursuant to the applicable debt instruments); and

(iii) promptly supply the City with all necessary records (i) to reflect the City's ownership of the System within the Inalienable Property; and (ii) to operate and maintain the System within the Inalienable Property including, without limitation, plant and equipment layout documents.

(e) In the event of an election by the City of the alternative set forth in clause (i) of subsection (a)(i) of this Section 10.8 upon any termination of this Agreement, the City may, but will not be obligated to, direct the Company to remove, at the Company's sole cost and expense, all, or any portion designated by the City, of the System from the Inalienable Property in accordance with all applicable requirements of the City and subject to the following:

(i) this provision will not apply to any portion of the System (whether buried or unburied) which, in the reasonable and informed judgment of the City, either (a) cannot be removed without undue adverse effect on the public or (b) would result in the Company incurring removal costs and expenses that are in excess of or otherwise disproportionate to any public benefit or use of the Inalienable Property reasonably expected by the City to be derived from the removal of such portion of the System;

(ii) in removing System facilities and equipment from the Inalienable Property the Company shall refill and compact, at its own cost and expense, any excavation that it makes and shall leave, in all material aspects, all Inalienable Property and other property in as good condition as that prevailing prior to the Company's removal of the System from the Inalienable Property and without affecting, altering or disturbing in any way any electric, telephone or other cables, wires, structures or attachments owned by the City or any Person other than the Company;

(iii) the City will have the right to inspect and approve the condition of such Inalienable Property after removal and, to the extent that the City reasonably determines that said Inalienable Property has not been left in materially as good condition as that prevailing prior to the Company's removal of the System therefrom, the Company will be liable to the City for the cost of restoring the Inalienable Property and other property to said condition;

(iv) the Security Fund, liability insurance and indemnity provisions of this Agreement will remain in full force and effect during the entire period of removal and associated repair of all affected Inalienable Property, and for not less than one hundred twenty (120) days after final completion thereof; and

(v) removal must be commenced within thirty (30) days of the removal order by the City and must be substantially completed within twelve (12) months thereafter including all reasonably associated repair of the Inalienable Property.

(f) If, in the reasonable judgment of the Commissioner, the Company fails to commence removal of the System from the Inalienable Property as designated by DoITT, within thirty (30) days after DoITT's removal order, or if the Company fails to substantially complete such removal, including all associated repair of the Inalienable Property, within twelve (12) months thereafter, then, to the extent not inconsistent with applicable law, the City will have the right to either:

(i) remove all or part of the System located within the Inalienable Property at the Company's cost and expense, such removal to be performed by City personnel or, at the City's option, by another Person; or at the City's option

(ii) take ownership of any portion of the Company's System within the Inalienable Property designated by the City for removal and not timely removed by the Company, which portion will belong to and become the property of the City without payment to the Company (notwithstanding the provisions of subsections (a)(ii), (b), (c) and (d) of this Section 10.8) and the Company shall execute and deliver such documents, as the Commissioner requests, in form and substance acceptable to the Commissioner, to evidence such ownership by the City (although failure by the Company to execute and/or deliver such documents will not limit, compromise or affect the City's ownership of the applicable facilities).

(g) None of the decisions, directions or actions of the City pursuant to this Section 10.8 will constitute a condemnation by the City or a sale or dedication under threat or in lieu of condemnation.

(h) Upon the later of the date one hundred and twenty (120) days after the termination of this Agreement for any reason or the date of the completion of removal of the System from and associated repair of the Inalienable Property pursuant to this Section 10.8 (or in the case of portions of the System that are, pursuant to a City decision under this Section 10.8, not being removed from the Inalienable Property, the date on which the Company delivers documentation confirming transfer of such portion of the System to the City), the Company will be entitled to the return of the Security Fund deposited pursuant to Section 5 hereof, or such portion thereof as remains on deposit with the City at said termination, provided that all offsets necessary (i) to reflect any withdrawals by the City from the Security Fund permitted pursuant to this Agreement, (ii) to cover any costs, loss or damage incurred by the City as a result of any Event of Default, and (iii) to reimburse the City for any and all costs and expenses incurred by the City related to removal of the System from the Inalienable Property pursuant to this Section 10.

(i) The City and the Company shall negotiate in good faith all other terms and conditions of any acquisition or transfer of the System located within the Inalienable Property, except that the Company hereby waives its rights (to the fullest extent such rights are lawfully waivable), if any, to relocation costs arising out of the termination of this Agreement pursuant to this Section 10.8 that may be provided by law and except that, in the event of any acquisition of the System within the Inalienable Property by the City: (i) the City will not be required to assume any of the obligations of any collective bargaining agreements or any other employment contracts held by the Company or any other obligations of the Company or its officers, employees, or agents, including, without limitation, any pension or other retirement, or any insurance obligations; and (ii) the City may lease, sell, operate, or otherwise dispose of all or any part of the System acquired by it in any manner.

**10.9 No Waiver; Cumulative Remedies** No failure on the part of the City to exercise, and no delay in exercising, any right hereunder may operate as a waiver thereof, nor will any single or partial exercise of any such right preclude any other right, except as provided herein, subject to the conditions and limitations established in this Agreement. The rights and remedies provided herein are cumulative and not exclusive of any remedies provided by law, and nothing contained in this Agreement will impair any of the rights of the City under applicable law, subject in each case to the terms and conditions of this Agreement. A waiver of any right or remedy by the City at any one time will not affect the exercise of such right or remedy or any other right or other remedy by the City at any other time. In order for any waiver of the City to be effective, it must be in writing. The failure of the City to take any action regarding a breach or default of this Agreement or an Event of Default hereunder by the Company shall not be deemed or construed to constitute a waiver of or otherwise affect the right of the City to take any action permitted by this Agreement at any other time regarding such breach, default or Event of Default which has not been cured, or with respect to any other breach, default or Event of Default by the Company.

**10.10 Partial Invalidity**. Except as expressly set forth otherwise in this Agreement, if any Section, subsection, sentence, clause, phrase, or other portion of this Agreement is, for any

reason, declared invalid or unenforceable, in whole or in part, by any court, agency, commission, legislative body, or other authority of competent jurisdiction, then the party which had been the beneficiary of such invalidated portion will have the right (except as may be limited by law), at its option, to terminate this Agreement (as if the scheduled expiration of the Term had occurred pursuant to Section 2.1 hereof) and invoke the termination provisions hereof as set forth in Sections 2.3.2 and 10.8 hereof, except that if the other party waives such invalidity and continues to comply voluntarily with such invalidated portion then so long as such voluntary compliance continues the right to terminate described in this Section 10.10 shall not apply. To the extent this Section 10.10 is itself determined to be inconsistent with law, it shall be deemed to be narrowed in its scope to the extent necessary to render it lawful.

10.11 Headings The headings contained in this Agreement are to facilitate reference only, do not form a part of this Agreement, and will not in any way affect the construction or interpretation hereof. Terms such as “hereby,” “herein,” “hereof,” “hereinafter,” “hereunder,” and “hereto” refer to this Agreement as a whole and not to the particular sentence or paragraph where they appear, unless the context otherwise requires. The terms “shall” and “will” are mandatory, not merely directive. All references to any gender shall be deemed to include both the male and the female, and any reference by number shall be deemed to include both the singular and the plural, as the context may require. Terms used in the plural include the singular, and vice versa, unless the context otherwise requires.

10.12 No Agency The Company shall conduct any work to be performed pursuant to this Agreement as an independent contractor and not as an agent of the City.

10.13 Governing Law This Agreement will be deemed to be executed in the City of New York and State of New York, and to be governed in all respects, including validity, interpretation and effect, and construed in accordance with the laws of the State of New York, as applicable to contracts entered into and to be performed entirely within that State.

10.14 Survival of Representations and Warranties All representations and warranties contained in this Agreement will survive the end of the Term.

10.15 Delegation of City Rights The City reserves the right to delegate and redelegate, from time to time and to the extent permitted by law, any of its rights or obligations under this Agreement to any governmental body or organization, or official of any other governmental body or organization, and to revoke any such delegation or redelegation. Any such delegation or redelegation by the City will be effective upon written notice by the City to the Company of such delegation or redelegation. Upon receipt of such notice by the Company, the Company will be bound by all terms and conditions of the delegation or redelegation not in conflict with this Agreement. Any such delegation, revocation or redelegation, no matter how often made, will not be deemed an amendment to this Agreement or require the Company’s consent.

10.16 Claims Under Agreement The City and the Company agree and intend that, except to the extent such agreement would be impermissible under applicable law, any and all claims asserted by or against the City arising under this Agreement or related thereto will be heard and determined either in a court of the United States (“Federal Court”) located in New York City or

in a court of the State of New York (“New York State Court”) located in the City and County of New York. To effect this agreement and intent, the Company agrees that:

(a) If the City initiates any action against the Company in Federal Court or in New York State Court, service of process may be made on the Company as provided in Section 10.18 hereof;

(b) With respect to any action between the City and the Company in New York State Court, the Company hereby expressly waives and relinquishes any rights it might otherwise have (i) to move or dismiss on grounds of forum non conveniens; (ii) to remove to Federal Court outside of the City of New York; and (iii) to move for a change of venue to a court of the State of New York outside New York County;

(c) With respect to any action between the City and the Company in Federal Court, the Company expressly waives and relinquishes any right it might otherwise have to move to transfer the action to a Federal Court outside the City of New York; and

(d) If the Company commences any action against the City in a court located other than in the City and State of New York, then, upon request of the City, the Company shall either consent to a transfer of the action to a court of competent jurisdiction located in the City and State of New York or, if the court where the action is initially brought will not or cannot transfer the action, the Company shall consent to dismiss such action without prejudice and may thereafter reinstitute the action in a court of competent jurisdiction in the City of New York. When the Company either gives such consent or dismisses such action, to allow for such reinstitution, the City agrees, where it is able, to waive any statute of limitation, provided the Company has brought such action at least three (3) months prior to the expiration of the statute of limitation and has provided the City with notice pursuant to this Agreement.

10.17 Modification Except as otherwise provided in this Agreement, any Appendix to this Agreement or applicable law, no provision of this Agreement nor any Appendix to this Agreement may be amended or otherwise modified, in whole or in part, except by a written instrument, duly executed by the City and the Company, and approved as required by applicable law.

10.18 Service of Process Process may be served on the Company either in person, wherever the Company may be found, or by registered mail addressed to the Company at its office in the City, or as set forth in Section 10.4 of this Agreement, or to such other location as the Company may provide to the City in writing, or to the Secretary of State of the State of New York.

10.19 Matching Provision In the event that the City, after the date that this Agreement has been fully executed, enters into a binding, written franchise agreement granting a franchisee other than the Company authority to use the Inalienable Property to provide facilities and services in a manner comparable to that authorized hereunder after a renewal pursuant to section 2.3.3 has been granted, and such franchise agreement contains provisions imposing lesser obligations on the franchisee thereunder than are imposed by the provisions of this Agreement, then the Company may petition DoITT for a reduction in its obligations hereunder, which petition DoITT will not unreasonably delay or deny if DoITT, acting reasonably, determines

(i) that the reduction in obligations sought by the Company must be granted in order to ensure fair and equal treatment between the Company and the other franchisee, and

(ii) that the Company is in compliance with this its obligations under this Agreement, and

(iii) that the obligations imposed on the Company under this Agreement, taken as a whole, place the Company at a substantial competitive disadvantage in relation to the obligations imposed on the other franchisee, and

(iv) that the reason for the City's imposition of lesser obligations on the other franchisee are not the result of the differing nature of the City's legal authority with respect to such other franchisee or its activities, and

(v) that the City's imposition lesser obligations on the other franchisee are not justified by other benefits to the City or its citizens that are being received in connection with such other franchisee's services and are not being received in connection with the Company's services.

[DOCUMENT CONTINUES ON NEXT PAGE]

(vi) The City shall promptly provide the Company with a copy of each franchise agreement covered by this Section 10.19 which is not otherwise publicly available.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the Execution Date.

THE CITY OF NEW YORK

By: \_\_\_\_\_  
Deputy Mayor

By: \_\_\_\_\_  
Department of Information Technology and  
Telecommunications

Approved as to form and certified as to legal authority:

\_\_\_\_\_  
Acting Corporation Counsel

PILOT FIBER NY LLC

By: \_\_\_\_\_

\_\_\_\_\_  
City Clerk

State of New York                    )  
  )ss.:  
County of \_\_\_\_\_                )

On the \_\_ day of \_\_\_\_\_, 2017, before me personally came \_\_\_\_\_, to me known, who, being by me duly sworn, did depose and say that he/she is \_\_\_\_\_ of [COMPANY], the entity described in and which executed the above instrument; and that he/she signed his/her name thereto in his/her capacity as \_\_\_\_\_ of [COMPANY], authorized to thus execute said instrument.

\_\_\_\_\_  
Notary Public

State of New York                    )  
  )ss.:  
County of New York                )

On the \_\_ day of \_\_\_\_\_, 2017, before me personally came \_\_\_\_\_, to me known, who, being by me duly sworn, did depose and say that he/she is Deputy Mayor of the City of New York, the entity described in and which executed the above instrument; and that he/she signed his/her name thereto in his/her capacity as Deputy Mayor of the City of New York authorized to thus execute said instrument.

\_\_\_\_\_  
Notary Public

State of New York                    )  
  )ss.:  
County of New York                )

On the \_\_ day of \_\_\_\_\_, 2017, before me personally came \_\_\_\_\_, to me known, who, being by me duly sworn, did depose and say that he/she is \_\_\_\_\_ of the Department of Information Technology and Telecommunications of the City of New York, the entity described in and which executed the above instrument; and that he/she signed his/her name thereto in such capacity being authorized to thus execute said instrument on behalf of the City of New York.

\_\_\_\_\_  
Notary Public



## **APPENDIX A**

### **CONSTRUCTION TERMS**

#### **A. Location of Cable**

1. In order to assure efficient management and use of the City's public rights-of-way, the Company shall install all cables and other equipment located within the Inalienable Property in a manner consistent with existing telephone or public utility lines, which general requirement will include, without limitation, the following specific obligations:

(a) If and when the Company seeks to install cables and related equipment in an area of the City in which lines within the Inalienable Property are installed within the duct and conduit facilities of Empire City Subway Company, Ltd. (ECS) or Consolidated Edison Company of New York Inc. (CECONY), or their successors, the Company shall install its cables and related equipment that are to be located within the Inalienable Property within the duct and conduit facilities of ECS or CECONY (and if no space is available within the facilities of ECS or CECONY, the Company shall apply to either ECS or CECONY for construction of new facilities necessary to support the Company's installation). The selection of which entity to use, ECS or CECONY, will be at the Company's discretion wherever a choice is available. If the City's contractual arrangements with ECS and CECONY as they exist as of the Effective Date should change in a material manner or be replaced during the term of this franchise, the terms of this subsection (a) will be deemed adjusted to reflect such reasonable new arrangements regarding management and use of common duct and conduit facilities as may be adopted by the City.

(b) In any area of the City where existing landline communications cables within the Inalienable Property are located underground, the Company shall install its cable and related facilities underground, except as otherwise provided in this Agreement or as otherwise approved by the agencies of the City having jurisdiction over such matters (it is understood that among other conditions that an agency of the City may place on the granting of any such approval may be, to the fullest extent permitted by law, a requirement of additional compensation for use of the Inalienable Property in addition to and not in lieu of that contemplated in Section 3 of this Agreement, which Section 3 compensation is only intended to cover compensation for use of the Inalienable Property in a manner that does not require such additional approval).

2. Whenever possible, the Company shall, in order to minimize the burden on the public rights-of-way, install its cables and other equipment (not otherwise covered by Section 1(a) above of this Appendix) using existing telephone or utility (as that term is defined in 47 USC § 224 in effect as of the Effective Date) ducts, conduits, poles or similar facilities. If and when space for the Company to install its cables and related equipment using such existing ducts, conduits, poles or similar facilities cannot be obtained, the Company may install its own such facilities, provided that:

(a) The Company shall first obtain all necessary permits from the City's Department of Transportation and/or other applicable City agencies, including, without limitation, with respect to additional above ground poles or similar facilities, possible land use review pursuant to Department of City Planning requirements and possible requirement of additional compensation in a manner comparable to that referred to in the parenthetical in Section 1(b) above of this Appendix (in addition, prior to applying for any such permit, the Company must submit to DoITT for DoITT's approval, and receive DoITT's approval of, a plan indicating all anticipated requests for permits to be made pursuant to this provision, which plan may be updated from time to time by submission and approval of an updated plan);

(b) all above-ground facilities will be maintained in accordance with such maintenance standards applicable to such facilities as are or may hereafter be established by the City .

3. In the event of any inconsistency between this Appendix A and applicable provisions of the New York City Administrative Code or rules of the New York City Department of Transportation (the "Department of Transportation"), or other rules of the City, such provisions and rules will prevail.

4. Notwithstanding any provisions to the contrary set forth in this Appendix A or in this Agreement, the Company will be authorized pursuant to this Agreement to install, operate and/or maintain equipment pedestal boxes above ground on the surface of City sidewalks *only* if (a) the Company abides by the requirements of Attachment 1 attached to and made a part of this Appendix A and the Agreement and (b) such boxes are used to provide Cable Television Service pursuant to a Cable Television Franchise and/or to provide residential switched telephone service connecting to the public switched telephone network, and (c) such boxes are not located in those portions of the City in which Empire City Subway, Ltd. is required by contract with the City to construct and maintain conduits for communications lines.

#### B. Additional Construction Terms

1. The Company shall comply with all applicable federal, state and City laws, rules, codes, and other requirements, in connection with the construction, repair, upgrade and maintenance of the System within the Inalienable Property of the City, now or hereafter in effect, provided such are lawful and not preempted.

2. The installation of all cables, wires, or other component parts of the System in or on any structure within the Inalienable Property shall be undertaken in a manner which does not interfere with the operation or use of any existing conduit or preexisting system or facility of any third party.

3. The Company shall comply with, and shall ensure that its subcontractors comply with, all applicable lawful rules, regulations and standards of the Department of Transportation provided such are lawful and not preempted. If the construction, upgrade, repair, maintenance or operation of the System does not comply with such lawful, non-preempted rules, regulations and standards, the Company must, at its sole cost, remove and reinstall such cables,

wires or other component parts of the System to ensure compliance with such rules, regulations and standards.

4. The Company shall comply with requirements as may be adopted from time to time by the City regarding the periodic inspection by the Company of any of its facilities that are located within the Inalienable Property and which are on the surface of the ground or above ground, provided such requirements are reasonable for the purpose of assuring compliance with reasonable safety and esthetic standards for such facilities.

5. (a) The Company shall provide, in a format acceptable to the Commissioner, and to the extent (pursuant to subparagraph (c) below) different from the requirements set forth in subparagraph (b) below, consistent with industry standards, maps and other information detailing the location of the System installed in the streets of the City pursuant to this Agreement.

(b) As of the Effective Date, the following format is acceptable to the Commissioner:

(i) For any installation where the Company initiated a street cut and installed its own duct and cable, wire, fiber optic telecommunications cable or other closed-path transmission medium that may be used in lieu of cable, wire or fiber optic telecommunications cable for the same purposes, all locations of such infrastructure elements must be produced utilizing the City's accurate physical base map (NYCMAP). The Company shall also indicate what type of cable, wire, fiber optic telecommunications cable or other closed-path transmission medium that may be used in lieu of cable, wire or fiber optic telecommunications cable it is using in each location, including above and below ground locations and for both microtrenching and traditional trenching. The submission must be digital – provided on a CD, DVD or external hard drive and the infrastructure elements depicted must be accurate within two feet vertically and six inches horizontally, to match with the NYCMAP.

(ii) For any installation where the Company used the ducts of a third party, the Company shall use its best efforts to create maps using such specific source information, datapoints and detail as may have been made available to the Company upon the Company's request from the third party owning the underlying facilities where the System is installed.

(iii) The data, both graphical and attribute, must be formatted so that it can be easily read into a database. Line styles and symbols must conform to DoITT standards and all data must be structured according to DoITT specifications. Acceptable formats include, but are not limited to: ESRI shapefiles (preferred) and drawing interchange file.

(c) Upon written notice to the Company, the Commissioner may reasonably change the format requirements described in (b) above. Annually, simultaneously with the first payment due during each calendar year pursuant to Section 3.3.2, the Company shall submit to DoITT a certification representing that the most recently submitted mapping information submitted pursuant to this Section 5 of this Appendix A is accurate and current as a description of the System installed in the streets of the City pursuant to this Agreement and including a statement of the Company's calculation of its Installation Area as defined in Section 3.2.3 of this Agreement, such calculation to include a level of detail reasonably satisfactory to the City. Such

certification shall be signed by a licensed professional engineer, except that if the compensation due pursuant to Section 3.2 of this agreement with respect to any calendar year is less than the product of \$280,000 multiplied by the CPI Adjustment the annual certification to be made during the following calendar year may, at the option of the Company, be signed by the chief executive officer of the Company (or if there is no chief executive officer, the individual of equivalent responsibility in the Company) in lieu of a professional engineer. The Company shall submit to DoITT updates of the mapping information described in this Section 5 of this Appendix A promptly upon the completion of construction of each addition or change to the System which results in a change in the Installation Area as defined in Section 3.2.3 of this Agreement, which update shall include a calculation of the resulting changes in the Company's Installation Area and the dates such changes became effective, such calculation to include a level of detail reasonably satisfactory to the City. At the City's option, the Franchisee will bear the costs for the City to retain a professional engineering firm to verify footage reports submitted by the Franchisee.

## **ATTACHMENT 1 TO APPENDIX A**

### **STANDARDS FOR ON-STREET TELECOMMUNICATIONS PEDESTAL STRUCTURES**

#### **1. APPLICABILITY**

The standards described in this Attachment 1 shall apply, unless and until revised as described in Section 10 of this Attachment 1, to all “On-Street Pedestal Structures” (hereinafter referred to as “Pedestal Structures”), for which sidewalk opening permits are granted by the Department of Transportation (DOT) after November 13, 2000, defined as any communication utility box and related construction, such as foundations and bollards, which are located, in whole or in part, above grade and within the right-of-way of a public street, except when such box is located on a pole.

#### **2. LOCATION STANDARDS**

##### **a. Clearance**

- i. Corner Clearance Policy: Pedestal Structures shall comply with Executive Order #22 of April 13, 1995, plus an additional ten feet clearance; that is, there shall be a minimum distance of 20 feet between the “corner,” as defined in Executive Order #22 (attached) or any superseding Executive Orders, and any Pedestal Structure.
- ii. The edge of any Pedestal Structure nearest the curb shall be a minimum of 18 inches and a maximum of 24 inches from the curb.
- iii. A minimum clear path of 8 feet or one-half the width of the sidewalk width, whichever is less, shall be maintained. However, in no case shall the minimum clear path be less than 4 feet.
- iv. Minimum Distance between Pedestal Structures and Other Street Furniture: Varies depending on adjoining furniture; see attached Table 1.

##### **b. Required Distance from other Pedestal Structures**

- i. A minimum distance of 100 feet shall be maintained between any two Pedestal Structures, regardless of ownership, along any block-front; and
- ii. A maximum of three Pedestal Structures shall be permitted on any single block-front.

#### **3. DIMENSIONAL STANDARDS**

- a. **Height:** 2 feet-3 inches minimum and 4 feet maximum (excluding supporting base). The maximum height of any base structure, separate from the Pedestal Structure shall be 4 inches.
- b. **Length (dimension parallel to curb):** 6 feet maximum
- c. **Width (dimension perpendicular to curb):** 2 feet-4inches maximum
- d. **Area:**
  - i. Pedestal Structures greater than 3 feet in height shall have a maximum area as follows:
    - (1) 7 square feet if the width is less than or equal to 18 inches;
    - (2) 4.25 square feet if the width is greater than 18 inches
  - ii. Pedestal Structures less than or equal to 3 feet in height shall have a maximum area of 14 square feet.

#### 4. GENERAL DESIGN STANDARDS

- a. All Pedestal Structures shall be constructed of steel or similar durable, vandal resistant materials.
- b. Materials shall have a low degree of light reflectivity.
- c. Pedestal Structures shall have no sharp edges or protuberances.
- d. Advertising Prohibited: No advertising shall appear on any Pedestal Structure.
- e. Identifying Information: Each Pedestal Structure shall have the following information permanently displayed on its surface.
  - i. Name of the telecommunications service provider; and
  - ii. The name, address and phone number of the telecommunications service provider contact for complaints regarding the pedestal Structure and a statement that the structure is subject to City jurisdiction and that complaints may be made by calling 311.

The required information shall be placed in an easily visible location facing the pedestrian pathway and appear in clearly legible letters a minimum of ½ inch in height. The logo of the telecommunications service provider may be included with the required information provided that the maximum coverage of all such information, including the logo, shall not exceed 48 square inches.

#### 5. COMPANY MANAGEMENT STATEMENT

The following information shall be provided to the New York City Department of Information Technology and Telecommunications (DoITT) with respect to a proposed on-street Pedestal Structure:

- a. Description of potential off-street and pole-mounted locations and reason(s) for their rejection.
- b. The address and owner(s) name(s) where the telecommunications service provider has been refused off-street access to install equipment to be placed in the Pedestal Structure;
- c. Description of alternate on-street locations which are consistent with these standards and reason(s) for their rejection;
- d. When the telecommunications service provider is utilizing more than one size Pedestal Structure within the City, explanation of the technical and/or engineering requirements for proposal to install other than the smallest Pedestal Box in current use by the provider; and
- e. Where the proposed on-street location is determined to be unsatisfactory DoITT may require additional information as to the actions taken pursuant to sections (a), (b) and (c) above as well as to require consideration of additional off-street locations or the installation of a pole-mounted structure.

## **6. COMPANY ENGINEERING PLANS: SUBMISSION REQUIREMENTS**

Concurrent with submission of the Company Management Statement, drawings showing the following information shall be provided to DoITT:

- a. Exact location and size of the proposed Pedestal Structure;
- b. Placement and distance of nearest Pedestal Structures;
- c. Placement and distance of other street furniture at and adjoining the proposed location;
- d. Number and location of homes served by the equipment to be installed in the proposed Pedestal Structure;
- e. List of the electronics to be placed in the Pedestal Structure; and
- f. A completed DOT permit form for sidewalk opening.

## **7. CITY AGENCY APPROVAL**

- a. DoITT: documentary and on-site review.

- b. Landmarks Preservation Commission approval, as necessary for Pedestal Structures to be located in historic districts
- c. DOT (following DoITT sign-off): review and issuance of sidewalk opening permit.

## **8. MAINTENANCE**

Pedestal Structures, including any supporting base, shall be maintained in accordance with the following:

- a. Any individual Pedestal Structure reported to a telecommunications service provider contact for complaints (identified pursuant to section 4(e)(ii) above) as having, graffiti or stickers shall be cleaned within 5 working days;
- b. The telecommunications service provider shall establish a regular 30 day cleaning cycle, or such other schedule as may be acceptable to DoITT, to ensure that the Pedestal Structure is maintained in a clean condition, free of litter, rust, debris, stickers, graffiti and grime; and
- c. The quarterly preventive maintenance report to DoITT must include certification that all Pedestal Structures were cleaned in accordance with the regular cleaning cycle, as well as a log showing dates of receipt of complaints with regard to individual Pedestal Structures and date of response.

## **9. WAIVER**

The Commissioner of DoITT may, in his or her sole discretion waive or modify these standards in specific cases when 1) compliance with the standards is impossible or impracticable, and precludes the petitioner from providing its standard telecommunications services and 2) when, in the Commissioner's sole opinion, the public health, safety and general welfare will not be endangered thereby. The petitioner shall request such waiver in writing and shall provide any information requested by DoITT, which may assist the Commissioner in his or her determination.

## **10. REVISION OF STANDARDS**

The standards set forth in Sections 2, 3 and 4, and Table 1, of this Attachment 1 shall be subject to revision by the City's Department of City Planning ("DCP") as follows, and to the extent such standards are thus revised, the Company shall thereafter be subject to such revised standards as if they had been expressly set forth herein: DCP may adopt such revised standards provided such revised standards (i) reflect streetscape and urban design considerations, (ii) are arrived at after the Company is given 30 days notice and opportunity to comment in person and in writing and such comments, including any comments with respect to the cost of implementation, are duly considered, (iii) are consistent with the ability of the Company to provide the services authorized by the



Franchise Agreement of which this Attachment is a part, and (iv) do not limit the continued operation and maintenance of facilities installed pursuant to a franchise agreement, if any, previously executed by the City and the Company (“maintenance” as that term is used in this clause (iv) is understood to include, without limitation, replacement in kind of individual units as they are damaged or malfunction or otherwise reach the end of their useful life).

**TABLE 1:****Minimum Distances between Street Furniture (from DOT Revocable Consents)**

<b>Street Furniture</b>	<b>Minimum Clearance (feet)</b>
Subway Entrance (open side)	15
Sidewalk Cafes	15
Newsstand	15
Bus Stop (with/without shelter)	15
Fire Hydrant/Standpipe	10
Driveway	10
Bicycle Rack (including bicycles)	8
Street Tree	5
Bench	5
Principal Building Entrance	5
Ramp intended to provide access for people with disabilities	5
Subway Entrance (closed end or side)	5
Public Telephone	5
Planters on the sidewalk not adjacent to the building façade	5
Mail Box	4
Street Lights	4
Parking Meters	4
Edge of Tree Pit	3
Street Signs	3
Utility Hole Covers, Cellar Doors, Areaways	3
Transformer Vault <sup>1</sup> , Sidewalk Grates	3
All Other Legal Street Furniture	5

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<sup>1</sup> This restriction does not apply to vaults owned by the Company or its affiliates.

## **APPENDIX B**

### **IN-KIND COMPENSATION**

The Company will provide the City, for the City's use, with ten percent (10%) of the capacity of the backbone of the Company's fiber optic network, but in no event more than six (6) fiber strands within such backbone. Franchisee also shall provide the City with additional capacity, equivalent to two (2) fiber strands in addition to the six (6) fiber strands, where the backbone consists of more than 80 strands of fiber. (The term "backbone" as used in this Appendix B will mean any portion of Franchisee's fiber optic network that contains twenty-four (24) or more fiber strands.

The fiber strands provided to the City in accordance with this Appendix B must be of the same type, quality and capacity standard as the other fiber strands installed. In the event of the use of a technology other than fiber optic strands, reasonably equivalent in-kind compensation will be provided to the City. The fiber strands provided to the City as in-kind compensation hereunder will be owned by the City and the City will hold title to such strands, which title must be free of encumbrance by actions of the Company. Upon termination of this Agreement, the City's title to such strands will remain in effect, except that if the City directs the removal of all or part of the Company's facilities from the Inalienable Property after termination under Section 10.8 of this Agreement, then the City's title to such strands will terminate upon the removal by the Company of those cables removed pursuant to such City direction. The Company shall, as part of its in-kind compensation to the City for use of the public right-of-way maintain and keep in good repair (or provide for the maintenance and good repair of) the fiber strands set aside for the City hereunder to the same standard as it applies to strands used by the Company's customers or by the Company to provide service to its customers. The parties agree that it is not the intention of this Exhibit B to require the Company to provide "drops" (i.e., electronics and internal wiring located within or serving particular buildings) to the City, although the Company acknowledges that as a necessary element of its obligation to make the capacity described above available to the City as described herein, the Company will provide at no charge reasonable access and assistance as needed to allow the City to connect the City's facilities and equipment to the fiber strands being provided.

Notwithstanding anything to the contrary in the preceding two paragraphs or this Agreement, to the extent that the Company is providing the in-kind compensation described in the first two paragraphs of Appendix B of the Information Services Franchise held by the Company, and the fiber capacity thus provided to the City is located within the facilities also being used to provide services under this Agreement, such provision of fiber capacity shall be a credit against the fiber capacity required hereunder.

## **APPENDIX C**

### **STANDARD CITY CONTRACT PROVISIONS**

The following standard City contract provisions are applicable to this Agreement and thus absent any state or federal law to the contrary shall be binding on the Company. However, to the extent it is determined by a court of competent jurisdiction and after all appeals have been exhausted that any one or more such provisions are beyond the City's authority to enforce or to require in the context of this Agreement, then each such provision that is the subject of such a determination shall be treated, as the case may be, as either unenforceable or as excised from this Agreement and not applicable hereunder. All the provisions set forth in this Appendix C are intended to be severable, and thus any such unenforceability or excision and nonapplicability as described in the preceding sentence shall (notwithstanding anything to the contrary stated within such provisions) not result in the termination of this Agreement generally or of any provisions of this Agreement that remain enforceable or that are not thus excised and rendered nonapplicable.

#### **A. INVESTIGATIONS CLAUSE**

1.1 The parties to this agreement agree to cooperate fully and faithfully with any investigation, audit or inquiry conducted by a State of New York ("State") or City of New York ("City") governmental agency or authority that is empowered directly or by designation to compel the attendance of witnesses and to examine witnesses under oath, or conducted by the Inspector General of a governmental agency that is a party in interest to the transaction, submitted bid, submitted proposal, contract, lease, permit, or license that is the subject of the investigation, audit or inquiry.

1.2 (a) If any person who has been advised that his or her statement, and any information from such statement, will not be used against him or her in any subsequent criminal proceeding refuses to testify before a grand jury or other governmental agency or authority empowered directly or by designation to compel the attendance of witnesses and to examine witnesses under oath concerning the award of or performance under any transaction, agreement, lease, permit, contract, or license entered into with the City, the State, or any political subdivision or public authority thereof, or the Port Authority of New York and New Jersey, or any local development corporation within the City, or any public benefit corporation organized under the laws of the State of New York, or;

1.2 (b) If any person refuses to testify for a reason other than the assertion of his or her privilege against self-incrimination in a investigation, audit or inquiry conducted by a City or State governmental agency or authority empowered directly or by designation to compel the attendance of witnesses and to take testimony under oath, or by the Inspector General of the governmental agency that is a party in interest in, and is seeking testimony concerning the award of, or performance under, any transaction, agreement, lease, permit, contract, or license entered into with the City, the State, or any political subdivision thereof or any local development corporation within the City, then;

1.3 (a) The commissioner or agency head whose agency is a party in interest to the transaction, submitted bid, submitted proposal, contract, lease, permit, or license shall convene a hearing, upon not less than five (5) days written notice to the parties involved to determine if any penalties should attach for the failure of a person to testify.

1.3 (b) If any non-governmental party to the hearing requests an adjournment, the commissioner or agency head who convened the hearing may, upon granting the adjournment, suspend any contract, lease, permit, or license pending the final determination pursuant to paragraph 1.5 below without the City incurring any penalty or damages for delay or otherwise.

1.4 The penalties which may attach after a final determination by the commissioner or agency head may include but shall not exceed:

- (a) The disqualification for a period not to exceed five (5) years from the date of an adverse determination for any person, or any entity of which such person was a member at the time the testimony was sought, from submitting bids for, or transacting business with, or entering into or obtaining any contract, lease, permit or license with or from the City; and/or
- (b) The cancellation or termination of any and all such existing City contracts, leases, permits or licenses that the refusal to testify concerns and that have not been assigned as permitted under this agreement, nor the proceeds of which pledged, to an unaffiliated and unrelated institutional lender for fair value prior to the issuance of the notice scheduling the hearing, without the City incurring any penalty or damages on account of such cancellation or termination; monies lawfully due for goods delivered, work done, rentals, or fees accrued prior to the cancellation or termination shall be paid by the City.

1.5 The commissioner or agency head shall consider and address in reaching his or her determination and in assessing an appropriate penalty the factors in paragraphs (a) and (b) below. He or she may also consider, if relevant and appropriate, the criteria established in paragraphs (c) and (d) below in addition to any other information which may be relevant and appropriate:

- (a) The party's good faith endeavors or lack thereof to cooperate fully and faithfully with any governmental investigation or audit, including but not limited to the discipline, discharge, or disassociation of any person failing to testify, the production of accurate and complete books and records, and the forthcoming testimony of all other members, agents, assignees or fiduciaries whose testimony is sought.
- (b) The relationship of the person who refused to testify to any entity that is a party to the hearing, including, but not limited to, whether the person whose testimony is sought has an ownership interest in the entity and/or the degree of authority and responsibility the person has within the entity.
- (c) The nexus of the testimony sought to the subject entity and its contracts, leases, permits or licenses with the City.

- (d) The effect a penalty may have on a unaffiliated and unrelated party or entity that has a significant interest in an entity subject to penalties under 1.4 above, provided that the party or entity has given actual notice to the commissioner or at the hearing called for in 1.3(a) above gives notice and proves that such interest was previously acquired. Under either circumstance the party or entity must present evidence at the hearing demonstrating the potential adverse impact a penalty will have on such person or entity.

1.6 (a) The term “license” or “permit” as used herein shall be defined as a license, permit, franchise or concession not granted as a matter of right.

(b) The term “person” as used in this Section A. of Appendix C shall be defined as any natural person doing business alone or associated with another person or entity as a partner, director, officer, principal or employee.

(c) The term “entity” as used herein shall be defined as any firm, partnership, corporation, association, or person that receive monies, benefits, licenses, leases, or permits from or through the City or otherwise transacts business with the City.

(d) The term “member” as used herein shall be defined as any person associated with another person or entity as a partner, director, officer, principal or employee.

1.7 In addition to and notwithstanding any other provision of this agreement the Commissioner or agency head may in his or her sole discretion terminate this agreement upon not less than three (3) days written notice in the event contractor fails to promptly report in writing to the Commissioner of Investigation of the City of New York any solicitation of money, goods, requests for future employment or other benefit or things of value, by or on behalf of any employee of the City or other person, firm, corporation or entity for any purpose which may be related to the procurement or obtaining of this agreement by the contractor, or affecting the performance of this contract.

## **B. MACBRIDE PRINCIPLES PROVISIONS**

### **ARTICLE I. MACBRIDE PRINCIPLES**

#### **NOTICE TO ALL PROSPECTIVE CONTRACTORS**

Local Law No. 34 of 1991 became effective on September 10, 1991 and added Section 6-115.1 to the Administrative Code of the City of New York. The local law provides for certain restrictions on City contracts to express the opposition of the people of the City of New York to employment discrimination practices in Northern Ireland and to encourage companies doing business in Northern Ireland to promote freedom of workplace opportunity.

Pursuant to Section 6-115.1, prospective contractors for contracts to provide goods or services involving an expenditure of an amount greater than ten thousand dollars, or for construction involving an amount greater than fifteen thousand dollars, are asked to sign a rider in which they covenant and represent, as a material condition of their contract, that any business in Northern Ireland operations conducted by the contractor and any individual or legal entity in which

the contractor holds a ten percent or greater ownership interest and any individual or legal entity that holds a ten percent or greater ownership interest in the contractor will be conducted in accordance with the MacBride Principles of nondiscrimination in employment.

Prospective contractors are not required to agree to these conditions. However, in the case of contracts let by competitive sealed bidding, whenever the lowest responsible bidder has not agreed to stipulate to the conditions set forth in this notice and another bidder who has agreed to stipulate to such conditions has submitted a bid within five percent of the lowest responsible bid for a contract to supply goods, services or construction of comparable quality, the contracting entity shall refer such bids to the Mayor, the Speaker of the City Council or other officials, as appropriate, who may determine, in accordance with applicable law and rules, that it is in the best interest of the City that the contract be awarded to other than the lowest responsible bidder pursuant to Section 313(b)(2) of the City Charter.

In the case of contracts let by other than competitive sealed bidding, if a prospective contractor does not agree to these conditions, no agency, elected official or the Council shall award the contract to that bidder unless the entity seeking to use the goods, services or construction certifies in writing that the contract is necessary for the entity to perform its functions and there is no other responsible contractor who will supply goods, services or construction of comparable quality at a comparable price.

## **PART A**

In accordance with Section 6-115.1 of the Administrative Code of the City of New York, the contractor stipulates that such contractor and any individual or legal entity in which the contractor holds a ten percent or greater ownership interest and any individual or legal entity that holds a ten percent or greater ownership interest in the contractor either (a) have no business operations in Northern Ireland, or (b) shall take lawful steps in good faith to conduct any business operations they have in Northern Ireland in accordance with the MacBride Principles, and shall permit independent monitoring of their compliance with such principles.

## **PART B**

For purposes of this section, the following term shall have the following meaning:

“MacBride Principles” shall mean those principles relating to nondiscrimination in employment and freedom of workplace opportunity which require employers doing business in Northern Ireland to:

- (1) increase the representation of individuals from underrepresented religious groups in the work force, including managerial, supervisory, administrative, clerical and technical jobs;
- (2) take steps to promote adequate security for the protection of employees from underrepresented religious groups both at the workplace and while traveling to and from work;
- (3) ban provocative religious or political emblems from the workplace;

- (4) publicly advertise all Job openings and make special recruitment efforts to attract applicants from underrepresented religious groups;
- (5) establish layoff, recall and termination procedures which do not in practice favor a particular religious group;
- (6) abolish all job reservations, apprenticeship restrictions and different employment criteria which discriminate on the basis of religion;
- (7) develop training programs that will prepare substantial numbers of current employees from underrepresented religious groups for skilled jobs, including the expansion of existing programs and the creation of new programs to train, upgrade and improve the skills of workers from underrepresented religious groups;
- (8) establish procedures to assess, identify and actively recruit employees from underrepresented religious groups with potential for further advancement; and
- (9) appoint a senior management staff member to oversee affirmative action efforts and develop a timetable to ensure their full implementation.

## **ARTICLE II. ENFORCEMENT OF ARTICLE I.**

The contractor agrees that the covenants and representations in Article I above are material conditions to this contract, unless otherwise expressly set forth herein. In the event the contracting entity receives information that the contractor who made the stipulation required by this section is in violation thereof, the contracting entity shall review such information and give the contractor an opportunity to respond. If the contracting entity finds that a violation has occurred, the entity shall have the right to declare the contractor in default and/or terminate this contract for cause and procure the supplies, services or work from another source in any manner the entity deems proper. In the event of such termination, the contractor shall pay to the entity, or the entity in its sole discretion may withhold from any amounts otherwise payable to the contractor, the difference between the contract price for the uncompleted portion of this contract and the cost to the contracting entity of completing performance of this contract either itself or by engaging another contractor or contractors. In the case of a requirements contract, the contractor shall be liable for such difference in price for the entire amount of supplies required by the contracting entity for the uncompleted term of its contract. In the case of a construction contract, the contracting entity shall also have the right to hold the contractor in partial or total default in accordance with the default provisions of this contract, and/or may seek debarment or suspension of the contractor. The rights and remedies of the entity hereunder shall be in addition to, and not in lieu of, any rights and remedies the entity has pursuant to this contract or by operation of law.

### **C. EMPLOYMENT AND PURCHASING**

1. Right to Bargain Collectively The Company agrees to recognize the right of its employees to bargain collectively through representatives of their own choosing in accordance with applicable law. The Company shall recognize and deal with the representatives duly designated or selected by a majority of its employees for the purpose of collective bargaining with respect to rates of pay, wages, and hours of employment or any other terms, conditions or privileges of employment. The



Company shall not dominate, interfere with, participate in the management or control of, or give financial support to any union or association of its employees.

2. Local Preference The Company shall, at its own cost and expense, develop and maintain a plan for the recruitment, education, training and employment of residents of the City, for the opportunities to be created by the construction, operation, marketing and maintenance of the System within the Inalienable Property. Such recruitment activities shall include provisions for the posting of employment and training opportunities at appropriate City agencies responsible for encouraging employment of City residents. Such plan shall be designed so as to ensure the promotion of equal employment opportunity for all qualified Persons employed by, or seeking employment with, the Company. Such plan shall be updated from time to time as the City deems reasonably necessary. The Company shall, throughout the Term, implement such plan, at its own cost and expense, by ensuring, to the maximum feasible extent, the recruitment, education, training, and employment of City residents.

3. City Vendors To the maximum feasible extent, after taking into account price and quality considerations, the Company shall utilize vendors located in the City in connection with the construction, operation, marketing and maintenance of the System. The Company shall, after taking into account price and quality considerations, in the purchase of comparable materials, equipment, services or supplies of any nature, give effect to a preference for such items which are assembled, manufactured, or otherwise produced, in whole or in part, within the City.

4. Equal Employment Opportunity The Company agrees to comply with the provisions of Mayor's Executive Order No. 50 (April 25, 1980) (codified at Title 10 Sections 1-14 of the Rules of the City of New York) and City Administrative Code 6-108 and all rules and regulations promulgated thereunder (collectively, the "EEO Requirements"), as such EEO Requirements may be amended, modified or superseded throughout the Term. Notwithstanding that the EEO Requirements may not apply on their face to the Company based solely on its status as a party to this Agreement, the Company shall comply in all respects with the provisions of such EEO Requirements and successor and replacement laws, orders and regulations adopted following the Effective Date. As required by said Executive Order No. 50, the provisions of Sections 50.30 and 50.31 of the Final Rule implementing said Order are incorporated herein by this reference. The Company agrees to make a reasonable inquiry and to engage in reasonable compliance monitoring efforts with all unions to ensure that all contractors and subcontractors comply with the required contractual language in Paragraph 5 of this Section C. of this Appendix C. The Company shall not contract with and shall discontinue any contract entered into after the Effective Date with any union, contractor or subcontractor that refuses to agree to or fails to comply with the contractual language in said Section 5.

5. Enforcement The Company shall take steps to ensure that the requirements of the preceding Paragraph 4 are adhered to by each union with which the Company deals, each officer, employee, agent, contractor or subcontractor of the Company, and each Person performing work pursuant to this Agreement with respect to the System for, on behalf of, or at the discretion of, the Company. The requirements of said Paragraph 4 hereof shall apply to every contract relating to the System between the Company and: (i) any union; (ii) any contractor; (iii) any subcontractor; or (iv) any Person with which any of the foregoing Persons has a relationship in connection with any aspect of the System. To comply with the obligations of said Paragraph 4 and this Paragraph 5, the Company shall include, in all contracts described in the foregoing sentence which are entered into

following the Effective Date (which shall include any renewals, amendments and modifications of existing contracts), the following language, stating that such party: “has received a copy of Section C of Appendix B of a certain agreement by and between the City of New York and the Company dated as of [**insert Effective Date**] pursuant to which the Company agreed to comply with each term, condition and requirement of said Section C, which terms, conditions and requirements are deemed to be incorporated herein by this reference.”

**D. ADDITIONAL COVENANTS**

Until the termination of this Agreement and the satisfaction in full by the Company of its obligations under this Agreement, the Company agrees that it will comply with the following affirmative covenants, unless the City otherwise consents in writing:

The Company shall comply with: (a) all laws, rules, regulations, orders, writs, decrees and judgments applicable to the System within the Inalienable Property (including, but not limited to, those of the PSC and the FCC and any other federal or state agency or authority of competent jurisdiction); and (b) all local laws and all rules, regulations, orders, or other directives of the City, DoITT, and the Commissioner related to management of the Inalienable Property to the extent lawful and not preempted.

The Company agrees to comply in all respects with the City’s Vendor Information Exchange System, as the same may be amended from time to time.

## **APPENDIX D**

### **COMPANY CONTROL AS OF THE EFFECTIVE DATE AND PERMITTED TRANSFERS**

Full list of 10% or more direct or indirect interests in the franchise assets as of the Effective Date (hereinafter, the “Approved Interest Holders”):

Joseph Fasone  
RRE Ventures VI, LP  
USV 2014, LP

#### **Permitted Transfers**

1. Any transaction the result of which is that both (1) Control of the Company, the System and the franchise granted hereunder is exercised by one or more of the Approved Interest Holders listed above and (2) no Person other than an Approved Interest Holder holds an interest which gives it Control of the Company, the System or the franchise granted hereunder.
2. Any transfer, directly or indirectly, by any individual Approved Interest Holder of all or any portion of his or her direct or indirect equity interest in the Company, the System and the franchise granted hereunder, outright or in trust, to or for the benefit of the spouse, a sibling, parent or any lineal descendant of such individual Approved Interest Holder or a lineal descendant of a sibling of such individual Approved Interest Holder (each, a “Relative”) or any personal representative, estate or executor under any will of such individual Approved Interest Holder or pursuant to the laws of intestate succession, so long as the final recipient from any personal representative, estate or executor under any will or pursuant to the laws of intestate succession is a Relative of such individual Approved Interest Holder.
3. Any transaction (an “intra-corporate transaction”) in which an interest of one or more entity or entities which is an Approved Interest Holder is transferred to an entity which wholly owns, directly or indirectly, such Approved Interest Holder(s), or an entity which is, directly or indirectly, wholly owned by such Approved Interest Holder(s), or an entity which is, directly or indirectly, under wholly common ownership with such Approved Interest Holder(s).

## **APPENDIX E**

### **CERTIFICATES OF INSURANCE**

#### **Instructions to New York City Agencies, Departments, and Offices**

All certificates of insurance (except certificates of insurance solely evidencing Workers' Compensation Insurance, Employer's Liability Insurance, and/or Disability Benefits Insurance) must be accompanied by one of the following:

- (1) the Certification by Insurance Broker or Agent on the following page setting forth the required information and signatures;

-- OR --

- (2) copies of all policies as certified by an authorized representative of the issuing insurance carrier that are referenced in such certificate of insurance. If any policy is not available at the time of submission, certified binders may be submitted until such time as the policy is available, at which time a certified copy of the policy shall be submitted.

CITY OF NEW YORK

CERTIFICATION BY INSURANCE BROKER OR AGENT

The undersigned insurance broker or agent represents to the City of New York that the attached Certificate of Insurance is accurate in all material respects.

\_\_\_\_\_  
[Name of broker or agent (typewritten)]

\_\_\_\_\_  
[Address of broker or agent (typewritten)]

\_\_\_\_\_  
[Email address of broker or agent (typewritten)]

\_\_\_\_\_  
[Phone number/Fax number of broker or agent  
(typewritten)]

\_\_\_\_\_  
[Signature of authorized official, broker, or agent]

\_\_\_\_\_  
[Name and title of authorized official, broker, or agent  
(typewritten)]

State of .....)

)

ss.: County of  
.....  
....)

Sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_ 20 \_\_\_\_

\_\_\_\_\_  
NOTARY PUBLIC FOR THE STATE OF \_\_\_\_\_



**CITY OF NEW YORK**  
**FRANCHISE AND CONCESSION REVIEW COMMITTEE**

**(Cal. No. 3)**

RESOLVED, that the Franchise and Concession Review Committee authorizes the New York City Department of Health and Mental Hygiene (“DOHMH”) to utilize a different procedure, pursuant to Section 1-16 of the Concession Rules of the City of New York, to amend the concession agreement with OptumRx Discount Card Services, LLC (formally known as Catamaran Discount Card Services, LLC) to develop, operate and administer the NYC Drug Discount Card Program available to all New York City residents. The amended concession agreement extends the expiration date of the concession agreement from February 16, 2017 to August 16, 2018.

**THIS IS A TRUE COPY OF THE RESOLUTION ADAPOTED BY THE  
FRANCHISE AND CONCESSION REVIEW COMMITTEE ON**

**March 8, 2017**

Date: \_\_\_\_\_

Signed: \_\_\_\_\_

Title: Director of the Mayor’s Office of Contract Services

# CONCESSION AGREEMENT RECOMMENDATION FOR AWARD MEMORANDUM COVER SHEET

(Attach, in the following order, applicable CRFA Memo, Responsibility Determination Form, approved CPSR Cover Sheet and, if the selection procedure was not CSB, the CPSR Memo and CCPO Memo (if applicable) )

<b>AGENCY:</b> NYC Department of Health and Mental Hygiene ("DOHMH")	<b>RECOMMENDED CONCESSIONAIRE</b> <b>Name:</b> <u>OptumRx Discount Card Services, LLC (f/k/a Catamaran Discount Card Services, LLC)</u> <b>Address:</b> <u>1600 McConnor Parkway, Schaumburg, Illinois 60173</u> <b>Telephone #</b> <u>720-482-3726</u> <input checked="" type="checkbox"/> <b>EIN</b> <input type="checkbox"/> <b>SSN #</b> <u>31-1728846</u> <b>Not-for-Profit Organization</b> <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No <b>Certified by DSBS as M/WBE</b> <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	<b>CONCESSION TITLE/ DESCRIPTION:</b> <u>To develop, operate and administer the NYC Drug Discount Card Program available to all New York City residents.</u>  <b>CONCESSION I.D.#</b> <u>11HM000701R2T01</u>
<b># VOTES required for proposed action</b> = <u>4</u> <input type="checkbox"/> N/A		

**LOCATION OF CONCESSION SITE(S\*) Address** ☒ N/A  
 \*Attach additional sheet **Borough** \_\_\_\_\_ **C.B.** \_\_\_\_\_ **Block #** \_\_\_\_\_ **Lot #** \_\_\_\_\_

## SELECTION PROCEDURE (\*CCPO approval of CRFA required)

- ☐ Competitive Sealed Bids  
☐ Competitive Sealed Proposals\* (☐ FCRC approved Agency request to deviate from final recommendation of the Selection Committee on \_\_/\_\_/\_\_.)  
☒ Different Selection Procedure: \* (☐ Sole Source Agreement ☒ Other Amendment to the existing concession agreement between DOHMH and OptumRx Discount Card Services, LLC (formerly known as Catamaran Discount Card Services, LLC.)  
 > FCRC approved different selection procedure on 07/13/2016.  
☐ Negotiated Concession\*

## CONCESSION AGREEMENT TERM

**Initial Term:** From 02/17/2015 To 02/16/2017  
**Renewal Option(s) Term:** None  
**Total Potential Term:** Eighteen (18) Months  
☐ \* >20 years – FCRC unanimously approved term on \_\_/\_\_/\_\_

## ANNUAL REVENUE

(Check all that apply)  
☐ Additional sheet (☐s) attached

- ☐ **Annual Fee(s)** \$ \_\_\_\_\_  
☐ **% Gross Receipts** \_\_\_\_\_ %  
☐ **The Greater of Annual Minimum Fee(s of \$ \_\_\_\_\_ v. \_\_\_\_\_ % of Gross Receipts**  
☒ **Other** OptumRx will continue to operate and administer the NYC Drug Discount Card Program

## NOTIFICATION REQUIREMENTS

**Subject concession was awarded by CSB or CSP.**

☐ YES ☒ NO

If YES, check the applicable box(es) below:

- ☐ The subject concession is a Significant Concession and the Agency completed its consultations with each affected CB/BP regarding the scope of the solicitation by \_\_/\_\_/\_\_, which was at least 30 days prior to its issuance.  
☐ The subject concession is a Significant Concession and the Agency included this concession in the Agency's Plan and completed consultations with each affected CB/BP pursuant to §1-10 of the Concession Rules.  
☐ The subject concession was determined not to be a Major Concession and the Agency sent notification of such determination to each affected CB/BP by \_\_/\_\_/\_\_, which was at least 40 days prior to issuance of the solicitation.

If NO, check the applicable box below:

- ☒ The Agency certifies that each affected CB/BP received written notice by 06/03/2016, which was at least 40 days in advance of the FCRC meeting on 07/13/2016 at which the agency sought and received approval to use a different selection procedure.  
☐ The Agency certifies that each affected CB/BP received written notice on \_\_/\_\_/\_\_, at the time that a notice of intent to enter into negotiations was published for the subject concession, and provided a copy of such notification to the members of the Committee within five days on \_\_/\_\_/\_\_.



☐ The Agency certifies that based on exigent circumstances the FCRC unanimously approved waiver of advance written notice to each affected CB/BP on \_\_/\_\_/\_\_.

**Law Department approved concession agreement on \_\_/\_\_/\_\_**

**Award is a major concession.** ☐ YES ☐ NO

**If YES, award was approved pursuant to Sections 197-c and 197-d of the NYC Charter as follows:**

☐ CPC approved on \_\_/\_\_/\_\_ ☐ City Council approved on \_\_/\_\_/\_\_ or ☐ N/A

**AUTHORIZED AGENCY STAFF**

**This is to certify that the information presented herein is accurate and that I find the proposed concessionaire to be responsible and approve of the award of the subject concession agreement.**

**If the concession was awarded by other than CSB or CSP, additionally check the applicable box below:**

- ☐ The concession was approved by the FCRC on \_\_/\_\_/\_\_.
- ☐ The concession was not subject to the approval of the FCRC because it has a term of <30 days and is not subject to renewal.

**Name** \_\_\_\_\_ **Title** \_\_\_\_\_

**Signature** \_\_\_\_\_ **Date** \_\_/\_\_/\_\_

**CERTIFICATE OF PROCEDURAL REQUISITES**

**This is to certify that the agency has complied with the prescribed procedural requisites for award of the subject concession agreement.**

**Signature** \_\_\_\_\_ **Date** \_\_/\_\_/\_\_

**City Chief Procurement Officer**

**RECOMMENDATION FOR AWARD OF CONCESSION AGREEMENT MEMORANDUM:**  
**CONCESSION AGREEMENT AWARDED BY OTHER THAN CSB OR CSP**

**SUMMARY OF PROPOSED CONCESSION USE (Attach Proposed Agreement)**

New York City Department of Health and Mental Hygiene ("DOHMH") is seeking Franchise and Concession Review Committee ("FCRC") approval to use a different procedure, pursuant to Section 1-16 of the Concession Rules of the City of New York ("Concession Rules"), to amend its current Concession Agreement with OptumRx Discount Card Services, LLC (formerly known as Catamaran Discount Card Services, LLC) to develop, operate and administer the NYC Drug Discount Card Program available to all New York City residents.

***Instructions:*** *Provide all information requested below; check all applicable boxes.*

**A. SELECTION PROCEDURE**

☐

Sole Source

☒

Other ***Describe:*** DOHMH is seeking FCRC approval to use a different procedure, pursuant to Section 1-16 of the Concession rules, to amend its current Concession Agreement with OptumRx Discount Card Services, LLC (formerly known as Catamaran Discount Card Services, LLC) for the development, operation and administration of the NYC Drug Discount Card Program available to all New York City residents.

**B. NEGOTIATIONS**

***Instructions:*** *Describe the nature of negotiations conducted, including negotiations with respect to the amount of revenue offered.*

OptumRx Discount Card Services, LLC (formerly known as Catamaran Discount Card Services, LLC) is willing to continue to operate and administer the NYC Drug Discount Card Program during an eighteen (18) month extension period.

The amended Concession Agreement would extend the expiration date of the current Concession Agreement from February 16, 2017 to August 16, 2018. DOHMH intends to undertake a new competitive request for proposals process to solicit a concessionaire to develop, operate and administer the NYC Drug Discount Card Program, and anticipates a new award by the expiration of this extension period.

**C. BASIS FOR AWARD** (If sole source award, attach the offer; if other than a sole source award, attach the three highest rated offers, if applicable.)

**The agency determined that award of the concession is in the best interest of the City because:**

DOHMH believes that the City will be best served by extending the Concession Agreement with OptumRx Discount Card Services, LLC, formerly known as Catamaran Discount Card Services, LLC, to enable the residents of New York City to continue to have access to pharmaceutical drugs at discount prices without interruption while DOHMH undertakes a new competitive request for proposals process to solicit a concessionaire to develop, operate and administer the NYC Drug Discount Card Program.

Currently, over 800,000 IDNYC cards have been issued by the City with the BigAppleRX benefit feature on the card, enabling cardholders to purchase pharmaceutical drugs at discount prices provided by Optum Rx Discount Card Services, LLC (also referred to as "BigAppleRX provider"). Those IDNYC cards will remain in effect until 5 years after their effective date. Given that the BigApple RX benefit is linked to these IDNYC cards, transitioning to a new provider will be administratively complicated and time consuming. In

addition, the Mayor's Office of Immigrant Affairs has launched the ActionHealthNYC program (Program), which will provide uninsured low-income immigrant New Yorkers with better access to health care services. Participants in that Program will either have an IDNYC card or will be issued one, and the prescription drug benefit of BigAppleRX will be a key feature of the health care access provided under the Program. That Program will have a duration of at least one year with a high potential for extension and expansion. Maintaining the current BigAppleRX provider in place during the first year of that Program will make those benefits available without administrative interruption and will give DOHMH time to select a new concessionaire.

D. **PUBLIC HEARING** ☐ N/A – Subject award **NOT** a significant concession]

1. **Publication & Distribution of Public Hearing Notice**

☒ Subject concession is a **Citywide** concession and Agency hereby certifies that a notice containing a summary of the terms and conditions of the proposed concession and stating the time, date and location of the public hearing was published once in the City Record on 2/17/2017 which was not less than 15 days prior to the hearing date or a shorter period approved by the CCPO and was given to each affected CB-BP and the Committee Members on 2/17/2017, which was not less than 15 days prior to the hearing date. Agency also published a public hearing notice twice in the two newspapers indicated below. A copy of each such notice was sent to each affected CB-BP by 2/17/2017.

- ☒ New York Post, a NYC citywide newspaper on 2/21/2017 and 2/23/2017
- ☒ New York Daily, a NYC citywide newspaper on 2/27/2017 and 3/1/2017

**OR**

☐ Subject concession is **NOT a Citywide** concession and Agency hereby certifies that a notice containing a summary of the terms and conditions of the proposed concession and stating the time, date and location of the public hearing was published once in the City Record on \_\_\_/\_\_\_/\_\_\_, which was not less than 15 days prior to the hearing date or a shorter period approved by the CCPO and was given to each affected CB-BP and the Committee Members on \_\_\_/\_\_\_/\_\_\_, which was not less than 15 days prior to the hearing date. Agency additionally published a public hearing notice and summary of the terms and conditions of the proposed agreement twice in two newspapers indicated below. A copy of each such notice containing a summary of the terms and conditions of the proposed agreement was sent to each affected CB-BP by \_\_\_/\_\_\_/\_\_\_.

- ☐ \_\_\_\_\_, a NYC local newspaper published in the affected borough(s) on \_\_\_/\_\_\_/\_\_\_ and \_\_\_/\_\_\_/\_\_\_.
- ☐ \_\_\_\_\_, a NYC local newspaper published in the affected borough(s) on \_\_\_/\_\_\_/\_\_\_ and \_\_\_/\_\_\_/\_\_\_.

2. **Public Hearing Date, Exception to Public Hearing Requirement**

☐ A Public Hearing was conducted on \_\_\_/\_\_\_/\_\_\_.

**OR**

☐ The Agency certifies that the total annual revenue to the City from the subject concession does not exceed one million dollars and a Public Hearing was not conducted because, pursuant to §1-13(q)(2) of the Concession Rules, the Agency gave notice of the hearing and did not receive any written requests to speak at such hearing or requests from the Committee that the Agency appear at the hearing. Furthermore, the Agency certifies that it published a notice in the City

Record canceling such hearing on\_\_\_\_/\_\_\_\_/\_\_\_\_ and sent a copy of that notice to all Committee Members.



NEW YORK CITY DEPARTMENT OF  
HEALTH AND MENTAL HYGIENE  
Mary T. Bassett, MD, MPH  
*Commissioner*

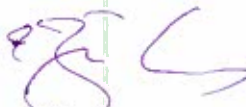
Eric Zimiles  
Assistant Commissioner  
Division of Prevention  
and Primary Care

[ezimiles@health.nyc.gov](mailto:ezimiles@health.nyc.gov)

Gotham Center  
42-09 28<sup>th</sup> Street, 12<sup>th</sup>  
Floor  
Queens, NY 11101-4132

1 347 396 4815 tel  
1 347 396 8039 fax

TO: All Borough Presidents  
All Community Boards

FROM: Eric Zimiles 

SUBJECT: Notice of Joint Public Hearing, March 6, 2017: re Amendment of the concession agreement between the New York City Department of Health and Mental Hygiene and OptumRx Discount Card Services, LLC (formerly known as Catamaran Discount Card Services, LLC) to develop, operate and administer the NYC Drug Discount Card Program available to all New York City residents

DATE: February 17, 2017

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**NOTICE OF A JOINT PUBLIC HEARING** of the Franchise and Concession Review Committee and the New York City Department of Health and Mental Hygiene to be held on March 6, 2017 at 2 Lafayette Street, 14<sup>th</sup> Floor Auditorium, Borough of Manhattan, commencing at 2:30 p.m. relative to:

**AMENDMENT** of the concession agreement between the New York City Department of Health and Mental Hygiene and OptumRx Discount Card Services, LLC (formally known as Catamaran Discount Card Services, LLC) for the development, operation and administration of the NYC Drug Discount Card Program available to all New York City residents. The amendment extends the expiration date of the concession agreement from February 16, 2017 to August 16, 2018.

A draft copy of the amendment may be reviewed or obtained at no cost commencing February 21, 2017 through March 6, 2017, between the hours of 9:00 a.m. and 5 p.m., excluding weekends and holidays at the New York City Department of Health and Mental Hygiene, Office of Contracts, located at 42-09 28<sup>th</sup> Street, 17<sup>th</sup> Floor, Long Island City, NY 11101.

Individuals requesting Sign Language Interpreters should contact the Mayor's Office of Contract Services, Public Hearings Unit, 253 Broadway, 9th Floor, New York, NY 10007, (212) 788-7490, no later than SEVEN (7) BUSINESS DAYS PRIOR TO THE PUBLIC HEARING.

TELECOMMUNICATION DEVICE FOR THE DEAF (TDD) 212-504-4115

AMENDMENT TO  
CONCESSION AGREEMENT  
BETWEEN

**OPTUMRX DISCOUNT CARD SERVICES, LLC  
(F/K/A CATAMARAN DISCOUNT CARD SERVICES, LLC)**

**AND**

**CITY OF NEW YORK  
Acting by and through its  
DEPARTMENT OF  
HEALTH AND MENTAL HYGIENE**

*For*

THE DEVELOPMENT, OPERATION, AND  
ADMINISTRATION OF THE  
NEW YORK CITY DRUG DISCOUNT CARD PROGRAM

**CONCESSION ID# 11HM000701R2T01  
EFFECTIVE: FEBRUARY 16, 2017**

**AMENDMENT TO THE FIRST RENEWAL AGREEMENT** (“**Amendment**”) effective as of February 16 2017 (the “Effective Date”), between the City of New York (“**City**”) acting by and through the Department of Health and Mental Hygiene (“**Department**”), having its principal office at 42-09 28<sup>th</sup> St., Queens, NY 11101, and OptumRx Discount Card Services, LLC (f/k/a Catamaran Discount Card Services, LLC), a Delaware pharmacy benefit management company (“**Concessionaire**” or “**OptumRx**”), having a principal office at 1600 McConnor Parkway, Schaumburg, IL 60173 (each a “Party”, together, the “Parties”).

### **RECITALS**

**WHEREAS**, the Department, pursuant to Local Law 19 of 2005 “Prescription Drug Discount Card Act” (“Local Law 19”), is required to develop a drug discount card program to be made available to all City residents, known as the NYC Drug Discount Card Program (“Program”); and

**WHEREAS**, Local Law 19 allows the Department to enter into an agreement for the services of a Program administrator, and the City has determined that such agreement shall be in the form of a concession; and

**WHEREAS**, the Department entered into a concession agreement with HealthTran LLC (d/b/a HealthTrans), as concessionaire (agreement identified as PIN# 11HM000700R0XOO), to develop, operate, and administer the Program for the initial term of three (3) years, from February 17, 2011 to February 16, 2014 (“Initial Term”), with the option to renew for one or more periods of twelve (12) months that in the aggregate do not exceed three (3) years (each a “Renewal”) (“Original Concession Agreement”); and

**WHEREAS**, during the Initial Term of the Original Concession Agreement, the concessionaire was acquired by SXC Health Solutions Corp, which subsequently changed its name to Catamaran Corporation, and as a result thereof the concessionaire’s name was changed to Catamaran Corporation; and

**WHEREAS**, the Original Concession Agreement was renewed for a first Renewal term of one (1) year, from February 17, 2014 to February 16, 2015, by amending and restating the Agreement, and including therein the remaining Renewals that in the aggregate do not exceed two (2) years (“First Renewal Agreement” identified as PIN#11HM000701R1XOO).

**WHEREAS**, the concessionaire in the First Renewal Agreement was Catamaran PBM of Colorado, a subsidiary of Catamaran Corporation, and during the First Renewal Agreement, the concessionaire changed its name to Catamaran Discount Card Services, LLC (hereinafter “Catamaran”); and

**WHEREAS**, the First Renewal Agreement was renewed for a second Renewal term of two (2) years, from February 17, 2015 to February 16, 2017, by a notice provided in accordance with

the provisions of the First Renewal Agreement (“Second Renewal” identified as PIN #11HM000701R2XOO); and

**WHEREAS**, during the term of the Second Renewal, the concessionaire changed its name from Catamaran ~~Discount Care Services, LLC~~ to OptumRx Discount Card Services, LLC ([f/k/a Catamaran](#)), due to the acquisition of Catamaran by OptumRx; and

**WHEREAS**, upon the expiration of the Second Renewal (February 16, 2017), there are no further Renewals provided for under the First Renewal Agreement; and

**WHEREAS**, the Department intends to undertake a competitive request for proposal process to solicit a new concessionaire to operate and administer the Program; and

**WHEREAS**, in order for the City to continue to comply with Local Law 19 and serve the needs of NYC residents during the request for proposal process, it will be necessary to extend the First Renewal Agreement for a period of eighteen (18) months, from February 16, 2017 to August 16, 2018, to continue to provide the services of operating and administering the Program to NYC residents without interruption; and

**WHEREAS**, OptumRx is willing to continue to provide the services of operating and administering the Program, and the Parties desire to amend the terms of the First Renewal Agreement, subject to and in accordance with the terms of this Amendment; and

**WHEREAS**, the Franchise and Concession Review Committee has authorized the Department to use a different procedure to enter into this Amendment.

**NOW THEREFORE**, in consideration of the mutual promises herein contained, the Parties hereby agree as follows:

1. Unless otherwise noted, all capitalized terms referenced herein shall have the meaning ascribed thereto in the First Renewal Agreement.
2. The title of Article 3 of the First Renewal Agreement is hereby amended by deleting it in its entirety and replacing it with the following new title:

**“ARTICLE 3  
TERM; RENEWAL; EXTENSION”**

3. Article 3 of the First Renewal Agreement is amended by adding a new section, Section 3.03(Extension), after Section 3.02 (Renewal), to read as follows:

“Section 3.03 Extension. This Agreement shall be extended from February 16, 2017, the last day of the second Renewal Term exercised pursuant to Section 3.02 above, to August 16, 2018, for a period of eighteen (18) months, unless sooner terminated pursuant to the provisions hereof (“Extension Term”). Notwithstanding any inconsistent provision of this Agreement, the Services shall continue uninterrupted and in accordance with the provisions of this Agreement during the Extension Term.”



4. The third sentence of Section 11.03 (Proof of Insurance) of the First Renewal Agreement is hereby amended by deleting the sentence in its entirety and replacing it with the following new third sentence:  
  
“All such Certificate(s) of Insurance shall be accompanied by either a duly executed “Certification by Insurance Broker or Agent” in the form annexed hereto as Exhibit E or as otherwise required by the Commissioner or certified copies of all policies referenced in such Certificate of Insurance.”
5. The First Renewal Agreement is amended by adding a new exhibit, Exhibit E (Certificates of Insurance), which is annexed hereto as Exhibit E (Certificates of Insurance).
6. Except as expressly amended herein, all terms and provisions of the First Renewal Agreement shall remain unchanged and in full force and effect. In the event of any inconsistency between the terms of this Amendment and the First Renewal Agreement, the terms of this Amendment shall prevail.
7. This Amendment shall take effect on, and shall be retroactive to, February 16, 2017, subject to compliance with all applicable processes including registration ~~by~~with the New York City Comptroller pursuant to Section 328 of the New York City Charter.

[No further text on this page]

**IN WITNESS WHEREOF**, the parties hereto have executed this Amendment as of the day and year first written below.

**NEW YORK CITY DEPARTMENT OF  
HEALTH AND MENTAL HYGIENE**

**OPTUMRX, DISCOUNT CARD  
SERVICES, LLC (F/K/A CATAMARAN  
DISCOUNT CARD SERVICES, LLC)**

By: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

**APPROVED AS TO FORM AND  
CERTIFIED AS TO LEGAL AUTHORITY:**

\_\_\_\_\_  
Acting Corporation Counsel

Date: \_\_\_\_\_

STATE OF NEW YORK     )  
  ) ss.:  
COUNTY OF QUEENS     )

On this \_\_\_\_\_ day of \_\_\_\_\_, 2017, before me personally came \_\_\_\_\_, to me known and known to me to be the \_\_\_\_\_ of the Department of Health and Mental Hygiene of the City of New York, the person described as such in and who as such executed the foregoing agreement as for the purposes therein mentioned.

\_\_\_\_\_  
Notary Public

STATE OF \_\_\_\_\_     )  
  ) ss.:  
COUNTY OF \_\_\_\_\_     )

On this \_\_\_\_\_ day of \_\_\_\_\_, 2017, before me personally came \_\_\_\_\_, to me known and known to be the Concessionaire's \_\_\_\_\_, the firm described in and which executed the foregoing agreement and s/he acknowledged to me that s/he subscribed the name of said firm thereto on behalf of said firm for the purposes therein mentioned.

\_\_\_\_\_  
Notary Public

## **CERTIFICATES OF INSURANCE**

### **Instructions to New York City Agencies, Departments, and Offices**

All certificates of insurance (except certificates of insurance solely evidencing Workers' Compensation Insurance, Employer's Liability Insurance, and/or Disability Benefits Insurance) must be accompanied by one of the following:

- (1) the Certification by Insurance Broker or Agent on the following page setting forth the required information and signatures;

-- OR --

- (2) copies of all policies as certified by an authorized representative of the issuing insurance carrier that are referenced in such certificate of insurance. If any policy is not available at the time of submission, certified binders may be submitted until such time as the policy is available, at which time a certified copy of the policy shall be submitted.

## CITY OF NEW YORK

**CERTIFICATION BY INSURANCE BROKER OR AGENT**

The undersigned insurance broker or agent represents to the City of New York that the attached Certificate of Insurance is accurate in all material respects.

[Name of broker or agent (typewritten)]

[Address of broker or agent (typewritten)]

[Email address of broker or agent (typewritten)]

[Phone number/Fax number of broker or agent (typewritten)]

\_\_\_\_\_  
[Signature of authorized official, broker, or agent]

[Name and title of authorized official, broker, or agent (typewritten)]

State of .....)

) SS.:

County of .....)

Sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_

NOTARY PUBLIC FOR THE STATE OF \_\_\_\_\_

Document comparison by Workshare Compare on Monday, March 06, 2017  
11:30:13 AM

Input:	
Document 1 ID	interwovenSite://LAWMAN-DMS.LAW.Local/Legal/7332214/1
Description	#7332214v1<Legal> - Optum Rx Discount Card Amendment 02-13-17-Dist to FCRC
Document 2 ID	interwovenSite://LAWMAN-DMS.LAW.Local/Legal/7330112/1
Description	#7330112v1<Legal> - Optum Rx Discount Card Amendment -Law Dept FINAL
Rendering set	Standard

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<u>Moved to</u>	
Style change	
Format change	
<del>Moved deletion</del>	
Inserted cell	
Deleted cell	
Moved cell	
Split/Merged cell	
Padding cell	

Statistics:	
	Count
Insertions	2
Deletions	3
Moved from	0
Moved to	0
Style change	0
Format changed	0
Total changes	5

**AMENDMENT TO  
CONCESSION AGREEMENT  
BETWEEN**

**OPTUMRX DISCOUNT CARD SERVICES, LLC  
(F/K/A CATAMARAN DISCOUNT CARD SERVICES, LLC)**

**AND**

**CITY OF NEW YORK  
Acting by and through its  
DEPARTMENT OF  
HEALTH AND MENTAL HYGIENE**

*For*

**THE DEVELOPMENT, OPERATION, AND  
ADMINISTRATION OF THE  
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**CONCESSION ID# 11HM000701R2T01  
EFFECTIVE: FEBRUARY 16, 2017**

**AMENDMENT TO THE FIRST RENEWAL AGREEMENT** (“**Amendment**”) effective as of February 16 2017 (the “**Effective Date**”), between the City of New York (“**City**”) acting by and through the Department of Health and Mental Hygiene (“**Department**”), having its principal office at 42-09 28<sup>th</sup> St., Queens, NY 11101, and OptumRx Discount Card Services, LLC (f/k/a Catamaran Discount Card Services, LLC), a Delaware pharmacy benefit management company (“**Concessionaire**” or “**OptumRx**”), having a principal office at 1600 McConnor Parkway, Schaumburg, IL 60173 (each a “**Party**”, together, the “**Parties**”).

### **RECITALS**

**WHEREAS**, the Department, pursuant to Local Law 19 of 2005 “Prescription Drug Discount Card Act” (“**Local Law 19**”), is required to develop a drug discount card program to be made available to all City residents, known as the NYC Drug Discount Card Program (“**Program**”); and

**WHEREAS**, Local Law 19 allows the Department to enter into an agreement for the services of a Program administrator, and the City has determined that such agreement shall be in the form of a concession; and

**WHEREAS**, the Department entered into a concession agreement with HealthTran LLC (d/b/a HealthTrans), as concessionaire (agreement identified as PIN# 11HM000700R0XOO), to develop, operate, and administer the Program for the initial term of three (3) years, from February 17, 2011 to February 16, 2014 (“**Initial Term**”), with the option to renew for one or more periods of twelve (12) months that in the aggregate do not exceed three (3) years (each a “**Renewal**”) (“**Original Concession Agreement**”); and

**WHEREAS**, during the Initial Term of the Original Concession Agreement, the concessionaire was acquired by SXC Health Solutions Corp, which subsequently changed its name to Catamaran Corporation, and as a result thereof the concessionaire’s name was changed to Catamaran Corporation; and

**WHEREAS**, the Original Concession Agreement was renewed for a first Renewal term of one (1) year, from February 17, 2014 to February 16, 2015, by amending and restating the Agreement, and including therein the remaining Renewals that in the aggregate do not exceed two (2) years (“**First Renewal Agreement**” identified as PIN#11HM000701R1XOO).

**WHEREAS**, the concessionaire in the First Renewal Agreement was Catamaran PBM of Colorado, a subsidiary of Catamaran Corporation, and during the First Renewal Agreement, the concessionaire changed its name to Catamaran Discount Card Services, LLC (hereinafter “**Catamaran**”); and

**WHEREAS**, the First Renewal Agreement was renewed for a second Renewal term of two (2) years, from February 17, 2015 to February 16, 2017, by a notice provided in accordance with the provisions of the First Renewal Agreement (“**Second Renewal**” identified as PIN #11HM000701R2XOO); and



**WHEREAS**, during the term of the Second Renewal, the concessionaire changed its name from Catamaran to OptumRx Discount Card Services, LLC (f/k/a Catamaran), due to the acquisition of Catamaran by OptumRx; and

**WHEREAS**, upon the expiration of the Second Renewal (February 16, 2017), there are no further Renewals provided for under the First Renewal Agreement; and

**WHEREAS**, the Department intends to undertake a competitive request for proposal process to solicit a new concessionaire to operate and administer the Program; and

**WHEREAS**, in order for the City to continue to comply with Local Law 19 and serve the needs of NYC residents during the request for proposal process, it will be necessary to extend the First Renewal Agreement for a period of eighteen (18) months, from February 16, 2017 to August 16, 2018, to continue to provide the services of operating and administering the Program to NYC residents without interruption; and

**WHEREAS**, OptumRx is willing to continue to provide the services of operating and administering the Program, and the Parties desire to amend the terms of the First Renewal Agreement, subject to and in accordance with the terms of this Amendment; and

**WHEREAS**, the Franchise and Concession Review Committee has authorized the Department to use a different procedure to enter into this Amendment.

**NOW THEREFORE**, in consideration of the mutual promises herein contained, the Parties hereby agree as follows:

1. Unless otherwise noted, all capitalized terms referenced herein shall have the meaning ascribed thereto in the First Renewal Agreement.
2. The title of Article 3 of the First Renewal Agreement is hereby amended by deleting it in its entirety and replacing it with the following new title:

**“ARTICLE 3  
TERM; RENEWAL; EXTENSION”**

3. Article 3 of the First Renewal Agreement is amended by adding a new section, Section 3.03(Extension), after Section 3.02 (Renewal), to read as follows:

“Section 3.03 Extension. This Agreement shall be extended from February 16, 2017, the last day of the second Renewal Term exercised pursuant to Section 3.02 above, to August 16, 2018, for a period of eighteen (18) months, unless sooner terminated pursuant to the provisions hereof (“Extension Term”). Notwithstanding any inconsistent provision of this Agreement, the Services shall continue uninterrupted and in accordance with the provisions of this Agreement during the Extension Term.”

4. The third sentence of Section 11.03 (Proof of Insurance) of the First Renewal Agreement is hereby amended by deleting the sentence in its entirety and replacing it with the following new third sentence:

“All such Certificate(s) of Insurance shall be accompanied by either a duly executed “Certification by Insurance Broker or Agent” in the form annexed hereto as Exhibit E or as otherwise required by the Commissioner or certified copies of all policies referenced in such Certificate of Insurance.”

5. The First Renewal Agreement is amended by adding a new exhibit, Exhibit E (Certificates of Insurance), which is annexed hereto as Exhibit E (Certificates of Insurance).
6. Except as expressly amended herein, all terms and provisions of the First Renewal Agreement shall remain unchanged and in full force and effect. In the event of any inconsistency between the terms of this Amendment and the First Renewal Agreement, the terms of this Amendment shall prevail.
7. This Amendment shall take effect on, and shall be retroactive to, February 16, 2017, subject to compliance with all applicable processes including registration with the New York City Comptroller pursuant to Section 328 of the New York City Charter.

[No further text on this page]

**IN WITNESS WHEREOF**, the parties hereto have executed this Amendment as of the day and year first written below.

**NEW YORK CITY DEPARTMENT OF  
HEALTH AND MENTAL HYGIENE**

**OPTUMRX, DISCOUNT CARD  
SERVICES, LLC (F/K/A CATAMARAN  
DISCOUNT CARD SERVICES, LLC)**

By: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

**APPROVED AS TO FORM AND  
CERTIFIED AS TO LEGAL AUTHORITY:**

\_\_\_\_\_  
Acting Corporation Counsel

Date: \_\_\_\_\_

STATE OF NEW YORK                    )  
  ) ss.:  
COUNTY OF QUEENS                    )

On this \_\_\_\_ day of \_\_\_\_\_, 2017, before me personally came \_\_\_\_\_, to me known and known to me to be the \_\_\_\_\_ of the Department of Health and Mental Hygiene of the City of New York, the person described as such in and who as such executed the foregoing agreement as for the purposes therein mentioned.

Notary Public

STATE OF \_\_\_\_\_ )  
 ) ss.:  
COUNTY OF \_\_\_\_\_ )

On this \_\_\_\_ day of \_\_\_\_\_, 2017, before me personally came \_\_\_\_\_, to me known and known to be the Concessionaire's \_\_\_\_\_, the firm described in and which executed the foregoing agreement and s/he acknowledged to me that s/he subscribed the name of said firm thereto on behalf of said firm for the purposes therein mentioned.

Notary Public

## **CERTIFICATES OF INSURANCE**

### **Instructions to New York City Agencies, Departments, and Offices**

All certificates of insurance (except certificates of insurance solely evidencing Workers' Compensation Insurance, Employer's Liability Insurance, and/or Disability Benefits Insurance) must be accompanied by one of the following:

- (1) the Certification by Insurance Broker or Agent on the following page setting forth the required information and signatures;

-- OR --

- (2) copies of all policies as certified by an authorized representative of the issuing insurance carrier that are referenced in such certificate of insurance. If any policy is not available at the time of submission, certified binders may be submitted until such time as the policy is available, at which time a certified copy of the policy shall be submitted.

The undersigned insurance broker or agent represents to the City of New York that the attached Certificate of Insurance is accurate in all material respects.

[Name and title of authorized official, broker, or agent (typewritten)]

NOTARY PUBLIC FOR THE STATE OF \_\_\_\_\_

**CITY OF NEW YORK  
FRANCHISE AND CONCESSION REVIEW COMMITTEE**

**(Cal. No. 4)**

**RESOLVED**, that the Franchise and Concession Review Committee authorizes the New York City Department of Parks and Recreation ("Parks") to utilize a different procedure, pursuant to Section 1-16 of the Concession Rules of the City of New York, to enter into a Sole Source License Agreement ("Agreement") with The Battery Conservancy, Inc. ("Licensee") for the operation and maintenance of two (2) food service kiosks within the Bosque Gardens ("Licensed Premises"), and to provide for the maintenance of the Bosque Gardens in The Battery, Manhattan. In lieu of a license fee, Licensee shall provide, or cause to be provided, services for the maintenance and/or improvement ("Services") of the Licensed Premises to the Commissioner's reasonable satisfaction. Such Services shall include keeping and maintaining the Licensed Premises in good condition and repair, all in accordance with the provisions of this Agreement. The term of this Agreement shall be five (5) years with five (5) renewable one (1) year option years, at Parks' option, and shall commence on Parks' giving written Notice to Proceed to Licensee.

THIS IS A TRUE COPY OF THE RESOLUTION ADOPTED BY THE  
FRANCHISE AND CONCESSION REVIEW COMMITTEE ON

March 8, 2017

Date: \_\_\_\_\_

Signed: \_\_\_\_\_

Title: Director of the Mayor's Office of Contract Services

# CONCESSION AGREEMENT RECOMMENDATION FOR AWARD MEMORANDUM COVER SHEET

(Attach, in the following order, applicable CRFA Memo, Responsibility Determination Form, approved CPSR Cover Sheet and, if the selection procedure was not CSB, the CPSR Memo and CCPO Memo (if applicable) )

<b>AGENCY:</b> <u>New York City Department of Parks and Recreation ("Parks")</u>	<b>RECOMMENDED CONCESSIONAIRE</b> <b>Name:</b> <u>The Battery Conservancy, Inc.</u> <b>Address:</b> <u>One Whitehall Street, 17<sup>th</sup> Floor, New York, NY 10004</u> <b>Telephone #</b> (212) 344-3491 <input checked="" type="checkbox"/> <b>EIN</b> <input type="checkbox"/> <b>SSN</b> #13-3769101 <b>Not-for-Profit Organization</b> <input checked="" type="checkbox"/> <b>Yes</b> <input type="checkbox"/> <b>No</b> <b>Certified by DSBS as M/WBE</b> <input type="checkbox"/> <b>Yes</b> <input checked="" type="checkbox"/> <b>No</b>	<b>CONCESSION TITLE/ DESCRIPTION:</b> <u>Sole Source License Agreement with The Battery Conservancy, Inc. for the operation and maintenance of two (2) food service kiosks within the Bosque Gardens, and to provide for the maintenance of the Bosque Gardens in The Battery, Manhattan.</u>  <b>CONCESSION I.D.#</b> <u>M5-SB</u>
<b># VOTES required for proposed action</b> <b>=</b> <u>4</u> <input type="checkbox"/> <b>N/A</b>		

## LOCATION OF CONCESSION SITE(S\*)

**The Battery**

**Address** Intersection of State Street, Battery Place, Peter Minuit Plaza, South Street, New York, NY

☐ **N/A**

\*Attach additional sheet

**Borough** Manhattan **C.B.** 1 **Block #** 3 **Lot #** 1

## SELECTION PROCEDURE

(\*CCPO approval of CRFA required)

- ☐ Competitive Sealed Bids
- ☐ Competitive Sealed Proposals\* (☐ FCRC approved Agency request to deviate from final recommendation of the Selection Committee on \_\_/\_\_/\_\_.)
- ☒ Different Selection Procedure: \* (☒ Sole Source Agreement ☐ Other \_\_\_\_\_ )
- > FCRC approved different selection procedure on 08/12/2015.
- ☐ Negotiated Concession\*

## CONCESSION AGREEMENT TERM

**Initial Term:** Five (5) years from Notice to Proceed

**Renewal Option(s) Term:** Five (5) one (1)-year renewal options

**Total Potential Term:** Ten (10) years\*

☐ \* >20 years – FCRC unanimously approved term on \_\_/\_\_/\_\_

## ANNUAL REVENUE

(Check all that apply)

☐ Additional sheet (☐s) attached

☐ **Annual Fee(s)** \$ \_\_\_\_\_

☐ **% Gross Receipts** \_\_\_\_\_%

☐ **The Greater of Annual Minimum Fee(s of \$\_\_\_\_\_ v. \_\_\_\_\_% of Gross Receipts**

☒ **Other** In lieu of a license fee, Licensee shall provide, or cause to be provided, services for the maintenance and/or improvement ("Services") of the Licensed Premises to the Commissioner's reasonable satisfaction. Such Services shall include keeping and maintaining the Licensed Premises in good condition and repair, all in accordance with the provisions of this Agreement. It is currently estimated that the value of such Services could be up to \$213,000 per year. Any profits that Licensee receives from its sublicense for the operation of the kiosks or any other profit that it receives directly from operation of the kiosks ("Annual Profits") after the cost recovery date ("Cost Recovery Date", the date on which Licensee has been fully reimbursed for the final amount of the capital cost of construction and installation of the kiosks, shall be used by Licensee for Services at the Licensed Premises. After the Cost Recovery Date, if Annual Profits exceed the lesser of (x) actual maintenance costs; or (y) \$213,000, any excess funds will be paid by Licensee directly to Parks for the City's General Fund.



**NOTIFICATION REQUIREMENTS****Subject concession was awarded by CSB or CSP.**☐ YES ☒ NO**If YES**, check the applicable box(es) below:

- ☐ The subject concession is a Significant Concession and the Agency completed its consultations with each affected CB/BP regarding the scope of the solicitation by \_\_/\_\_/\_\_, which was at least 30 days prior to its issuance.
- ☐ The subject concession is a Significant Concession and the Agency included this concession in the Agency's Plan and completed consultations with each affected CB/BP pursuant to §1-10 of the Concession Rules.
- ☐ The subject concession was determined not to be a Major Concession and the Agency sent notification of such determination to each affected CB/BP by \_\_/\_\_/\_\_, which was at least 40 days prior to issuance of the solicitation.

**If NO**, check the applicable box below:

- ☒ The Agency certifies that each affected CB/BP received written notice by 07/02/2015, which was at least 40 days in advance of the FCRC meeting on 08/12/2015 at which the agency sought and received approval to use a different selection procedure.
- ☐ The Agency certifies that each affected CB/BP received written notice on \_\_/\_\_/\_\_, at the time that a notice of intent to enter into negotiations was published for the subject concession, and provided a copy of such notification to the members of the Committee within five days on \_\_/\_\_/\_\_.
- ☐ The Agency certifies that based on exigent circumstances the FCRC unanimously approved waiver of advance written notice to each affected CB/BP on \_\_/\_\_/\_\_.

**Law Department approved concession agreement on \_\_/\_\_/\_\_****Award is a major concession.**☐ YES ☒ NO**If YES**, award was approved pursuant to Sections 197-c and 197-d of the NYC Charter as follows:

- ☐ CPC approved on \_\_/\_\_/\_\_ ☐ City Council approved on \_\_/\_\_/\_\_ or ☐ N/A

**AUTHORIZED AGENCY STAFF****This is to certify that the information presented herein is accurate and that I find the proposed concessionaire to be responsible and approve of the award of the subject concession agreement.****If the concession was awarded by other than CSB or CSP, additionally check the applicable box below:**

- ☐ The concession was approved by the FCRC on \_\_/\_\_/\_\_.
- ☐ The concession was not subject to the approval of the FCRC because it has a term of <30 days and is not subject to renewal.

Name Alexander HanTitle Director of Concessions

Signature \_\_\_\_\_

Date \_\_/\_\_/\_\_

**CERTIFICATE OF PROCEDURAL REQUISITES****This is to certify that the agency has complied with the prescribed procedural requisites for award of the subject concession agreement.**

Signature \_\_\_\_\_

Date \_\_/\_\_/\_\_

**City Chief Procurement Officer**

**RECOMMENDATION FOR AWARD OF CONCESSION AGREEMENT MEMORANDUM:**  
**CONCESSION AGREEMENT AWARDED BY OTHER THAN CSB OR CSP**

**SUMMARY OF PROPOSED CONCESSION USE (Attach Proposed Agreement)**

The New York City Department of Parks and Recreation ("Parks") intends to seek Franchise and Concession Review Committee ("FCRC") approval to utilize a different procedure, pursuant to Section 1-16 of the Concession Rules of the City of New York, to enter into a sole source license agreement ("Agreement") with The Battery Conservancy, Inc. ("TBC") for the operation and maintenance of two (2) food service kiosks within the Bosque Gardens, and to provide for the maintenance of the Bosque Gardens ("Licensed Premises") in The Battery, Manhattan.

**Instructions:** *Provide all information requested below; check all applicable boxes.*

**A. SELECTION PROCEDURE**

☒ Sole Source

☐ Other *Describe:*

**B. NEGOTIATIONS**

**Instructions:** *Describe the nature of negotiations conducted, including negotiations with respect to the amount of revenue offered.*

The term of this Agreement shall be five (5) years with five (5) renewable one (1) year option years, at Parks' option, and shall commence on Parks' giving written Notice to Proceed to TBC.

In lieu of a license fee, TBC shall provide, or cause to be provided, services for the maintenance and/or improvement ("Services") of the Licensed Premises to the Commissioner's reasonable satisfaction. Such Services shall include keeping and maintaining the Licensed Premises in good condition and repair, all in accordance with the provisions of this Agreement. It is currently estimated that the value of such Services could be up to \$213,000 per year. Any profits that TBC receives from its sublicense for the operation of the Kiosks or any other profit that it receives directly from operation of the Kiosks ("Annual Profits") after the Cost Recovery Date, the date on which TBC has been fully reimbursed for the final amount of the capital cost of construction and installation of the Kiosks, shall be used by TBC for Services at the Licensed Premises. After the Cost Recovery Date, if Annual Profits exceed the lesser of (x) actual maintenance costs; or (y) \$213,000, any excess funds will be paid by Licensee directly to Parks for the City's General Fund.

**C. BASIS FOR AWARD** (If sole source award, attach the offer; if other than a sole source award, attach the three highest rated offers, if applicable.)

**The agency determined that award of the concession is in the best interest of the City because:**

TBC, a not-for-profit organization, was formed in 1994 to promote and assist in the restoration, preservation, maintenance, programming, and operations of The Battery, as well as portions of Pier A's Harbor Park Visitor Center, and the Peter Minuit Plaza, which is adjacent to The Battery. The partnership between TBC and Parks was memorialized in 2007, when TBC and Parks signed a license agreement with a term of ten (10) years and an option for renewals. In 2010, TBC and Parks entered into a sole source license agreement for the

operation and maintenance of a food and beverage concession at Peter Minuit Plaza and to provide for the maintenance of Peter Minuit Plaza. In 2013, TBC and Parks entered into a sole source license agreement for the operation, maintenance, repair, and improvement of SeaGlass at the Battery with ancillary food, beverage, and merchandise concessions.

Since it began operating, TBC, through its fundraising efforts, has secured approximately \$46 million of privately raised funds, which in turn has leveraged over \$92 million in incremental public funds for the benefit of The Battery.

In Spring 2003, the Lower Manhattan Development Corp ("LMDC") awarded \$8.5 million for the building of the Battery's Bosque. This award was part of the funding allocated in the wake of 9/11 by the Federal Government for downtown open space restoration. As part of this initiative, TBC funded the design, fabrication and construction of two (2) food service kiosks, designed by Claire Weisz and Mark Yoes of Weisz + Yoes Architecture.

On June 1, 2006, Parks entered into a sole source license agreement with TBC to provide for the operation and maintenance of the two (2) food service kiosks within the Bosque Gardens, and to provide for the maintenance of the Bosque Gardens. The term was for five (5) years, with five (5) renewable one-year options, the last of which expired on May 31, 2016. Under the 2006 Bosque Kiosk Agreement, in return for TBC's maintenance of the Gardens at significantly greater cost than any revenue anticipated or realized from the kiosks, the City forewent a concession fee from the Kiosk license.

The kiosks serve visitors, residents, workers and tourists, and create revenue to support the care and maintenance of the surrounding Licensed Premises, including the Bosque Gardens - a four-acre grove of trees adjacent to the promenades, consisting of nearly 60,000 square feet of perennial beds, granite seating wall, wood benches, a 40-foot diameter granite fountain, and soft surface paths in The Battery for the benefit of the public. This new Agreement with TBC will allow TBC to continue to provide the public with food services while providing for the maintenance of the Licensed Premises.

The kiosks enhance the economic activity of Lower Manhattan and TBC's maintenance of the Licensed Premises adds to the overall beautification of the area. TBC has demonstrated a specific commitment to The Battery, having worked since its inception to promote and assist in its restoration, preservation, Maintenance, and operation. TBC has further demonstrated a specific commitment to the Licensed Premises, having funded the design, fabrication and construction of the two (2) food service kiosks and having designed, built and maintained the surrounding Bosque Gardens. Therefore, Parks believes that it is in the City's best interest to approve this Agreement with TBC.

**D. PUBLIC HEARING ☐ N/A – Subject award NOT a significant concession]**

**1. Publication & Distribution of Public Hearing Notice**

- ☐ Subject concession is a **Citywide** concession and Agency hereby certifies that a notice containing a summary of the terms and conditions of the proposed concession and stating the time, date and location of the public hearing was published once in the City Record on \_\_\_/\_\_\_/\_\_\_, which was not less than 15 days prior to the hearing date or a shorter period approved by the CCPO and was given to each affected CB-BP and the Committee Members on \_\_\_/\_\_\_/\_\_\_, which was not less than 15 days prior to the hearing date. Agency also published a public hearing notice twice in the two newspapers indicated below. A copy of each such notice was sent to each affected CB-BP by \_\_\_/\_\_\_/\_\_\_.

- ☐ \_\_\_\_\_, a NYC citywide newspaper on \_\_\_/\_\_\_/\_\_\_ and \_\_\_/\_\_\_/\_\_\_  
☐ \_\_\_\_\_, a NYC citywide newspaper on \_\_\_/\_\_\_/\_\_\_ and \_\_\_/\_\_\_/\_\_\_

OR

- ☒ Subject concession is **NOT a Citywide** concession and Agency hereby certifies that a notice containing a summary of the terms and conditions of the proposed concession and stating the time, date and location of the public hearing was published once in the City Record on 02/17/2017, which was not less than 15 days prior to the hearing date or a shorter period approved by the CCPO and was given to each affected CB-BP and the Committee Members on 02/17/2017, which was not less than 15 days prior to the hearing date. Agency additionally published a public hearing notice and summary of the terms and conditions of the proposed agreement in the newspapers indicated below. A copy of each such notice containing a summary of the terms and conditions of the proposed agreement was sent to each affected CB-BP by 02/17/2017.
- ☒ New York Post, a NYC citywide newspaper on 02/16/2017 and 02/23/2017.
  - ☒ Downtown Express, a NYC local newspaper published in the affected borough(s) on 02/23/2017.
  - ☒ Our Town Downtown, a NYC local newspaper published in the affected borough(s) on 02/23/2017.

## 2. Public Hearing Date, Exception to Public Hearing Requirement

- ☒ A Public Hearing was conducted on 03/06/2017.

OR

- ☐ The Agency certifies that the total annual revenue to the City from the subject concession does not exceed one million dollars and a Public Hearing was not conducted because, pursuant to §1-13(q)(2) of the Concession Rules, the Agency gave notice of the hearing and did not receive any written requests to speak at such hearing or requests from the Committee that the Agency appear at the hearing. Furthermore, the Agency certifies that it published a notice in the City Record canceling such hearing on \_\_\_/\_\_\_/\_\_\_ and sent a copy of that notice to all Committee Members.



## MEMORANDUM

**TO:** Hon. Gale Brewer, President of the Borough of Manhattan  
Noah Pfefferblit, District Manager, Manhattan Community Board #1

**FROM:** Philip Abramson, NYC Parks Director of Revenue Communications *PA*

**SUBJECT:** Notice of Joint Public Hearing, March 6, 2017: Intent to award as a concession the operation and maintenance of two (2) food service kiosks within the Bosque Gardens, and to provide for the maintenance of the Bosque Gardens in The Battery, Manhattan, to The Battery Conservancy Inc.

**DATE:** February 17, 2017

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NOTICE OF A JOINT PUBLIC HEARING of the Franchise and Concession Review Committee and the New York City Department of Parks and Recreation to be held on Monday, March 6, 2017 at 2 Lafayette Street, 14<sup>th</sup> Floor Auditorium, Borough of Manhattan, commencing at 2:30 p.m. relative to:

INTENT TO AWARD as a concession the operation and maintenance of two (2) food service kiosks within the Bosque Gardens, and to provide for the maintenance of the Bosque Gardens ("Licensed Premises") in The Battery, Manhattan for a potential ten (10) year term to The Battery Conservancy, Inc. ("Licensee"). In lieu of a license fee, Licensee shall provide, or cause to be provided, services for the maintenance and/or improvement ("Services") of the Licensed Premises to the Commissioner's reasonable satisfaction. Such Services shall include keeping and maintaining the Licensed Premises in good condition and repair, all in accordance with the provisions of this Agreement. It is currently estimated that the value of such Services could be up to \$213,000 per year. Any profits that Licensee receives from its sublicense for the operation of the Kiosks or any other profit that it receives directly from operation of the Kiosks ("Annual Profits") after the Cost Recovery Date, the date on which Licensee has been fully reimbursed for the final amount of the capital cost of construction and installation of the Kiosks, shall be used by Licensee for Services at the Licensed Premises. After the Cost Recovery Date, if Annual Profits exceed the lesser of (x) actual maintenance costs; or (y) \$213,000, any excess funds will be paid by Licensee directly to Parks for the City's General Fund.

LOCATION: A draft copy of the license agreement may be reviewed or obtained at no cost, commencing on Friday, February 17, 2017 through Monday, March 6, 2017, between the hours of 9:00 a.m. and 5:00 p.m., excluding weekends and holidays at the NYC Department of Parks and Recreation, located at 830 Fifth Avenue, Room 313, New York, NY 10065.

Individuals requesting Sign Language Interpreters should contact the Mayor's Office of Contract Services, Public Hearings Unit, 253 Broadway, 9<sup>th</sup> Floor, New York, NY 10007, (212) 788-7490, no later than SEVEN (7) BUSINESS DAYS PRIOR TO THE PUBLIC HEARING.

TELECOMMUNICATION DEVICE FOR THE DEAF (TDD) 212-504-4115

**LICENSE AGREEMENT**

**BETWEEN**

**THE BATTERY CONSERVANCY, INC.**

**AND**

**NEW YORK CITY  
DEPARTMENT OF  
PARKS & RECREATION**

*for*

**THE OPERATION AND MAINTENANCE OF TWO (2) FOOD SERVICE KIOSKS WITHIN THE BOSQUE  
GARDENS IN THE BATTERY AND TO PROVIDE FOR THE MAINTENANCE OF THE BOSQUE GARDENS OF  
THE BATTERY**

**DATED: \_\_\_\_\_, 2017**

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**THIS LICENSE AGREEMENT** (“License Agreement” or “License” or “Agreement”), made as of the \_\_\_\_ day of \_\_\_\_\_, 2017 between The City of New York (the “City”), a municipal corporation of the State of New York, acting by and through the New York City Department of Parks & Recreation (“Parks”), and The Battery Conservancy, Inc. (“TBC” or “Licensee”), a New York not-for-profit corporation, whose address is One Whitehall St., 17<sup>th</sup> floor, New York, NY 10004.

**WITNESSETH**

**WHEREAS**, pursuant to Section 533 of the New York City Charter, the Commissioner of Parks (the “Commissioner”) is charged with the responsibility for the management, maintenance and operation of City parks and recreation facilities under the jurisdiction of Parks ; and

**WHEREAS**, TBC was formed in 1994 to promote and assist in the restoration, preservation, maintenance, programming, and operations of The Battery (“the Battery”) and later of the Peter Minuit Plaza that are under the jurisdiction of Parks (together the “Premises”); and

**WHEREAS**, since it began operating, TBC, through its fundraising efforts, has secured approximately \$46 million of privately raised funds, which in turn has leveraged over \$92 million in incremental public funds for the benefit of The Battery; and

**WHEREAS**, the partnership between TBC and Parks was memorialized in 2007, when TBC and Parks signed a license agreement with a term of ten (10) years and an option for renewals (hereinafter the (“M&O Agreement”). In 2010, TBC and Parks entered into a sole-source license agreement for the operation and maintenance of a food and beverage concession at Peter Minuit Plaza and to provide for the maintenance of Peter Minuit Plaza. In 2013, TBC and Parks also entered into a sole-source license agreement for operation, maintenance and repair and improvement of SeaGlass at The Battery with ancillary food, beverage, and merchandise concessions; and

**WHEREAS**, in Spring 2003, the Lower Manhattan Development Corporation awarded \$8.5 million for the building of The Battery Bosque. This award was part of the funding allocated in the wake of 9/11 by the Federal Government for downtown open space restoration. As part of this initiative, TBC funded the design, fabrication and installation of two food-service kiosks, designed by Claire Weisz and Mark Yoes of Weisz + Yoes Architecture (the “Kiosks”); and

**WHEREAS**, the Bosque Gardens at The Battery consist of a four-acre grove of trees adjacent to the waterfront promenade, consisting of nearly 60,000 square feet of perennial beds, granite seating wall, wood benches, a 40-foot diameter granite fountain, and soft surface paths for the benefit of the public (hereinafter the “Gardens”); and

**WHEREAS**, On June 1, 2006, Parks entered into a sole-source license agreement with TBC to provide for the operation and maintenance of the Kiosks within the Gardens, and to



provide for the maintenance of the Gardens (hereinafter the “2006 Bosque Kiosk Agreement”). The term was for five (5) years, with five (5) renewable one-year options, the last of which will expire on May 31, 2016. Under the 2006 Bosque Kiosk Agreement, in return for TBC’s maintenance of the Gardens at significantly greater cost than any revenue anticipated or realized from the Kiosks the City forewent a concession fee from the Kiosk license. These Kiosks serve visitors, residents, workers and tourists, and create revenue to support the care and maintenance of the surrounding areas; and

**WHEREAS**, Parks and TBC now wish to enter into a new sole-source license agreement similar to the 2006 Bosque Kiosk Agreement to provide for TBC’s continued operations and maintenance of maintenance of the Kiosks and to provide for the maintenance of the Gardens in accordance with the terms set forth herein;

**WHEREAS**, The Franchise and Concession Review Committee (“FCRC”) has authorized Parks to enter into a new sole-source license agreement with TBC, to provide for the operation and maintenance of the Kiosks within the Gardens and to provide for the maintenance of the Gardens (collectively referred to as the “Licensed Premises”) for the benefit of the public. A map of the Licensed Premises is attached hereto as Exhibit A and made a part hereof.

#### **ARTICLE 1: GRANT OF LICENSE**

**1.1** Parks hereby grants to TBC, and TBC hereby accepts from Parks, this License for the operation and maintenance of the Kiosk at the Licensed Premises. In lieu of a license fee, TBC shall provide, or cause to be provided, services for the maintenance and/or improvement (“Services”) of the Licensed Premises to the Commissioner’s reasonable satisfaction. Such Services shall include keeping and maintaining the Licensed Premises in good condition and repair, all in accordance with the provisions of this License. All such work will be under the supervision of the Director of Operations for TBC. It is currently estimated that the value of such Services could be up to \$213,000.00 per year. As more fully provided in Article 4 below, any profits that TBC receives from its sublicensee for the operation of the Kiosks or any other profit that it receives directly from operation of the Kiosks (“Annual Profits”) after the Cost Recovery Date shall be used by TBC for Services at the Licensed Premises. After the Cost Recovery Date, if Annual Profits exceed the lesser of (x) actual annual maintenance costs or (y) \$213,000.00 (the currently estimated annual cost of maintaining the Gardens), any excess funds will be paid by TBC directly to Parks for the City’s General Fund.

**1.2** For the purposes of the License Agreement, for the avoidance of doubt, any and all obligations of TBC as stated herein shall be strictly interpreted to require TBC to cause its sublicensee to perform those obligations when applicable subject to sublicense agreement approved pursuant to Article 14 of the Agreement. Notwithstanding any such sublicense, TBC shall remain responsible for any such obligations as between Parks and TBC.

**1.3** All plans, schedules, services, merchandise, prices and fees and hours of operation are subject to Parks’ prior written approval. TBC will be responsible for all costs associated with the operation and maintenance of the Licensed Premises.

**1.4** TBC shall obtain any and all approvals, permits, and other licenses required by Federal, State and City laws, rules, regulations and orders which are or may become necessary to operate and maintain the Kiosks and to provide for the maintenance of the Gardens. In order to comply with this License Agreement, TBC must fulfill all of the obligations contained herein.

**1.5** It is expressly understood that no land, building, space, or equipment is leased or otherwise conveyed to TBC by Parks, but that during the Term of this License, TBC shall have the use of the Licensed Premises for the purposes herein provided. Except as herein provided, TBC has the right to occupy and operate the Licensed Premises only so long as each and every term and condition in this License is complied with, and so long as the Commissioner does not terminate this License in accordance with the terms herein.

**1.6** TBC shall at all times provide full and free access to the Licensed Premises to the Commissioner or his representatives and to other City, State and Federal officials having jurisdiction, for inspection purposes and to ensure Parks' satisfaction with TBC's compliance with the terms of this License Agreement.

**1.7** TBC may use such name for the Licensed Premises or in connection with its operations at the Licensed Premises as shall be approved in advance in writing by Parks and upon such terms and conditions as shall be agreed to in writing by Parks. Parks shall be the owner of the portion of any new name selected by TBC for use at the Licensed Premises that indicates or refers to Parks property or a preexisting facility name. The City will not own any portion of a new name that consists of the name, portrait or signature of a living or deceased individual or a restaurant identifier that is not otherwise associated with Parks' property. All names used at the Licensed Premises or in connection with TBC's operations at the Licensed Premises must be consistent with the image of the City as well as the character and purposes of the Licensed Premises as a symbol of the City. In no event may a name, product name, logo, and/or corporate identifier used for or at any portion of the Licensed Premises or in connection with TBC's operations at the Licensed Premises be obscene, unlawful to use, or antithetical to the character of the Licensed Premises as a symbol of the City. Any name which the general public associates with tobacco products or alcoholic beverages shall be presumed to be so antithetical.

## **ARTICLE 2: DEFINITIONS**

**2.1** As used throughout this License, the following terms shall have the meanings set forth below:

**(a)** "City" shall mean the City of New York, its departments and political subdivisions.

**(b)** "Capital Improvements" shall mean all construction, reconstruction or renovation of the Licensed Premises. Capital Improvements also include all Alterations and "Additional Fixed Equipment," as that term is defined in Section 2.1(h) below, which the TBC installs or causes to be installed on the Licensed Premises. Capital Improvements shall not include routine maintenance and repair activities required to be performed in the normal course of management and operation of the Licensed Premises.

(c) "Commissioner" shall mean the Commissioner of the New York City Department of Parks & Recreation or his designee.

(d) "Comptroller" shall mean the Comptroller of the City of New York.

(e) "Gross Receipts" shall include, without limitation:

(i) "Gross Receipts" shall include all funds or receipts of any kind received by TBC, without deduction or setoff of any kind, from the sale of food and beverages or other merchandise or services at the Licensed Premises, from the licensing of the Licensed Premises for private functions, and from any related services of any kind, provided that Gross Receipts shall exclude (x) the amount of any federal, state or city sales taxes which may now or hereafter be imposed upon or be required to be collected and paid by TBC, (y) the amounts received by TBC in connection with the sale of inventory and equipment (other than Fixed and Additional Fixed Equipment) outside the ordinary course of TBC's business, and (z) all funds received from TBC's Special Events (including all funds received from all food service connected to said Special Events) as defined herein, provided that such funds from TBC's Special Events are used for the maintenance, operation and improvement of the Licensed Premises and the Battery. Gross Receipts shall include any funds received for orders placed or made at the Licensed Premises. Although delivery of merchandise or services may be made outside or away from the Licensed Premises, and shall include all receipts of TBC or orders taken at the Licensed Premises by TBC for services to be rendered by TBC in the future either at or outside of the Licensed Premises, excluding funds related to TBC's Special Events. For example, if TBC receives a \$1,000 deposit for services to be provided at a later date, the deposit must be reported at the time of payment, regardless of when the service is provided. All sales made or services rendered from the Licensed Premises shall be construed as made and completed therein even though payment therefor may be made at some other place, and although delivery of merchandise sold or services rendered upon the Licensed Premises may be made other than at the Licensed Premises.

(ii) All sales made by any other operator or operators using the Licensed Premises shall be made under a properly authorized sublicense or subcontract agreement, as provided in Article 14 herein. Further, Gross Receipts shall include TBC's income from rental and sublicense or subcontracting fees and commissions TBC receives in connection with all services provided by TBC's subcontractors or sublicensees.

(iv) All sales made for cash or credit (credit sales shall be included in Gross Receipts as of the date of the sale) regardless of whether the sales are paid or uncollected, it being the distinct intention and agreement of the parties that all sums due to be received by TBC from all sources from the operation of this License shall be included in Gross Receipts, provided however that any gratuities transmitted by TBC directly or indirectly to employees and staff shall not be included within Gross Receipts

(f) "Licensed Premises" shall mean the areas so denoted and described in **Exhibit A** attached hereto, and shall include the structures, as well as any improvements constructed thereon, including, without limitation, all buildings or structures, walkways, curbs, trees and landscaping.

(g) “TBC’s Special Events” shall mean any catered or private function (e.g. reservation of the Licensed Premises by TBC itself or through TBC by third parties) at the Licensed Premises, excluding “Parks’ Special Events” as defined in Article 13 of this Agreement. Subject to prior written approval from Parks, TBC may conduct special events or programs at the Licensed Premises. TBC shall submit to Parks for approval, all plans for any events or programs at the Licensed Premises, and in no event shall the Licensed Premises be closed to conduct private activities during public hours of use except when such activities are specifically approved or sponsored by Parks and such a closure has been announced to the public at least two weeks in advance of such activities or events. TBC shall document each Special Event via sequentially pre-numbered contracts that capture event information, including the time and date of the event, the number of attendees and required payment.

(h) "Fixed Equipment" shall mean any property affixed in any way to the Licensed Premises existing at the time Notice to Proceed is given, whose removal would damage the Licensed Premises.

(i) "Additional Fixed Equipment" shall mean Fixed Equipment affixed to the Licensed Premises subsequent to the date that Notice to Proceed is given, with the exception of any rides that are installed at the Licensed Premises subsequent to said Notice To Proceed date, provided, however, that any permanent support structures installed by TBC for such rides shall be considered Additional Fixed Equipment.

(ii) "Fixed and Additional Fixed Equipment" shall refer to Fixed Equipment and Additional Fixed Equipment jointly and severally.

(i) *Intentionally Omitted.*

(j) "Year" or "Operating Year" shall both refer to the period between the Commencement Date (or its anniversary in any year other than Year 1) and the day before the anniversary of such date in the immediately following calendar year.

(k) "Season" or "Operating Season" shall mean the period of operation within each Operating Year during which TBC operates the Licensed Premises as specified in Section 10.1(a).

(l) *Intentionally Omitted.*

(m) “Consumer Price Index” and “CPI” shall mean the Consumer Price Index for all urban consumers; all items indexed (C.P.I.-U.) for the New York, New York/Northeastern New Jersey area, by the United States Department of Labor, Bureau of Labor Statistics. In the event the index shall hereafter be converted to a different standard reference base or otherwise revised, the determination of the increase shall be made with the use of such conversion factor, formula or table for converting the index as may be published by the Bureau of Labor Statistics for the New York City geographic area. In the event the index shall cease to be published, then for the purpose of this License Agreement there shall be substituted for the index such other index as Parks and TBC shall agree upon.

(n) “CPI Adjustment” means an adjustment made by multiplying the dollar amount to be adjusted by a fraction, the numerator of which shall be the CPI for the calendar month prior to the month in which the adjustment is to occur, and the denominator of which shall be the CPI for the calendar month prior to the Commencement Date.

(o) “Substantial Completion” or “Substantially Complete” shall mean, with respect to an improvement at the Licensed Premises, that the New York City Department of Buildings (“DOB”) has issued a Temporary Certificate of Occupancy for the improvement or, if earlier, that the Commissioner certifies that an improvement to the Licensed Premises has been completed substantially in accordance with the plans, specifications, schematics, working and mechanical drawings approved by Parks, notwithstanding that minor work remains to be completed in accordance with work schedules provided for herein and/or set forth as incomplete items as provided for in Section 6.14 herein, and that the improvement may be utilized by the public.

(p) “Final Completion” or “Finally Complete” shall mean that the construction of an improvement to the Licensed Premises has been completed to such an extent that the Commissioner certifies in writing that it has been Finally Completed and that no further work is required by TBC pursuant to this License in connection with the construction of said improvement. Notwithstanding the issuance of any such certification, TBC shall be liable for any claims related to such construction and shall be responsible for any other obligations (including maintenance, repair and indemnity) set forth in this License Agreement.

(q) "Expendable Equipment" or "Personal Equipment" shall mean all equipment, other than Additional Fixed Equipment provided by TBC. All rides that are installed at the Licensed Premises by the TBC subsequent to the date of Notice to Proceed shall be considered Personal Equipment, except that any permanent support structures installed by TBC for such rides shall be considered Additional Fixed Equipment.

(r) "Alteration" shall mean (excepting ordinary repair and maintenance):

(i) any restoration (to original premises or in the event of fire or other cause), rehabilitation, modification, addition or improvement to Licensed Premises; or

(ii) any work affecting the plumbing, heating, electrical, water, mechanical, ventilating or other systems of the Licensed Premises.

### **ARTICLE 3: TERM OF LICENSE**

**3.1** The term (“Term”) of this License shall be five (5) years with five (5) renewable one (1) year option years, at Parks’ option, and shall commence on Parks’ giving written Notice to Proceed to Licensee (“Commencement Date”). Regardless of the Commencement date, the Term shall terminate upon the entry by Parks and TBC into a new M&O Agreement.

**3.2** Notwithstanding any language contained herein, this License is terminable at will by the Commissioner at any time. Such termination shall be effective after thirty (30) days’ written notice is sent to TBC. The Commissioner, the City, its employees and agents shall not be liable for damages to TBC in the event that this License is terminated by Commissioner as provided for herein.

**3.3** Parks may terminate this License for cause as follows:

(a) Should TBC breach or fail to comply in any material respect with any of the provisions of this License or any Federal, State or local law, rule, regulation or order affecting the License or the Licensed Premises with regard to any and all matters, Commissioner shall in writing order TBC to remedy such breach or comply with such provision, law, rule, regulation or order, and in the event that TBC fails to comply with such written notice or commence, in good faith and with due diligence, efforts to comply with such order within thirty (30) days from the mailing or facsimile transmission thereof, subject to unavoidable delays beyond the reasonable control of TBC, then this License shall immediately terminate. In the event such breach or failure to comply cannot be remedied within such thirty (30) day period due to reasons beyond TBC's control, the cure period shall be extended for such period as may be reasonably necessary in the Commissioner's judgment to cure such breach. If said breach or failure to comply is corrected, and a repeated violation of the same provision, law, rule, regulation or order follows thereafter, Commissioner, by notice in writing, may revoke and terminate this License, such revocation and termination to be immediately effective on the mailing thereof.

(b) The following shall constitute events of default for which this License may be terminated on one (1) days' notice: the appointment of any receiver of TBC's assets; the making of a general assignment for the benefit of creditors; the occurrence of any act which operates to deprive TBC permanently of the rights, powers and privileges necessary for the proper conduct and operation of this License; the levy of any attachment or execution which substantially interferes with TBC's operations under this License and which attachment or execution is not vacated, dismissed, stayed or set aside within a period of sixty days.

(c) Nothing contained in Sections (a) or (b) above shall be deemed to imply or be construed to represent an exclusive enumeration of circumstances under which Commissioner may terminate this License.

**3.4** Upon the expiration or sooner termination of this License by Commissioner, all rights of TBC herein shall be forfeited without claim for loss, damages, refund of investment or any other payment whatsoever against Commissioner, Parks or City.

**3.5** In the event Commissioner terminates this License for reasons related to Sections 3.3 above, any property of the TBC on the Licensed Premises may be held and used by Commissioner in order to operate the License until all indebtedness of the TBC hereunder, at the time of termination of this License, is paid in full.

**3.6** TBC agrees that upon the expiration or sooner termination of this License, it shall immediately cease all operations pursuant to this License and shall vacate the Premises without any further notice by City and without resort to any judicial proceeding by the City. Upon the expiration or sooner termination of this License, City reserves the right to take immediate possession of the Premises.

**3.7** Except as contemplated pursuant to Section 3.5 above, TBC shall, upon the expiration or thirty (30) days after the sooner termination of this License, remove all personal possessions from the Premises. TBC acknowledges that any personal property remaining on the Premises

after the expiration or after 30 days from the sooner termination of this License, if applicable, is intended by TBC to be abandoned. TBC shall remain liable to the City for any damages, including lost revenues and the cost of removal or disposal of property, should TBC fail to remove all possessions from the Premises during the time prescribed in this Agreement. Pursuant to Section 4.4 herein, City may seize so much of the Security Deposit as is appropriate to recover such damages. All obligations of TBC hereunder will remain in effect for so long as the TBC has personal possessions remaining on the Premises.

**3.8** If this License is terminated as provided herein, Parks may, without notice, re-enter and repossess the Licensed Premises using such force for that purpose as may be permitted by applicable law and is necessary without being liable to indictment, prosecution or damages therefor and may dispossess TBC by summary proceedings or otherwise, without court order or other judicial approval.

**3.9** If this License is terminated as provided in Section 3.3 hereof:

(a) Parks may draw down on the Security Deposit in accordance with Section 4.4; and

(b) Parks may complete all repair, maintenance and construction work required to be performed by TBC to the Licensed Premises hereunder and may repair and alter the Licensed Premises in such manner as Parks may deem necessary or advisable without relieving TBC of any liability under this License Agreement or otherwise affecting any such liability, and/or relicense the Licensed Premises or any portion thereof for the whole or any part of the remainder of the Term or for a longer period. Parks shall in no way be responsible or liable for any failure to relicense any portion(s) of the Licensed Premises or for any failure to collect any fees due on any such relicensing, and no such failure to relicense or to collect fees shall operate to relieve TBC of any liability under this License Agreement or to otherwise affect any such liability.

#### **ARTICLE 4: PAYMENT TO CITY**

**4.1** In lieu of a license fee, TBC shall provide, or cause to be provided, the Services, as contemplated in Article 1 above. "Eligible Services Costs" for such Services by TBC shall include the costs of materials, personnel, outside contractors, consultants and other goods and services and whether relating to maintenance, repair or improvement of the Licensed Premises (provided such activity has been undertaken in compliance with this Agreement and any other agreement from time to time between Parks and TBC), (including without limitation any costs for maintenance, repair or improvement to the Kiosks which may, under the sublicense, be the responsibility of its sublicensee, but in respect of which the sublicensee has defaulted in its obligation), but shall exclude (i) any allocation of TBC office rent or overhead, (ii) any portion of the salary of the President or development professionals employed by TBC, (iii) expenses or costs actually paid by its sublicensee (and as to which TBC does not owe any reimbursement), and (iv) any other cost, such as insurance, which is expressly stated to be a cost to be borne by TBC pursuant to this Agreement. Cost of any Capital Improvements by TBC only (not its sublicensee) at the Licensed Premises or any portion thereof, as described in Article 6 herein, may be deemed Eligible Service Costs at Parks option and provided that it in no way interferes with TBC's maintenance responsibilities as described herein.

**4.2** TBC shall apply any Annual Profits as follows:

(a) The final amount of the capital cost of construction and installation of the Kiosks shall be the “Construction Costs.” Until TBC has been reimbursed in full for the amount of such Construction Costs through receipt and retention of Annual Profits, TBC shall be entitled to retain 100% of all Annual Profits. The date on which TBC has been fully reimbursed for the Construction Costs shall be the “Cost Recovery Date”, and TBC shall promptly notify the Commissioner thereof. No later than thirty (30) days after the Cost Recovery Date, TBC shall provide Parks with a statement detailing reimbursement of Construction Costs as described in this subsection (a).

(b) For each Operating Year after the Cost Recovery Date, TBC shall be entitled to use the amount of the Annual Profits solely for the maintenance of the Licensed Premises during each such Operating Year equal to the lesser of (x) Eligible Services Costs for such Operating Year or (y) \$213,000.00 (which amount shall be increased each year by the percentage CPI increase for such year reported by the US Department of Commerce). No later than thirty (30) days after the end of an Operating Year, TBC shall deliver to the Commissioner, an accounting setting forth its calculation of Eligible Services Costs for the preceding Operating Year, in accordance with Article 13 herein.

(c) Any Annual Profits in such Operating Year in excess of the amount that TBC is entitled to retain pursuant to this Article 4 shall be paid to Parks for the City's General Fund.

**4.3** TBC shall provide the Services at the Licensed Premises as described herein, regardless of the availability of funding of Services.

**4.4** (a) Upon entering into a sublicense for the Kiosks, TBC shall or shall cause its sublicensee to deposit with the City \$10,000.00 as its security deposit ("Security Deposit"). This Security Deposit may be in the form of an interest bearing account or other format approved in writing by Parks. The City shall hold the Security Deposit without liability to pay interest thereon, as security for the full, faithful and prompt performance of and compliance with each and every term and condition of this License to be observed and performed by TBC. The Security Deposit shall remain with the City throughout the Term of this License.

(b) The City shall not be obligated to place or to keep cash deposited hereunder in interest-bearing bank accounts.

(c) If any fees or other charges or sums payable by TBC or sublicensee to the City shall be overdue and unpaid or should the City make payments on behalf of TBC or sublicensee, or should TBC or sublicensee fail to perform any of the terms of this then Parks may, at its option, and without prejudice to any other remedy which the City may have on account thereof, after five days' notice, appropriate and apply the Security Deposit or as much thereof as may be necessary to compensate the City toward the payment of license fees, late charges, liquidated damages or other sums due from TBC or sublicensee or towards any loss, damage or expense sustained by the City resulting from such default on the part of TBC or sublicensee. In such event, TBC or sublicensee shall restore the Security Deposit to the original sum deposited within five business days after written demand therefor. In the event TBC shall fully and faithfully



comply with all of the terms, covenants and conditions of this License and pay all License fees and other charges and sums payable by TBC or sublicensee to the City, the Security Deposit shall be returned to TBC or sublicensee upon the surrender of the Licensed Premises by TBC in compliance with the provisions of this License.

**4.5 (a)** On or before the thirtieth (30<sup>th</sup>) day following each month, TBC shall submit to Parks, a statement of Gross Receipts, signed and verified by an officer of TBC, reporting any Gross Receipts generated under this License Agreement during the preceding month.

## **ARTICLE 5: RIGHT TO AUDIT**

**5.1** Parks, the Comptroller and other duly authorized representatives of the City shall have the right to examine or audit the records, books of account and data of the TBC for the purpose of examination, audit, review, or any purpose they deem necessary. Parks, Comptroller or other duly authorized representatives of the City shall be permitted to inspect any equipment used by TBC, including, but not limited to point of sale records, and all reports or data generated from or by the point of sale system.

TBC shall cooperate fully and assist Parks, the Comptroller or any other duly authorized representative of the City in any examination or audit thereof. If TBC's books and records, including supporting documentation, are situated at a location 50 miles or more from the City, the records must be brought to the City for examination and audit or TBC must pay the food, board and travel costs incidental to two (2) auditors conducting such examination or audit at said location.

**5.2** TBC's failure or refusal to permit Parks, the Comptroller or any other duly authorized representative of the City to audit and examine the TBC's records, books of account and data or the interference in any way by the TBC in such an audit or examination is presumed to be a failure to substantially comply with the terms and conditions of this License and a default hereunder which shall entitle Parks to terminate this License.

**5.3** Notwithstanding the foregoing, the parties hereto acknowledge and agree that the powers, duties, and obligations of the Comptroller pursuant to the provisions of the New York City Charter shall not be diminished, compromised or abridged in any way.

## **ARTICLE 6: CAPITAL IMPROVEMENTS**

**6.1** TBC shall have no obligation to make or provide, including no obligation to provide any payments or financing for, any further capital improvements to all or any portion of the Premises other than with respect to any repairs or replacements that TBC is required to provide in accordance with this Agreement. However, TBC may elect to make Capital Improvements at the Premises subject to Parks prior written approval. In the event of any such Capital Improvement at the Premises, to the extent required by Article 5 of the New York State Lien Law, to guarantee prompt payment of moneys due to a contractor or his or her subcontractors and to all persons furnishing labor and materials to the contractor or his or her subcontractors in the prosecution of any Capital Improvement Project (as defined below) with an estimated cost exceeding two hundred fifty thousand dollars (\$250,000), TBC (or a contractor on its behalf) shall post a payment bond or other form of undertaking reasonably approved by Parks in the amount

reasonably required by Parks before commencing such work. Such bond or other undertaking shall be in a form reasonably acceptable to Parks. For purposes of this provision, a “Capital Improvement Project” shall mean a set of capital improvements that are made by TBC pursuant to this Agreement and that are reasonably related in time and purpose as determined by Parks in its sole reasonable discretion.

**6.2** For any Capital Improvements that TBC commences at the License Premises, TBC shall apply for applicable licenses from Parks’ Revenue Division prior to commencement of work. TBC shall commence Capital Improvements only after the issuance of a construction license from Parks and a building permit issued by the DOB, insofar as it has jurisdiction over Capital Improvements. TBC shall also, prior to commencing work, obtain all other necessary governmental approvals, permits, and licenses. TBC will also be responsible for obtaining, amending and complying with the Certificate of Occupancy, sign-offs, public assembly permits, Department of Health and Mental Hygiene (“DOHMH”) permits, fire department certificates and all other permits including, but not limited to, New York City Department of Environmental Protection (“DEP”), New York State Department of Environmental Conservation and/or other government agency approvals and permits necessary for any alterations to the existing premises. TBC shall notify Commissioner of the specific date on which construction shall begin.

**6.3** TBC shall perform all Capital Improvements in accordance with all applicable federal, state, and City laws, rules, regulations, orders, and industry standards, and with materials as set forth in the approved plans, specifications, schematics, working and mechanical drawings. All equipment and materials installed as part of the Capital Improvements shall be new or like-new, free of defects, of high grade and quality, suitable for the purpose intended and furnished in ample quantities to prevent delays. TBC shall obtain all commercially reasonable manufacturer’s warranties and guarantees for all such equipment and materials, as applicable, and shall assign same to the City with respect to any portion of the TBC’s Capital Improvements when and if the City exercises its option to take title to such equipment and material, as may be requested by the City from time to time. TBC shall execute and deliver to the City any documents reasonably requested by the City in order to enable the City to enforce such guaranties and warranties. All of the City’s rights and title and interest in and to said manufacturers’ warranties and guaranties may be assigned by the City to any subsequent licensees of the Licensed Premises.

**6.4** As required by Section 24-216 of the New York City Administrative Code, devices and activities which will be operated, conducted, constructed or manufactured pursuant to this License and which are subject to the provisions of the New York City Noise Control Code (the “Code”) shall be operated, conducted, constructed or manufactured without causing a violation of such Code. Such devices and activities shall incorporate advances in the art of noise control developed for the kind and level of noise emitted or produced by such devices and activities, in accordance with regulations issued pursuant to federal, state, and City laws, rules, regulations and orders.

**6.5** Unless otherwise provided, TBC shall choose the means and methods of completing the Capital Improvements unless Commissioner reasonably determines that such means and methods constitute or create a hazard to the Capital Improvements or to persons or property or will not produce finished Capital Improvements.

**6.6** No temporary storage or other ancillary structures and staging areas may be erected and maintained at the Licensed Premises without Parks' prior written approval and all other agencies having jurisdiction.

**6.7** TBC is prohibited from cutting down, pruning or removing any trees on the Licensed Premises without Parks' prior written approval. Any attachments to the trees, such as lights, will not be permitted.

**6.8** During performance of the Capital Improvements and up to the date of Final Completion, TBC shall be responsible for the protection of the finished and unfinished Capital Improvements against any damage, loss or injury. In the event of such damage, loss or injury, TBC shall promptly replace or repair such Capital Improvements at its sole cost and expense.

**6.9** TBC shall provide written notice to Commissioner when the Capital Improvements are Substantially Completed. After receiving such notice, Commissioner shall inspect such Capital Improvements. After such inspection Commissioner and TBC shall jointly develop a single final list of incomplete and outstanding items incorporating all findings from such inspection concerning all work not completed to the satisfaction of the Commissioner. TBC shall proceed with due diligence to complete all items on that list within a reasonable time as determined by the Commissioner.

**6.10** TBC, within three (3) months of Substantial Completion, shall furnish the Commissioner with a certified statement, issued by TBC, detailing the actual costs of construction. Accompanying such statement shall be construction documents, bills, invoices, labor time books, accounts payable, daily reports, bank deposit books, bank statements, checkbooks and canceled checks. TBC shall maintain accurate books and records of account of construction costs, which shall be segregated from other accounts, and shall itemize and specify those costs attributable to the Licensed Premises to permit audit by Parks or the New York City Comptroller upon request.

**6.11** TBC shall provide Parks with discharges for any and all liens which may be filed or levied against the Capital Improvements during construction of such improvements. TBC shall use its best efforts to discharge such liens within thirty (30) business days of receipt of lien by TBC. Upon Final Completion (as defined in Article 2) of all Capital Improvements, Parks shall return to TBC the unused balance of any construction security provided to the City.

**6.12** TBC shall promptly repair, replace, restore, or rebuild, as the Commissioner reasonably may determine, items of Capital Improvements in which defects in materials, workmanship or design may appear or to which damages may occur because of such defects, during the one year period subsequent to the date of the Final Completion of such Capital Improvements.

**6.13** Neither Parks, nor the City, nor the agencies, officers, agents, employees or assigns thereof shall be bound, precluded or estopped by any determination, decision, approval, order, letter, payment or certificate made or given under or in connection with this License by the City, the Commissioner, or any other officer, agent or employee of the City, before the Final Completion and acceptance of the Capital Improvements, from showing that the Capital Improvements or any part thereof do not in fact conform to the requirements of this License and

from demanding and recovering from the TBC such damages as Parks or the City may sustain by reason of TBC's failure to perform each and every part of this License in accordance with its terms, unless such determination, decision, approval order, letter, payment or certificate shall be made pursuant to a specific waiver of this Section 6.18 signed by the Commissioner or his authorized representative.

**6.14** Upon installation, title to all construction, renovation, improvements, and fixtures made to the Licensed Premises, including all furnishings, finishes and equipment accepted by Parks as Capital Improvements, shall vest in and thereafter belong to the City at the City's option. Such option which may be exercised at any time after the Substantial Completion of their construction, renovation, improvement, affixing, placement or installation. The City shall not take title to any rides that are installed at the Licensed Premises by the TBC subsequent to the date of Notice to Proceed, but the City may take title to any permanent support structures installed by TBC for such rides. To the extent the City chooses not to exercise its option with respect to any of the construction, renovation, improvements, equipment or fixtures made to the Licensed Premises, it shall be TBC's responsibility at the expiration or sooner termination of this License, to remove its equipment (other than Additional Fixed Equipment) and restore the Licensed Premises to the Commissioner's satisfaction at TBC's the sole cost and expense. However, TBC shall not under any circumstances be required to remove heating, plumbing, air conditioning, electrical wiring, elevators, windows and ventilation fixtures.

**6.15** Prior to the commencement of any construction, TBC shall have an asbestos inspection performed on the existing structures at the Licensed Premises to the extent required by DOB or other applicable authority. In the event that asbestos removal is deemed necessary, TBC will remove the asbestos according to City, State and Federal regulations.

## **ARTICLE 7: ALTERATIONS**

**7.1** (a) TBC may alter the Licensed Premises only in accordance with the requirements of subsection (b) below of this Article. Alterations upon attachment, installation or affixing shall become the City's property at its option.

(b) To alter Licensed Premises, TBC must:

(i) obtain Commissioner's written approval for whatever designs, plans, specifications, cost estimates, agreements and contractual understandings may pertain to contemplated purchases and/or work;

(ii) ensure that work performed and Alterations made on the Licensed Premises are undertaken and completed in accordance with submissions approved pursuant to subsection (i) above of this Article, in a good and workman like manner, and within a reasonable time; and

(iii) notify Commissioner of completion of, and the making final payment for, any Alteration within ten (10) days after the occurrence of said completion or final payment.

(c) Commissioner may, in his discretion, make repairs, alterations, decorations, additions or improvements to Licensed Premises at the City's expense, but nothing herein shall

be deemed to obligate or require Commissioner to make any repairs, Alterations, decorations, additions, or improvements, nor shall this provision in any way affect or impair TBC's obligation herein in any respect.

#### **ARTICLE 8: FIXED AND EXPENDABLE EQUIPMENT**

**8.1** TBC shall, at its sole cost and expense and to the Commissioner's reasonable satisfaction provide, and replace if necessary, all equipment and materials necessary for the successful operation of this License, and put, keep, repair, preserve and maintain in good order all equipment found on, placed in, installed in or affixed to the Licensed Premises.

**8.2** City has title to all Fixed Equipment on the Premises as of the date of issuing the Notice to Proceed. Unless otherwise provided herein, title to any Additional Fixed Equipment and to all construction, renovation, or improvements made to the Licensed Premises shall vest in and belong to the City at the City's option, which option may be exercised at any time after the substantial completion of the affixing of said equipment or the substantial completion of such construction, renovation or improvement. To the extent the City chooses not to exercise such option, it shall be TBC's responsibility at its sole cost and expense to remove such equipment and restore the Licensed Premises to the Commissioner's satisfaction to a condition as good as or better than at the commencement of the Term.

**8.3** TBC shall supply at its own cost and expense all Expendable Equipment required for the proper operation of this License, and repair or replace same at its own cost and expense when reasonably requested by Commissioner. This equipment may include, but is not limited to kitchen equipment, non-Fixed cooking equipment, security cameras, office furniture, tables and chairs, and computers. TBC must acquire and use for the purpose intended any Expendable Equipment which the Commissioner reasonably determines is necessary to the operation of this License.

**8.4** TBC must acquire, replace or repair, install or affix, at its sole cost and expense, any equipment, materials and supplies required for the proper operation of the Licensed Premises as described herein or as Commissioner reasonably requires.

**8.5** Title to all Expendable Equipment obtained by TBC (other than that applied toward Capital Improvements) shall remain in TBC and TBC shall be remove such equipment at the termination or expiration of this License. In the event such equipment remains in the Licensed Premises following such termination or expiration, Commissioner, after the expiration or after 30 days from the sooner termination of this License, may treat such property as abandoned and charge all costs and expenses incurred in the removal thereof to TBC.

**8.6** TBC acknowledges that it is acquiring this License to use the Licensed Premises and Fixed Equipment thereon solely in reliance on its own investigation, that no representations, warranties or statements have been made by the City concerning the fitness thereof, and that by taking possession of the Licensed Premises and Fixed Equipment, TBC accepts them in their present condition "as is."

**8.7** The equipment to be removed by TBC pursuant to this License Agreement shall be removed from the Licensed Premises in such a way as shall cause no damage to the Licensed Premises. Notwithstanding its vacating and surrender of the Licensed Premises, TBC shall remain liable to City for any damage it may have caused to the Licensed Premises, normal wear and tear excepted.

#### **ARTICLE 9: UTILITIES**

**9.1** Parks makes no representations regarding the adequacy of utilities currently in place at the Licensed Premises. TBC will be required to connect to and/or upgrade any existing utility service or create a new utility system, and obtain the appropriate permits and approvals. This includes, to the extent such a meter and/or submeter is not in place, establishing a dedicated meter and/or submeter that captures utility usage on the licensed premises and an account with the appropriate service providers. TBC will be required to pay for any and all utility costs connected with its operation of this concession during the Term. These utility costs include, but are not limited to, paying all water and sewer charges that DEP assesses for water usage. TBC shall adhere to all DEP directives and restrictions regarding drought and water conservation issues during the Term.

#### **ARTICLE 10: OPERATION OF THE KIOSKS**

**10.1 (a)** TBC shall operate the Kiosks for the accommodation of the public and in such manner as the Commissioner shall reasonably prescribe and as permitted by the laws, rules, regulations and orders of government agencies having jurisdiction. TBC shall accept the Kiosks in its "as-is" condition. TBC shall provide the necessary number of personnel having the requisite skills together with the necessary personal equipment and consumable supplies and shall perform the following services at the Licensed Premises:

**(i)** operate the Kiosks; and

**(ii)** continuously perform such ongoing and preventive maintenance activities necessary to maintain the Kiosks in good order and repair, as required by this Agreement, and as consistent with prevailing professional and industry or trade standards.

**(b)** TBC shall comply with applicable safety guidelines and federal, state and City laws, rules and regulations related to its operation and maintenance of the Kiosks. TBC shall, at its sole cost and expense, obtain, possess and display prominently at the Kiosks all approvals, permits, licenses, and certificates (including amendments thereto) that may be required for the operation and maintenance of the Kiosks in accordance with all applicable Federal, State, and City laws, rules and regulations. TBC shall operate and occupy the Kiosks in accordance with all applicable law and shall, at its sole cost and expense, obtain all approvals, licenses, permits and certificates (including amendments thereto) that may be required to operate the Kiosks in accordance with applicable law, including any necessary Certificate(s) of Occupancy. TBC shall at all times operate the Kiosks in accordance with the provisions of any required licenses or permits.

**(c)** TBC shall notify the Commissioner within five (5) business days whenever TBC or its sublicensee tentatively schedules any private use of the Kiosks (e.g., private parties) which

would close the Kiosks to the general public. In no event shall TBC or its sublicensee close the Kiosks to conduct private activities during public hours of use except when such activities are specifically approved or sponsored by Parks. Any closure of the Kiosks that TBC or its sublicensee seeks to schedule during public hours of use must be announced to the public, by posting notification of such closure, at the Kiosks at least five (5) business days in advance.

(d) TBC shall submit to Commissioner for his prior reasonable approval, not less than sixty (60) days before the first day of each “Operating Year” (which shall hereinafter refer to the period between the Commencement Date of this License in any calendar year and the day before the anniversary of said execution date in the following calendar year), schedules for the coming Operating Year concerning operating days and hours, and proposed schedule of prices for the services and products to be provided at the Kiosks during the forthcoming Operating Year. TBC shall be required to have a sufficient number of staff available at the Kiosks during regular operating hours to ensure safe and proper operation of the facility and such staffing plan shall also be subject to Parks’ prior written approval. Parks reserves the right to require all staff to wear uniforms that have been approved in writing by Parks.

(e) Following approval of such schedules, TBC shall at its sole cost and expense, print, frame, and prominently display in a place and manner designated by Commissioner, the current approved schedule of operating days, hours, prices.

**10.2** (a) Smoking and the use of electronic cigarettes anywhere on the Kiosks is strictly prohibited.

(b) Additionally, TBC shall not use in its operations any polystyrene packaging or food containers.

(c) TBC is prohibited from selling any beverages in glass bottles. All beverages shall be dispensed in non-glass, shatter-proof containers.

(d) TBC shall adhere to and enforce the prohibitions contained in this Article

**10.3** TBC shall maintain equipment at quality levels that meet or exceed Parks’ standards. TBC shall operate its Kiosk operations in such a manner as to maintain the highest New York City Department of Health inspection rating.

**10.4** TBC shall provide accessibility throughout the Kiosks in compliance with the Americans with Disabilities Act (“ADA”). Compliance shall include, without limitation, installation of ramps as needed, and providing ADA-compliant signage.

**10.5** TBC shall employ an operations manager (“Manager”) possessing appropriate qualifications to manage operations at the Kiosks in a manner that is reasonably satisfactory to Commissioner. The Manager must be available by telephone during all hours of operation, and TBC shall continuously notify the Commissioner and the Parks Enforcement Patrol Communications Division of a 24-hour pager or cellular telephone number through which Parks may contact the Manager in event of an emergency. TBC shall require that its sublicensee replace any Manager, employee, subcontractor whenever reasonably demanded by

Commissioner.

**10.6** TBC shall provide equipment which will provide security for all monies received by it. TBC shall provide for the transfer of all monies collected to TBC's banking institution. TBC shall bear the loss of any lost, stolen, misappropriated or counterfeit monies derived from operations under this License.

**10.7** TBC, at its sole cost and expense, shall provide, hire, train, supervise and be responsible for the acts of all personnel necessary to fulfill its obligations under this License, including but not limited to:

- (a) collecting and safeguarding all monies generated under this License;
- (b) maintaining the Kiosks; and
- (c) conducting and supervising all activities to be engaged in by TBC or TBC's invitees upon the Kiosks.

**10.8** TBC shall, at its sole cost and expense, be responsible for all security at the Kiosks year round and shall provide a twenty-four hour per day security system at the Kiosks in accordance with plans that have received the prior written approval of Parks. TBC shall secure the Kiosks and equipment every evening.

**10.9** TBC shall prepare and provide to Parks, on a regular basis and in a format reasonably acceptable to the Commissioner, operational status reports and reports of major accidents or unusual incidents occurring on the Kiosks. TBC shall promptly notify Parks, in writing, of any claim for injury, death, property damage or theft which shall be asserted against TBC with respect to the Kiosks. TBC shall also designate a person to handle all such claims, including all insured claims for loss or damage pertaining to the operations of the Kiosks, and TBC shall notify Parks in writing as to said person's name and address.

**10.10** TBC shall promptly notify Commissioner of any unusual conditions that may develop in the course of the operation of this License such as, but not limited to, fire, flood, casualty and substantial damage of any character.

**10.11** TBC shall maintain close liaison with the Parks Enforcement Patrol and New York City Police Department. TBC shall cooperate with all efforts to enforce Parks Rules and Regulations at the Kiosks and adjacent areas. TBC shall use its best efforts to prevent illegal activity on the Kiosks.

**10.12** TBC may establish an advertising and promotion program, subject to Parks' prior written approval. TBC shall have the right to print or to arrange for the printing of programs or brochures containing any advertising matter except advertising matter which in the sole discretion of the Commissioner is indecent, in obvious bad taste, which demonstrates a lack of respect for public morals or conduct, or which adversely effects the reputation of the Kiosks, Parks, or the City of New York. TBC may release news items to the media as it sees fit. If the



Commissioner in his sole discretion, however, finds any advertising or other releases to be unacceptable, then TBC shall cease or alter such advertisements or releases as directed by the Commissioner. The Commissioner shall have prior approval as to design and distribution of all advertising and promotional materials.

**10.13 (a)** Any sign posted at the Kiosks, shall be subject to the Commissioner's approval, shall be appropriately located, and shall state that the Kiosks are a New York City Parks & Recreation concession operated by the TBC. The placement and design of all signage, including signage which includes TBC's name, trade name(s), and/or logo(s), is subject to Parks' prior written approval.

**(b)** Under no circumstances shall TBC be permitted to place advertisements on the exterior of its concession area or on any building or structure on the Kiosks. All advertising utilized at the Kiosks is subject to Parks' prior written approval. TBC shall not advertise any product brands without Parks' prior written approval. TBC is prohibited from displaying, placing or permitting the display or placement of advertisements in the Kiosks without Parks' prior written approval.

**(c)** The selling and/or advertisement of, cigarettes, cigars, any other tobacco products, and electronic cigarettes is prohibited. TBC will be required to adhere to and enforce this policy. The following standards will apply to all allowed advertising: Any type of advertising which is false or misleading, which promotes unlawful or illegal goods, services or activities, or which is otherwise unlawful, including but not limited to advertising that constitutes the public display of offensive sexual material in violation of Penal Law Section 245.11, shall be prohibited. Any prohibited material displayed or placed shall be immediately removed by the TBC upon notice from Parks at TBC's sole cost and expense.

**10.14** Wine and/or beer may be served to complement the food service, provided that the TBC obtains the appropriate license(s) from the State Liquor Authority (SLA). Wine and/or beer may only be served in the immediate vicinity of the Kiosks and/or in a cordoned-off area if exterior seating is proposed and must be consumed on the Licensed Premises within designated areas. All efforts must be made to keep alcohol consumption discreet. The TBC must keep in mind that this is a public park and the consumption of alcohol should be encouraged only as an accompaniment to the cuisine.

**10.15** TBC shall, at its sole cost and expense, post throughout the Kiosks such signs as may be necessary to direct patrons to its services and facilities. Such signs shall include the necessary wording and arrows to direct patrons to TBC's attendants. If TBC contemplates placing any signs off-site, such as on nearby highways or streets, TBC shall be responsible for obtaining any necessary approvals or permits from any governmental agency having jurisdiction over such highways, streets or locations. The design and content of all such signs, whether on or off Parks' property, are subject to Commissioner's prior written approval.

**10.16** TBC must obtain Parks' prior written approval prior to entering into any marketing or sponsorship agreement. In the event TBC breaches this provision, TBC shall take any action that the City may deem necessary to protect the City's interests.

**10.17** Should Commissioner determine that TBC is not operating the Kiosks in a satisfactory manner, Commissioner may in writing order TBC to improve operations or correct such conditions as Commissioner may deem unsatisfactory. In the event that TBC fails to comply with such written notice or respond in a manner reasonably satisfactory to Commissioner within the reasonable timeframe set forth in said notice, subject to unavoidable delays beyond TBC's reasonable control, notwithstanding any other provisions herein, then Commissioner may terminate this License.

**10.18** Should Commissioner, in Commissioner's sole judgment, determine that an unsafe or emergency condition exists on the Kiosks, after written notification, TBC shall have 24 hours to correct such unsafe or emergency condition. During any period where the Commissioner determines that an unsafe or emergency condition exists on the Kiosks then the Commissioner may require a partial or complete suspension of operation in the area affected by the unsafe or emergency condition. If TBC believes that such unsafe or emergency condition cannot be corrected within said period of time, the TBC shall notify the Commissioner in writing and indicate the period within which such condition shall be corrected. Commissioner, in Commissioner's sole discretion, may then extend such period of time in order to permit TBC to cure, under such terms and conditions as appropriate.

**10.19** TBC shall not use or permit the storage of any illuminating oils, oil lamps, turpentine, benzene, naphtha, or similar substances or explosives of any kind or any substances or items prohibited in the standard policies of insurance companies in the State of New York.

**10.20** TBC's operations at the Kiosks shall be in accordance with all applicable Fire Department Codes.

**10.21** The outdoor seating at the Kiosks, if any, must be arranged so that pedestrian traffic is not unreasonably inhibited. The number and the configuration of tables, table umbrellas, and chairs shall be subject to Parks' approval. Advertising (other than in a form identifying The Battery or TBC approved by the Commissioner for general use with the Park) on the umbrellas is strictly prohibited. In addition, TBC may, subject to Parks' prior approval, arrange restricted areas for the consumption of wine and beer. The location, design and number of tables and chairs within this cordoned-off area are subject to Parks' approval. Further, except for the cordoned off area, the public must have free and open access to the seating areas. All such tables and chairs must be secured by TBC no later than 11:00 p.m. each day.

**10.22** Inspectors from Parks will visit the Kiosks unannounced to inspect operations and ensure proper maintenance of the Premises. Based on their inspections, if TBC fails to provide the cleaning, maintenance, and operational services required by this License agreement, Parks shall notify TBC in writing, and TBC shall be required to correct such shortcomings within the timeframe set forth in such notice. If TBC fails to cure the violations within the timeframe set forth in the notice, Parks may, at its option, in addition to any other remedies available to it, require TBC to pay to Parks as liquidated damages Five Hundred Dollars (\$500.00) per day from the date of the notice, with respect to each violation of the License, until the shortcomings have been corrected. Liquidated damages, if not paid promptly, may be deducted from the Security Deposit. The schedule of damages is set forth below.

<b>PROVISION</b>	<b>LIQUIDATED DAMAGES PER OCCURENCE</b>
Unauthorized Menu Items or Merchandise	\$150
Missing or Unauthorized Price List	\$250
Overcharging	\$350
Expanding	\$350
Blocked Exits	\$350
Improper Disposal (noxious liquids, debris, etc.)	\$350
Damaged equipment or structure(s)	\$350
Unauthorized Advertising	\$350
Improper Storage	\$350
Graffiti or Dirty Facility and/or Equipment	\$350
Operating without applicable permit(s) or license(s)	\$350
311 sign not displayed	\$250

If TBC receives an assessment of liquidated damages for one of the above violations, there is a process by which the assessment may be appealed if TBC feels that the assessment has been assessed in error. The procedure is outlined below:

### **1. Filing an Appeal**

- A. If TBC wishes to appeal the assessment, a notice of appeal must be delivered to Parks within ten (10) days along with a statement of reasons why it believes the assessment was erroneous. The statement of reasons must be notarized. Any evidence supporting TBC's appeal (such as photographs, documents, witness statements, etc.) should also be included.

- B.** If no appeal is received within 10 days of the date the assessment is mailed, the assessment shall be considered final and charged to TBC's account.

## **2. Adjudication of Appeal**

- A.** The appeal shall be sent to the Director of Operations Management & Planning, whose office is located at the Arsenal, 830 Fifth Avenue, New York, NY 10065. The Commissioner has designated the Director of Operations Management & Planning to decide on the merits of these appeals. The decision of the Director of Operations Management & Planning shall constitute the final decision of Parks.
- B.** The Director of Operations Management & Planning is authorized to investigate the merits of the appeal, but is not required to hold a hearing or to speak to TBC in person.

**10.23** TBC recognizes that this License Agreement does not grant TBC or its vendors exclusive rights to sell in the park in which the Kiosks are located. Moreover, Parks may grant other licenses or permits to vendors to sell the same or similar items authorized under this License Agreement within the same park as that in which the Kiosks are located. Parks does not guarantee that illegal vendors, persons unauthorized by Parks or disabled veteran vendors will not compete with TBC or operate near the Kiosks. Parks encourages TBC to report illegal vendors by calling 311.

**10.24** Parks makes no representations that there is adequate storage space at the Kiosks. TBC shall be responsible, at its sole cost and expense, for obtaining any additional storage space required for the operation of the concession granted hereby. TBC shall not store any equipment or supplies at the Kiosks without the prior written approval of Parks. No item shall be placed upon any public space, including the ground adjacent to the Kiosks without Parks' prior written approval. TBC will be required to store all outdoor equipment on a nightly basis and anytime the Kiosks is closed. TBC acknowledges that there is no provision for on-site parking for TBC or its vendors or employees. No trucks or storage containers may be parked in the park. TBC is responsible for finding off-site parking for TBC and its vendors, employees and invitees.

**10.25** TBC may also sell, and/or sublicense the sale of, merchandise subject to Parks prior written approval; however, TBC recognizes that the City is the trademark owner of various marks and has licensed the use of those trademarks for use on certain designated merchandise. If TBC wants to sell, or sublicense the sale of, merchandise that uses the City's trademarks, TBC shall purchase such merchandise and/or require its sublicensees to purchase such merchandise from authorized licensees of the City. Parks will not permit the sale of merchandise promoting musicians, entertainers, sports figures, cartoon characters, commercial products or non-park-related events. All prices, and the kinds of merchandise to be sold, are subject to Parks approval.

The knowing sale of counterfeit or unlicensed merchandise by TBC and/or any sublicensee at the Kiosks will result in the immediate termination of this License Agreement.

**10.26** If practicable and requested by Parks, TBC shall make reasonable efforts to conduct customer and vendor satisfaction surveys to assist TBC to improve its operations pursuant to this License.

**10.27** TBC shall comply with all laws, rules and regulations of appropriate agencies, specifically DEP, regarding noise levels, and TBC shall be responsible for payment of any and all fees or royalties to the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), or such other entity as they may require for music or music programming. TBC may operate and play sound equipment and music only at a sound level reasonably acceptable to the Commissioner. Any musical programming or other types of entertainment must be approved by Parks. A cabaret license will be strictly prohibited at the Kiosks.

**10.27** TBC is responsible for providing safe lighting throughout the Kiosks. TBC shall make its best efforts replace lamps after lamp outages within ten (10) days of the reported outage.

**10.28** Licensee shall comply with the Earned Sick Time Act, also known as the Paid Sick Leave Law, as a concessionaire of the City of New York as set forth in the Paid Sick Leave Law Contract Rider annexed hereto as **Exhibit C**.

**10.29** All requirements in this Article 10 relating to operation of the Kiosks shall apply to TBC's sublicensee, or to any direct operation by TBC, as the case may be.

#### **ARTICLE 11: MAINTENANCE, SANITATION AND REPAIRS**

**11.1** TBC shall, at its sole cost and expense (or through arrangements with third parties) operate, and maintain the Licensed Premises in good and safe condition and in accordance with industry standards. This includes, but is not limited to, the maintenance and repair of the entire Licensed Premises, all interior and exterior structures, restrooms, building systems, utility systems and connections, sewer systems and connections, equipment, lighting, sidewalks, paved areas, vaults, gutters, curbs and fixtures.

**11.2** TBC shall maintain the Licensed Premises to the Commissioner's satisfaction. TBC shall perform all such maintenance in a good and worker-like manner. In part to secure TBC's obligation to maintain and repair the Kiosks at the Licensed Premises, TBC's sublicensee has provided Parks with a Security Deposit as provided in Section 4.4(a). TBC shall ensure that the entire Licensed Premises is swept and cleared of debris as often as required to maintain a clean facility, but in any event not less than twice daily. TBC shall ensure that restrooms are cleaned regularly throughout the day when the Licensed Premises are in operation, and are monitored constantly by TBC personnel in order to maintain them in a sanitary and presentable condition.

**11.3** At Parks' prior written request, TBC shall conduct site inspections at the Licensed Premises with a representative of Parks during usual business hours. Such inspections shall assess the condition of the Licensed Premises, and determine the nature and extent of repairs to be performed by TBC. TBC shall make all necessary repairs during the Term.

**11.4** TBC shall be responsible for, at its sole cost and expense, clean-up and removal of all snow, and clean-up of all waste, garbage, refuse, rubbish and litter from the Licensed Premises and the area within fifty (50) feet of the Licensed Premises. TBC shall provide easily accessible, adequate waste and recycling receptacles, approved by Parks and have these receptacles emptied on a daily basis and removed by a private carter. The location and placement of all waste and recycling receptacles is subject to Parks' prior written approval. Parks shall provide for the regular removal of trash and compacted material.

**11.5** At the expiration or sooner termination of this License, TBC shall turn over the Licensed Premises and the Fixed and Additional Fixed Equipment to Parks in a state of good repair, ordinary wear and tear excepted.

**11.6** TBC shall keep all signs and structures in good condition and and free of graffiti. TBC shall remove any and all graffiti that may appear on the buildings and structures on the Licensed Premises. Such graffiti removal shall be commenced if practicable, within twenty-four hours from the appearance of any such graffiti and shall continue until such graffiti is removed.

**11.7** TBC shall conduct regular pest control inspections and extermination, as needed. Pest control methods chosen by TBC shall be subject to Parks' approval. To the extent TBC applies pesticides to the Licensed Premises, TBC, or any subcontractor hired by TBC, shall comply with Chapter 12 of Title 17 of the New York City Administrative Code and limit the environmental impact of its pesticide use.

**11.8** During the Term TBC shall maintain and improve the landscaping at the Licensed Premises. This shall include, but is not limited to, performing any seeding, trimming, pruning, planting, fertilization, terrain shaping, and soil improvements. In addition, Parks requires that any trees on the Licensed Premises be pruned as needed. TBC shall submit detailed plans to Parks of all horticultural and landscaping work to be performed. All work to be performed at the Licensed Premises is subject to Parks' prior written approval. In addition, TBC shall obtain all necessary permits, approvals, and authorizations from all City, State, and Federal agencies having jurisdiction over the Licensed Premises before any work is performed, and such work shall be of a quality which meets Parks' standards. TBC shall obtain Parks' approval, which approval shall not be unreasonably withheld or delayed, before adding or removing any planting or other landscaping at or associated with the Licensed Premises. TBC shall not cut down, prune or remove any trees on the Licensed Premises without prior written approval from Parks. Any attachments to the trees, such as lights, will not be permitted.

**11.9** TBC shall clean, maintain, and stock all necessary supplies at the Licensed Premises, including public or employee restrooms, if any.

**11.10** TBC shall clean all drains, sewers and catch basins shall be regularly to prevent clogging.

**11.11** Repairs shall include but are not be limited to, the following:

(a) Benches or other seating: Replace broken or missing bench slats and paint benches, except for those on sidewalks, as needed.

(b) Pavements: All paved surfaces shall be maintained in a safe and attractive condition. To the extent feasible, replacement materials shall match existing materials.

(c) Facilities: All recreation facilities, equipment, and concessions. Areas that are located in the Licensed Premises shall be maintained in good condition and good working order at all times.

(d) Painting: All items with painted surfaces shall be painted as needed. Surfaces shall be scraped free of rust or other extraneous matter and painted to match the existing color.

**11.12** No vehicle fuel dispensing tanks or underground heating oil storage tanks over 1,100 gallon capacity shall be maintained at the Licensed Premises.

## **ARTICLE 12: APPROVALS**

**12.1** TBC is solely responsible for obtaining all government approvals, permits and licenses required by Federal, State and City laws, regulations, rules and orders to fulfill its obligations and conduct its operations under this License. Parks shall provide TBC with reasonable cooperation in obtaining the necessary approvals, permits and licenses.

**12.2** Whenever any act, consent, approval or permission is required of the City, Parks or the Commissioner under this License, the same shall be valid only if it is, in each instance, in writing and signed by Commissioner or his duly authorized representative. No variance, alteration, amendment, or modification of this instrument shall be valid or binding upon the City, Parks, the Commissioner or their agents, unless the same is, in each instance, in writing and duly signed by the Commissioner or his duly authorized representative.

## **ARTICLE 13: RESERVATION FOR PARKS' SPECIAL EVENTS**

**13.1 (a)** For the purposes of this Article 13 the term "Parks' Special Event(s)" shall mean any event at the Licensed Premises for which Parks has issued a Special Event Permit. TBC shall cooperate with Parks in connection with Parks' Special Events and unanticipated events and emergencies at the Licensed Premises. Commissioner represents to TBC that the Commissioner has not, as of the date hereof, granted to any other person or entity any license, permit, or right of possession or use which would prevent in any way TBC from performing its obligations and realizing its rights under this License. It is expressly understood that this Article 13 shall in no way limit Parks' right to sponsor or promote Parks' Special Events, as defined herein, at the Licensed Premises, or to enter into agreements with third parties to sponsor or promote such events, provided that Parks will use its reasonable efforts to ensure that such third parties will be responsible for maintenance and clean-up associated with any such Parks' Special Event.

(b) Parks, acting on behalf of the City, reserves the right to host a number of annual events at the Licensed Premises, including benefits and other non-profit or public events. The dates of such events shall be mutually agreed upon by both parties and shall be reserved in writing not less than one month in advance.

**13.2** Parks agrees to notify any third party operator or sponsor of Special Events of TBC's access rights to the Licensed Premises and to provide same with the name and telephone number of TBC's manager.

**ARTICLE 14: PROHIBITION AGAINST TRANSFER; ASSIGNMENTS AND  
SUBLICENSES**

**14.1** TBC shall not sell, transfer, assign, sublicense or encumber in any way this License, ten percent or more of the shares of or interest in TBC, or any equipment furnished as provided herein, or any interest therein,. TBC shall not consent, allow or permit any other entity to use any part of the Licensed Premises, buildings, space or facilities covered by this License. This License may not be transferred by operation of law unless approved in advance in writing by Commissioner, it being the purpose of this License Agreement to grant this License solely to TBC herein named.

**14.2** Reserved.

**14.3** Should TBC choose to assign or sublicense the management and operation of any element of this Licensed Premises to another party, TBC shall seek the Commissioner's approval by submitting a written request including proposed assignment documents as provided herein. The Commissioner may request any additional information he deems necessary and TBC shall promptly comply with such requests. TBC shall present to Commissioner the assignment or sublicense agreement for approval, together with any and all information as may be required by the City for such approval, including a statement prepared by a certified public accountant indicating that the proposed assignee or sublicensee has a financial net worth acceptable to the Commissioner together with a certification that it shall provide management control acceptable to the Commissioner for the management and operation of the Licensed Premises. The constraints contained herein are intended to assure the City that the Licensed Premises are operated by persons, firms and corporations who are experienced and reputable operators and are not intended to diminish TBC's interest in the Licensed Premises.

**14.4** The term "assignment" shall be deemed to include any direct or indirect assignment, sublet, sublicense, sale, pledge, mortgage, transfer of or change in ten percent or more in the stock or voting control of or interest in TBC, including any transfer by operation of law. No assignment or other transfer of any interest in this License Agreement shall be permitted which, alone or in combination with other prior or simultaneous transfers or assignments, would have the effect of changing the ownership or control, whether direct or indirect, of ten percent or more of the stock

or voting control of TBC in the Licensed Premises without the Commissioner's prior written consen. In addition, TBC shall immediately report to Parks any proposed change of five percent (5%) or more of the shares of or interest in TBC before such change takes place.

**14.5** No consent to or approval of any assignment or sublicense granted pursuant to this Article 14 shall constitute consent to or approval of any subsequent assignment or sublicense. Failure to comply with this provision shall cause the immediate termination of this License.



## **ARTICLE 15: PARKS CONSTRUCTION**

**15.1** Parks reserves the right to perform safety, maintenance or construction work deemed necessary by Commissioner in the Commissioner's sole discretion at or throughout the Licensed Premises at any time during the Term. TBC agrees to cooperate with Parks to accommodate any such work by Parks and provide public and construction access through the Licensed Premises as deemed necessary by the Commissioner. Parks shall give TBC at least one week's prior written notice of any such work and use reasonable efforts not to interfere substantially with TBC's operations or use of the Licensed Premises. Parks may temporarily close a part or all of the Licensed Premises if necessary for a Parks purpose as reasonably determined by the Commissioner. In the event that TBC must close the Licensed Premises for the purposes provided for in this License because of such Parks' work, then TBC may propose and submit for the Commissioner's approval a plan to equitably address the impact of the closure, including but not limited to a suspension of all financial obligations of this License. TBC shall be responsible for security of all Parks and TBC's property on the Licensed Premises at all times. Parks shall be solely responsible for claims, damages, or injury or to TBC resulting from Parks' work hereunder, except to the extent such claims, damages and injury are caused by the TBC's negligence or willful misconduct.

## **ARTICLE 16: COMPLIANCE WITH LAWS**

**16.1** TBC shall comply and cause its employees and agents to comply with all laws, rules, regulations and orders now or hereafter prescribed by Commissioner, and to comply with all laws, rules, regulations and orders of any City, State or Federal agency or governmental entity having jurisdiction over operations of the License and the Licensed Premises and/or TBC's use and occupation thereof

**16.2** TBC shall not use or allow the Licensed Premises, or any portion thereof, to be used or occupied for any unlawful purpose or in any manner violative of a certificate pertaining to occupancy or use during the Term of this License provided that TBC shall have no liability or responsibility for the type of use by Parks of its facilities for any Parks Special Events.

## **ARTICLE 17: NO DISCRIMINATION**

**17.1** TBC shall not unlawfully discriminate against any employee, applicant for employment or patron because of race, creed, color, national origin, age, sex, handicap, marital status, or sexual orientation.

**17.2** All advertising for employment shall indicate that TBC is an Equal Opportunity Employer.

## **ARTICLE 18: NO WAIVER OF RIGHTS**

**18.1** No acceptance by Commissioner or TBC of any compensation, fees, penalty sums, charges or other payments in whole or in part for any periods after a default of any terms and conditions herein shall be deemed a waiver of any right on the part of Commissioner or TBC to terminate this License. No waiver by Commissioner or TBC of any default on the part of TBC or Commissioner, as the case may be, in performance of any of the terms and conditions herein

shall be construed to be a waiver of any other or subsequent default in the performance of any of the said terms and conditions.

## **ARTICLE 19: RESPONSIBILITY FOR SAFETY, INJURIES OR DAMAGE, AND INDEMNIFICATION**

### **19.1 Licensee Responsibility**

(a) The Licensee shall be solely responsible for the safety and protection of its employees, agents, servants, contractors, and subcontractors, and for the safety and protection of the employees, agents, or servants of its contractors or subcontractors.

(b) The Licensee shall be solely responsible for taking all reasonable precautions to protect the persons and property of the City or others from damage, loss, or injury resulting from any and all operations under this License.

(c) The Licensee shall be solely responsible for injuries to any and all persons, including death, and damage to any and all property arising out of or related to the operations under this License, whether or not due to the negligence of the Licensee, including but not limited to injuries or damages resulting from the acts or omissions of any of its employees, agents, servants, contractors, subcontractors, or any other person.

(d) The Licensee shall use the Licensed Premises in compliance with, and shall not cause or permit the Licensed Premises to be used in violation of, any and all federal, state or local environmental, health and/or safety-related laws, regulations, standards, decisions of the courts, permits or permit conditions, currently existing or as amended or adapted in the future which are or become applicable to the Licensee or the Licensed Premises (collectively "Environmental Laws"). Except as may be agreed by the City as part of this License, Licensee shall not cause or permit, or allow any of the Licensee's personnel to cause or permit, any Hazardous Materials to be brought upon, stored, used, generated, treated or disposed of on the Licensed Premises. As used herein, "Hazardous Materials" means any chemical, substance, or material, which is now or becomes in the future listed, defined, or regulated in any manner by any Environmental Law based upon, directly or indirectly, its properties, or effects.

### **19.2 Indemnification and Related Obligations**

(a) To the fullest extent permitted by law, the Licensee shall indemnify, defend and hold the City and its officials and employees harmless against any and all claims, liens, demands, judgments, penalties, fines, liabilities, settlements, damages, costs and expenses of whatever kind or nature (including, without limitation, attorneys' fees and disbursements) arising out of or related to any of the operations under this License (regardless of whether or not the Licensee itself had been negligent) and/or the Licensee's failure to comply with the law or any of the requirements of this License. Insofar as the facts or law relating to any of the foregoing would preclude the City or its officials and employees from being completely indemnified by the Licensee, the City and its officials and employees shall be partially indemnified by the Licensee to the fullest extent permitted by law.

(b) The Licensee's obligation to defend, indemnify and hold the City and its officials and employees harmless shall not be (i) limited in any way by the Licensee's obligations to

obtain and maintain insurance under this License, nor (ii) adversely affected by any failure on the part of the City or its officials and employees to avail themselves of the benefits of such insurance.

## **ARTICLE 20: INSURANCE**

**20.1 a)** Throughout the Term TBC shall ensure that the types of insurance indicated in this Article are obtained and remain in force, and that such insurance adheres to all requirements herein. The City may require higher liability limits or other types of insurance if, in the opinion of Commissioner, TBC's operations warrant it.

**b)** TBC is authorized to undertake or maintain operations under this License only during the effective period of all required coverage.

**20.2 a)** TBC shall maintain Commercial General Liability insurance in the amount of at least Two Million Dollars (\$2,000,000) per occurrence. In the event such insurance contains an aggregate limit, the aggregate shall apply on a per-location basis applicable to the licensed premises and such per-location aggregate shall be at least Two Million Dollars (\$2,000,000). This insurance shall protect the insureds from claims for property damage and/or bodily injury, including death, that may arise from any of the operations under this License. Coverage shall be at least as broad as that provided by the most recently issued Insurance Services Office ("ISO") Form CG 0001, shall contain no exclusions other than as required by law or as approved by the Commissioner and shall be "occurrence" based rather than "claims-made."

**b)** Such Commercial General Liability insurance shall name the City, together with its officials and employees, as an Additional Insured with coverage at least as broad as the most recent edition of ISO Form CG 2026. Coverage shall be at least as broad as the most recent edition of ISO Form CG 2026. "Blanket" or other forms are also acceptable if they provide the City, together with its officials and employees, with coverage at least as broad as ISO Form CG 2026.

**20.3** TBC shall maintain Workers' Compensation insurance, Employers Liability insurance, and Disability Benefits insurance on behalf of, or with regard to, all employees involved in the TBC's operations under this License, and such insurance shall comply with the laws of the State of New York.

**20.4 a)** With regard to all operations under this License, TBC shall maintain or cause to be maintained Commercial Automobile Liability insurance in the amount of at least One Million Dollars (\$1,000,000) each accident (combined single limit) for liability arising out of the ownership, maintenance or use of any owned, non-owned or hired vehicles. Coverage shall be at least as broad as the latest edition of ISO Form CA0001.

**b)** If vehicles are used for transporting hazardous materials, such Business Automobile Liability insurance shall be endorsed to provide pollution liability broadened coverage for covered vehicles (endorsement CA 99 48) as well as proof of MCS-90.

### **20.5 Liquor Law Liability Insurance**

(a) In the event the TBC shall serve alcohol on the Licensed Premises, the TBC shall carry or cause to be carried liquor law liability insurance in an amount not less than Three Million Dollars (\$3,000,000) per occurrence, and name the City as additional insureds. Such insurance shall be effective prior to the commencement of any such service of alcohol and continue throughout such operations.

(b) In the event the TBC shall permit sublicensees or others to serve alcohol on the Licensed Premises, the TBC shall carry or cause each such person to carry liquor law liability insurance in an amount not less than Three Million Dollars (\$3,000,000) per occurrence, and name TBC and the City as additional insureds. Such insurance shall be effective prior to the commencement of any service of alcohol by such person on the Licensed Premises and continue throughout such operations.

**20.6** TBC represents and warrants that its operations at the Licensed Premises will not involve petroleum products, asbestos, lead, pcb's or any other hazardous materials.

**20.7** Policies of insurance required under this Article shall be provided by companies that may lawfully issue such policy and have an A.M. Best rating of at least A-/“VII” or a Standard and Poor's rating of at least A, unless prior written approval is obtained from the Commissioner.

(a) Policies of insurance required under this Article shall be primary and non-contributing to any insurance or self-insurance maintained by the City.

(b) There shall be no self-insurance program with regard to any insurance required under this Article unless approved in writing by the Commissioner. TBC shall ensure that any such self-insurance program provides the City with all rights that would be provided by traditional insurance under this Article, including but not limited to the defense and indemnification obligations that insurers are required to undertake in liability policies.

(c) The City's limits of coverage for all types of insurance required under this Article shall be the greater of (i) the minimum limits set forth in this Article or (ii) the limits provided to TBC under all primary, excess and umbrella policies covering operations under this License Agreement.

(d) All required policies, except for Workers' Compensation insurance, Employers Liability insurance, and Disability Benefits insurance, shall contain an endorsement requiring that the issuing insurance company endeavor to provide the City with advance written notice in the event such policy is to expire or be cancelled or terminated for any reason, and to mail such notice to both the Commissioner, City of New York Department of Parks and Recreation, Arsenal, 830 Fifth Avenue, New York, NY 10065 and the New York City Comptroller, Attn: Office of Contract Administration, Municipal Building, One Centre Street, Room 1005, New York, New York 10007. Such notice is to be sent at least (30) days before the expiration, cancellation or termination date, except in cases of non-payment, where at least ten (10) days written notice would be provided.

(e) All required policies, except Workers' Compensation, Employers Liability, and Disability Benefits, shall include a waiver of the right of subrogation with respect to all insureds and loss payees named therein.

**20.8** Certificates of Insurance for all insurance required in this Article must be submitted to and accepted by the Commissioner prior to execution of this License Agreement.

(a) For Workers' Compensation, Employers Liability Insurance, and Disability Benefits, TBC shall submit one of the following:

1. C-105.2 Certificate of Worker's Compensation Insurance
2. U-26.3 – State Insurance Fund Certificate of Workers' Compensation Insurance;
3. Request for WC/DB Exemption (Form CE-200);
4. Equivalent or successor forms used by the New York State Workers' Compensation Board; or
5. Other proof of insurance in a form acceptable to the City. ACORD forms are not acceptable proof of workers' compensation coverage.

(b) For all insurance required under this Article other than Workers Compensation, Employers Liability, and Disability Benefits insurance, TBC shall submit one or more Certificates of Insurance in a form acceptable to the Commissioner. All such Certificates of Insurance shall

(i) Certify the issuance and effectiveness of such policies of insurance, each with the specified minimum limits; and

(ii) be accompanied by the provision(s) or endorsement(s) in the TBC's policy/ies (including its general liability policy) by which the City has been made an additional insured or loss payee, as required herein. All such Certificates of Insurance shall be accompanied by either a duly executed "Certification by Insurance Broker or Agent" to be attached in **Exhibit B**, in the form required by the Commissioner or certified copies of all policies referenced in such Certificate of Insurance. If any policy is not available at the time of submission, certified binders may be submitted until such time as the policy is available, at which time a certified copy of the policy shall be submitted.

(c) Certificates of Insurance confirming renewals of insurance shall be submitted to the Commissioner prior to the expiration date of coverage of all policies required under this License Agreement. Such Certificates of Insurance shall comply with subsections (b) (i) and (ii) directly above.

(d) The Commissioner's acceptance or approval of a Certificate of Insurance or any other matter does not waive TBC's obligation to ensure that insurance fully consistent with the requirements of this Article is secured and maintained, nor does it waive TBC's liability for its failure to do so.

(e) TBC shall be obligated to provide the City with a copy of any policy of insurance required under this Article upon the Commissioner or the New York City Law Department's request.

**20.8 (a)** TBC may satisfy its insurance obligations under this Article through primary policies or a combination of primary and excess/umbrella policies, so long as all policies provide the scope of coverage required herein.

**(b)** TBC shall be solely responsible for the payment of all premiums for all policies and all deductibles or self-insured retentions to which they are subject, whether or not the City is an insured under the policy.

**(c)** Where notice of loss, damage, occurrence, accident, claim or suit is required under a policy maintained in accordance with this Article, TBC shall notify in writing all of its insurance carriers that issued potentially responsive policies of any such event relating to any operations under this License Agreement (including notice to Commercial General Liability insurance carriers for events relating to TBC's own employees) no later than 20 days after such event. For any policy where the City is an Additional Insured, such notice shall expressly specify that "this notice is being given on behalf of the City of New York as Insured as well as the Named Insured." Such notice shall also contain the following information: the number of the insurance policy, the name of the named insured, the date and location of the damage, occurrence, or accident, and the identity of the persons or things injured, damaged or lost. TBC shall simultaneously send a copy of such notice to:

The City of New York c/o Insurance Claims Specialist  
Affirmative Litigation Division,  
New York City Law Department,  
100 Church Street,  
New York, NY 10007

TBC's failure to secure and maintain insurance in complete conformity with this Article, or to give the insurance carrier timely notice on behalf of the City, or to do anything else required by this Article shall constitute a material breach of this License Agreement. Such breach shall not be waived or otherwise excused by any action or inaction by the City at any time.

**(d)** Insurance coverage in the minimum amounts provided for in this Article shall not relieve the TBC of any liability under this License Agreement, nor shall it preclude the City from exercising any rights or taking such other actions as are available to it under any other provisions of this License Agreement or the law.

**(e)** In the event of any loss, accident, claim, action, or other event that does or can give rise to a claim under any insurance policy required under this Article, TBC shall at all times fully cooperate with the City with regard to such potential or actual claim.

**(f)** TBC waives all rights against the City, including its officials and employees, for any damages or losses that are covered under any insurance required under this Article (whether or not such insurance is actually procured or claims are paid thereunder) or any other insurance applicable to the operations of TBC and/or its employees, agents, or servants of its contractors or subcontractors.

**(g)** In the event TBC requires any entity, by contract or otherwise, to procure insurance with regard to any operations under this License Agreement and requires such entity to

name TBC as an additional insured under such insurance, TBC shall ensure that such entity also names the City, including its officials and employees, as an additional insured with coverage at least as broad as ISO form CG 20 26.

(h) In the event TBC receives notice, from an insurance company or other person, that any insurance policy required under this Article shall expire or be cancelled or terminated (or has expired or been cancelled or terminated) for any reason, TBC shall immediately forward a copy of such notice to both **the Commissioner, City of New York Department of Parks and Recreation, Arsenal, 830 Fifth Avenue, New York, NY 10065** and **the New York City Comptroller, attn: Office of Contract Administration, Municipal Building, One Centre Street, Room 1005, New York, New York 10007**. Notwithstanding the foregoing, TBC shall ensure that there is no interruption in any of the insurance coverage required under this Article.

(i) Wherever this Article requires that insurance coverage be “at least as broad” as a specified form (including all ISO forms), there is no obligation that the form itself be used, provided that the Licensee can demonstrate that the alternative form or endorsement contained in its policy provides coverage at least as broad as the specified form.

#### **ARTICLE 21: WAIVER OF COMPENSATION**

**21.1** TBC hereby expressly waives any and all claims for compensation for any and all loss or damage sustained by reason of any defects, including, but not limited to, deficiency or impairment of the water supply system, gas mains, electrical apparatus or wires furnished for the Licensed Premises, or by reason of any loss of any gas supply, water supply, heat or current which may occur from time to time, or for any loss resulting from fire, water, windstorm, tornado, explosion, civil commotion, strike or riot, and TBC hereby expressly releases and discharges Commissioner, his agents, and City from any and all demands, claims, actions, and causes of action arising from any of the causes aforesaid.

**21.2** TBC further expressly waives any and all claims for compensation, loss of profit, or refund of its investment, if any, or any other payment whatsoever, in the event this License is terminated by Commissioner sooner than the fixed term because the Licensed Premises are required for any park or other public purpose, or because the License was terminated or revoked for any reason as provided herein.

#### **ARTICLE 22: INVESTIGATIONS**

**22.1 (a)** The parties to this License shall cooperate fully and faithfully with any investigation, audit or inquiry conducted by a State of New York (hereinafter "State") or City governmental agency or authority that is empowered directly or by designation to compel the attendance of witnesses and to examine witnesses under oath, or conducted by the Inspector General of a governmental agency that is a party in interest to the transaction, submitted bid, submitted proposal, contract, lease, permit, or license that is the subject of the investigation, audit or inquiry.

(b) (i) If any person who has been advised that his or her statement, and any information from such statement, will not be used against him or her in any subsequent criminal proceeding refuses to testify before a grand jury or other governmental agency or authority empowered directly or by designation to compel the attendance of witnesses and to examine

witnesses under oath concerning the award of or performance under any transaction, agreement, lease, permit, contract, or license entered into with the City, the State, or any political subdivision or public authority thereof, or the Port Authority of New York and New Jersey, or any local development corporation within the City, or any public benefit corporation organized under the laws of the State of New York; or

(ii) If any person refuses to testify for a reason other than the assertion of his or her privilege against self-incrimination in an investigation, audit or inquiry conducted by a City or State governmental agency or authority empowered directly or by designation to compel the attendance of witnesses and to take testimony concerning the award of, or performance under, any transaction, agreement, lease, permit, contract, or license entered into with the City, the State, or any political subdivision thereof or any local development corporation within the City, then

(1) The Commissioner or agency head whose agency is a party in interest to the transaction, submitted bid, submitted proposal, contract, lease, permit, or license shall convene a hearing, upon not less than five days written notice to the parties involved to determine if any penalties should attach for the failure of any person to testify.

(2) If any non-governmental party to the hearing requests an adjournment, the Commissioner or agency head who convened the hearing may, upon granting the adjournment, suspend any contract, lease, permit, or license pending the final determination pursuant to Section 22 (d) below without the City incurring any penalty or damages for delay or otherwise.

(c) The penalties which may attach after the Commissioner or agency head's a final determination may include but shall not exceed:

(i) The disqualification for a period not to exceed five years from the date of an adverse determination of any person or entity of which such person was a member at the time the testimony was sought, from submitting bids for, or transacting business with, or entering into or obtaining any contract, lease, permit or license with or from the City; and/or

(ii) The cancellation or termination of any and all existing City contracts, leases, permits, or licenses that the refusal to testify concerns and that have not been assigned as permitted under this license, nor the proceeds of which pledged, to an unaffiliated and unrelated institutional lender for fair value prior to the issuance of the notice scheduling the hearing, without the City incurring any penalty or damages on account of such cancellation or termination; monies lawfully due for goods delivered, work done, rentals, or fees accrued prior to the cancellation or termination shall be paid by the City.

(d) The Commissioner or agency head shall consider and address in reaching his or her determination and in assessing an appropriate penalty the factors in Section 22(d) (i) and (ii) below. He or she may also consider, if relevant and appropriate, the criteria established in Sections 22.1(d) (iii) and (iv) below in addition to any other information which may be relevant and appropriate.



(i) The party's good faith endeavors or lack thereof to cooperate fully and faithfully with any governmental investigation or audit, including but not limited to the discipline, discharge, or disassociation of any person failing to testify, the production of accurate and complete books and records, and the forthcoming testimony of all other members, agents, assignees or fiduciaries whose testimony is sought.

(ii) The relationship of the person who refused to testify to any entity that is a party to the hearing, including, but not limited to, whether the person whose testimony is sought has an ownership interest in the entity and/or the degree of authority and responsibility the person has within the entity.

(iii) The nexus of the testimony sought to the subject entity and its contracts, leases, permits or licenses with the City.

(iv) The effect a penalty may have on an unaffiliated and unrelated party or entity that has a significant interest in an entity subject to penalties under (c) above, provided that the party or entity has given actual notice to the Commissioner or agency head upon the acquisition of the interest, or at the hearing called for in (b) (ii) (A) above gives notice and proves that such interest was previously acquired. Under either circumstance the party or entity must present evidence at the hearing demonstrating the potentially adverse impact a penalty will have on such person or entity.

(e) (i) The term "license" or "permit" as used herein shall be defined as a license, permit, franchise or concession not granted as a matter of right.

(ii) The term "person" as used herein shall be defined as any natural person doing business alone or associated with another person or entity as a partner, director, officer, principal or employee.

(iii) The term "entity" as used herein shall be defined as any firm, partnership, corporation, association, or person that receives monies, benefits, licenses, leases, or permits from or through the City or otherwise transacts business with the City.

(iv) The term "member" as used herein shall be defined as any person associated with another person or entity as a partner, director, officer, principal or employee.

(f) In addition to and notwithstanding any other provision of this License the Commissioner or agency head may in his or her sole discretion terminate this License Agreement upon not less than three days written notice in the event TBC fails to promptly report in writing to the Commissioner of Investigation of the City of New York any solicitation of money, goods, requests for future employment or other benefit or thing of value, by or on behalf of any employee of the City or other person, firm, corporation or entity for any purpose which may be related to the procurement or obtaining of this agreement by the TBC, or affecting the performance or this License Agreement.

## **ARTICLE 23: CHOICE OF LAW, CONSENT TO JURISDICTION AND VENUE**

**23.1** This License Agreement shall be deemed to be executed in the City of New York, State of New York, regardless of the domicile of the TBC, and shall be governed by and construed in accordance with the laws of the State of New York.

**23.2** Any and all claims asserted by or against the City arising under this License or related thereto shall be heard and determined either in the courts of the United States located in New York City ("Federal Courts") or in the courts of the State of New York ("New York State Courts") located in the City and County of New York. To effect this License Agreement and its intent, TBC agrees:

(a) If the City initiates any action against the TBC in Federal Court or in New York State Court, service of process may be made on the TBC either in person, wherever such TBC may be found, or by registered or certified mail or by a nationally recognized overnight delivery service addressed to the TBC at its address set forth in this License, or to such other address as the TBC may provide to the City in writing.

(b) With respect to any action between the City and the TBC in New York State Court, the TBC hereby expressly waives and relinquishes any rights it might otherwise have (i) to move to dismiss on grounds of forum non conveniens, (ii) to remove to Federal Court; and (iii) to move for a change of venue to a New York State Court outside New York County.

**23.3** With respect to any action between the City and the TBC in Federal Court located in New York City, the TBC expressly waives and relinquishes any right it might otherwise have to move to transfer the action to a United States Court outside the City of New York.

**23.4** If the TBC commences any action against the City in a court located other than in the City and State of New York, upon request of the City, the TBC shall either consent to a transfer of the action to a court of competent jurisdiction located in the City and State of New York or, if the court where the action is initially brought will not or cannot transfer the action, the TBC shall consent to dismiss such action without prejudice and may thereafter reinstitute the action in a court of competent jurisdiction in New York City.

## **ARTICLE 24: WAIVER OF TRIAL BY JURY/ CLAIMS AND ACTIONS**

**24.0 (a)** TBC hereby waives trial by jury in any action, proceeding, or counterclaim brought by the City against TBC in any matter related to this License.

(b) No action at law or proceeding in equity against the City shall lie or be maintained upon any claim based upon this License Agreement or arising out of this License Agreement or in any way connected with this License Agreement unless TBC shall have strictly complied with all requirements relating to the giving of notice and of information with respect to such claims, all as herein provided.

(c) No action shall lie or be maintained against the City by TBC upon any claims based upon this License unless such action shall be commenced within six (6) months of the

termination or conclusion of this License, or within six (6) months after the accrual of the cause of action, whichever first occurs.

(d) In the event any claim is made or any action brought in any way relating to this License Agreement herein other than an action or proceeding in which TBC and the City are adverse parties, TBC shall diligently render to the City of New York without additional compensation any and all assistance which the City of New York may reasonably require of TBC.

#### **ARTICLE 25: CUMULATIVE REMEDIES - NO WAIVER**

**25.1** The specific remedies to which the City or TBC may resort under the terms of this License are cumulative and are not intended to be exclusive of any other remedies or means of redress to which it may be lawfully entitled in case of any other default hereunder. The City or TBC's failure to insist in any one or more cases upon the strict performance of any of the covenants of this License, or to exercise any option herein contained, shall not be construed as a waiver or relinquishment for the future of such covenants or option.

#### **ARTICLE 26: EMPLOYEES**

**26.1** All experts, consultants and employees of TBC who are employed by TBC to perform work under this License are neither employees of the City nor under contract to the City and TBC alone is responsible for their work, direction, compensation and personal conduct while engaged under this License. Nothing in this License shall impose any liability or duty on the City for acts, omissions, liabilities or obligations of TBC or any person, firm, company, agency, association, corporation or organization engaged by TBC as expert, consultant, independent contractor, specialist, trainee, employee, servant, or agent or for taxes of any nature including but not limited to unemployment insurance, workers' compensation, disability benefits and social security.

#### **ARTICLE 27: INDEPENDENT STATUS OF LICENSEE**

**27.1** TBC is not an employee of the City and in accordance with such independent status neither TBC nor its employees or agents will hold themselves out as, nor claim to be officers, employees, or agents of the City, or of any department, agency, or unit thereof, and they will not make any claim, demand, or application to or for any right or privilege applicable to an officer of, or employee of, the City, including, but not limited to, workers' compensation coverage, unemployment insurance benefits, social security coverage or employee retirement membership or credit.

#### **ARTICLE 28: CREDITOR-DEBTOR PROCEEDINGS**

**28.1** In the event any bankruptcy, insolvency, reorganization or other creditor-debtor proceedings shall be instituted by or against TBC or its successors or assigns, or the guarantor, if any, the Security Deposit shall be deemed to be applied first to the payment of license fees and/or other charges due the City for all periods prior to the institution of such proceedings and the balance, if any, of the Security Deposit may be retained by the City in partial liquidation of the City's damages.

## **ARTICLE 29: CONFLICT OF INTEREST**

**29.1** TBC represents and warrants that neither it nor any of its directors, officers, members, partners or employees, has any interest nor shall they acquire any interest, directly or indirectly, which would or may conflict in any manner or degree with the performance or rendering of the services herein provided. TBC further represents and warrants that in the performance of this License no person having such interest or possible interest shall be employed by it. No elected official or other officer or employee of the City, nor any person whose salary is payable, in whole or part, from the City treasury, shall participate in any decision relating to this License which affects his/her personal interest or the interest of any corporation, partnership or association in which he/she is, directly or indirectly, interested nor shall any such person have any interest, direct or indirect, in this License or in the proceeds thereof.

## **ARTICLE 30: PROCUREMENT OF AGREEMENT**

**30.1** TBC represents and warrants that no person or selling agency has been employed or retained to solicit or secure this License upon an agreement or understanding for a commission, percentage, brokerage fee, contingent fee or any other compensation. TBC further represents and warrants that no payment, gift or thing of value has been made, given or promised to obtain this or any other agreement between the parties. TBC makes such representations and warranties to induce the City to enter into this License and the City relies upon such representations and warranties in the execution hereof.

**30.2** For a breach or violation of such representations or warranties, the Commissioner shall have the right to annul this License without liability, entitling the City to recover all monies paid hereunder, if any, and the TBC shall not make any claim for, or be entitled to recover, any sum or sums due under this License. This remedy, if effected, shall not constitute the sole remedy afforded the City for the falsity or breach, nor shall it constitute a waiver of the City's right to claim damages or refuse payment or to take any other action provided by law or pursuant to this License.

## **ARTICLE 31: NO CLAIM AGAINST OFFICERS, AGENTS OR EMPLOYEES**

**31.1** No claim whatsoever shall be made by the TBC against any officer, agent or employee of the City for, or on account of, anything done or omitted in connection with this License.

## **ARTICLE 32: ALL LEGAL PROVISIONS DEEMED INCLUDED**

**32.1** Each and every provision of law required to be inserted in this License shall be and is deemed inserted herein, whether or not actually inserted, and if, through mistake or otherwise, any such provision is not inserted, or is not inserted in correct form, then this License shall, forthwith upon the application of either party, be amended by such insertion so as to comply strictly with the law and without prejudice to the rights of either party hereunder.

## **ARTICLE 33: SEVERABILITY: INVALIDITY OF PARTICULAR PROVISIONS**

**33.1** If any term or provision of this License or the application thereof to any person or circumstances shall, to any extent, be invalid or unenforceable, the remainder of this License, or the application of such term or provision to persons or circumstances other than those as to

which it is held invalid or unenforceable, shall not be affected thereby, and each term and provision of this License shall be valid and enforceable to the fullest extent permitted by law.

#### **ARTICLE 34: JUDICIAL INTERPRETATION**

**34.1** Should any provision of this License require judicial interpretation, it is agreed that the court interpreting or considering same shall not apply the presumption that the terms hereof shall be more strictly construed against a party by reason of the rule of construction that a document should be construed more strictly against the party who itself or through its agent prepared the same, it being agreed that all parties hereto have participated in the preparation of this License and that legal counsel was consulted by each responsible party before the execution of this License.

#### **ARTICLE 35: MODIFICATION OF AGREEMENT**

**35.1** This License Agreement constitutes the whole of the agreement between the parties hereto, and no other representation made heretofore shall be binding upon the parties hereto. This License Agreement may only be modified by an agreement in writing and duly executed by the party or parties affected by said modification.

#### **ARTICLE 36: NOTICES**

**36.1** Licensee shall prepare and provide to Parks operational status reports as reasonably requested by the Commissioner. In addition, Licensee shall immediately, or within twenty-four (24) hours of occurrence or notice thereof, report major and/or unusual incidents in a format reasonably acceptable to the Commissioner. Licensee shall promptly notify Parks, in writing, of any claim for injury, death, property damage, or theft, which may be asserted against Licensee with respect to the Licensed Premises. Licensee shall designate a person to handle all such claims, including all insured claims for loss or damage pertaining to the maintenance and repair of the Licensed Premises. The name and address of the designated person shall be provided to Parks in writing.

**36.2** Licensee shall promptly notify Parks of any unusual conditions that may develop in the course of the operation of the Licensed Premises, including, but not limited to, fire, flood, casualty, and substantial damage of any character. Licensee shall also notify Parks to the extent it is aware of any such unusual conditions.

**36.3** All notices from Licensee to Parks shall be in writing and delivered by mailing a copy of such notice by registered or certified mail, return receipt requested, to the attention of: **Parks' Chief of Community Outreach & Partnership Development**, New York City Department of Parks & Recreation, The Arsenal, Central Park, 830 Fifth Avenue, New York, NY 10065, or such other address as Parks may designate, with copies sent to Parks' General Counsel at the same address.

**36.4** All notices from Parks to Licensee shall be dispatched in the same manner, and delivered to Licensee to the attention of: The Battery Conservancy, One Whitehall St., 17<sup>th</sup> Floor, New York, NY 10004, or such other address as may be notified from time to time.

### **ARTICLE 37: LICENSEE ORGANIZATION, POWER AND AUTHORITY**

**37.1** TBC represents and warrants that TBC is a business corporation, duly organized, validly existing and in good standing under the laws of the State of New York and has the power and authority to enter into this License Agreement and perform its obligations hereunder. This is a continuing representation and warranty.

### **ARTICLE 38: HEADINGS**

**38.1** The Article Headings and Table of Contents are inserted for convenience only and shall not be deemed to constitute part of this License Agreement or to affect the construction thereof. The use in this License Agreement of singular, plural, masculine, feminine and neuter pronouns shall include the others as the context may require.

*[Remainder of Page Intentionally Omitted]*

*[Signature Page to Follow]*

**IN WITNESS WHEREOF**, the parties hereto have caused this License Agreement to be signed and sealed on the day and year first above written.

**NEW YORK CITY DEPARTMENT  
OF PARKS & RECREATION**

**THE BATTERY CONSERVANCY,  
INC.**

**By:**\_\_\_\_\_  
Alexander Han  
Director of Concessions

**By:**\_\_\_\_\_  
Hope Cohen  
Chief Operating Officer

**Dated:**\_\_\_\_\_

**Dated:**\_\_\_\_\_

**APPROVED AS TO FORM AND CERTIFIED AS TO LEGAL AUTHORITY**

\_\_\_\_\_  
**Acting Corporation Counsel**

\_\_\_\_\_  
**Date**

**STATE OF NEW YORK**

**ss:**

**COUNTY OF NEW YORK**

On this\_\_\_\_day of\_\_\_\_\_, 2017 before me personally came **Alexander Han** to me known, and known to be the **Director of Concessions** of the **New York City Department of Parks and Recreation**, and the said person described in and who executed the foregoing instrument and he acknowledged that he executed the same in his official capacity and for the purpose mentioned therein.

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**Notary Public**

**STATE OF NEW YORK**

**ss:**

**COUNTY OF**

On this\_\_\_\_day of \_\_\_\_\_, 2017 before me personally came **Hope Cohen** to me known and who, being duly sworn by me, did depose and say that she is the **Chief Operating Officer** of **The Battery Conservancy** and that she was authorized to execute the foregoing instrument on behalf of that company and acknowledged that she executed the same on behalf of that company for the purposes mentioned therein.

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**Notary Public**



EXHIBIT A  
LICENSED PREMISES



## **EXHIBIT B**

### **CERTIFICATES OF INSURANCE**

#### **Instructions to New York City Agencies, Departments, and Offices**

All certificates of insurance (except certificates of insurance solely evidencing Workers' Compensation Insurance, Employer's Liability Insurance, and/or Disability Benefits Insurance) must be accompanied by one of the following:

- (1) the Certification by Insurance Broker or Agent on the following page setting forth the required information and signatures;

-- OR --

- (2) copies of all policies as certified by an authorized representative of the issuing insurance carrier that are referenced in such certificate of insurance. If any policy is not available at the time of submission, certified binders may be submitted until such time as the policy is available, at which time a certified copy of the policy shall be submitted.

**Certificates of Insurance and Certification of Insurance Broker or Agent**

(§20.8 (b))

The undersigned insurance broker or agent represents to the City of New York that the attached Certificate of Insurance is accurate in all material respects.

\_\_\_\_\_  
[Name of broker or agent (typewritten)]

\_\_\_\_\_  
[Address of broker or agent (typewritten)]

\_\_\_\_\_  
[Email address of broker or agent (typewritten)]

\_\_\_\_\_  
[Phone number/Fax number of broker or agent (typewritten)]

\_\_\_\_\_  
[Signature of authorized official, broker, or agent]

\_\_\_\_\_  
[Name & title of authorized official, broker, or agent (typewritten)]

State of .....)

) ss.:

County of .....)

Sworn to before me this \_\_\_\_ day of \_\_\_\_\_ 20\_\_

\_\_\_\_\_  
NOTARY PUBLIC FOR THE STATE OF \_\_\_\_\_

**Insurance Certificate**  
*(Licensee to Attach)*

## **EXHIBIT C**

(§10.28)

### **PAID SICK LEAVE LAW CONCESSION AGREEMENT RIDER**

#### **Introduction and General Provisions**

The Earned Sick Time Act, also known as the Paid Sick Leave Law (“PSLL”), requires covered employees who annually perform more than 80 hours of work in New York City to be provided with paid sick time.<sup>1</sup> Concessionaires of the City of New York or of other governmental entities may be required to provide sick time pursuant to the PSLL.

The PSLL became effective on April 1, 2014, and is codified at Title 20, Chapter 8, of the New York City Administrative Code. It is administered by the City’s Department of Consumer Affairs (“DCA”); DCA’s rules promulgated under the PSLL are codified at Chapter 7 of Title 6 of the Rules of the City of New York (“Rules”).

The Concessionaire agrees to comply in all respects with the PSLL and the Rules, and as amended, if applicable, in the performance of this agreement. The Concessionaire further acknowledges that such compliance is a material term of this agreement and that failure to comply with the PSLL in performance of this agreement may result in its termination.

The Concessionaire must notify the Concession Manager in writing within ten (10) days of receipt of a complaint (whether oral or written) regarding the PSLL involving the performance of this agreement. Additionally, the Concessionaire must cooperate with DCA’s education efforts and must comply with DCA’s subpoenas and other document demands as set forth in the PSLL and Rules.

The PSLL is summarized below for the convenience of the Concessionaire. The Concessionaire is advised to review the PSLL and Rules in their entirety. On the website [www.nyc.gov/PaidSickLeave](http://www.nyc.gov/PaidSickLeave) there are links to the PSLL and the associated Rules as well as additional resources for employers, such as Frequently Asked Questions, timekeeping tools and model forms, and an event calendar of upcoming presentations and webinars at which the Concessionaire can get more information about how to comply with the PSLL. The Concessionaire acknowledges that it is responsible for compliance with the PSLL notwithstanding any inconsistent language contained herein.

### **PURSUANT TO THE PSLL AND THE RULES**

#### **Applicability, Accrual, and Use**

An employee who works within the City of New York for more than eighty hours in any consecutive 12-month period designated by the employer as its “calendar year” pursuant to the PSLL (“Year”) must be provided sick time. Employers must provide a minimum of one hour of sick time for every 30 hours worked by an employee and compensation for such sick time must be

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<sup>1</sup> Pursuant to the PSLL, if fewer than five employees work for the same employer, as determined pursuant to New York City Administrative Code §20-912(g), such employer has the option of providing such employees uncompensated sick time.

provided at the greater of the employee's regular hourly rate or the minimum wage. Employers are not required to provide more than forty hours of sick time to an employee in any Year.

An employee has the right to determine how much sick time he or she will use, provided that employers may set a reasonable minimum increment for the use of sick time not to exceed four hours per day. In addition, an employee may carry over up to forty hours of unused sick time to the following Year, provided that no employer is required to allow the use of more than forty hours of sick time in a Year or carry over unused paid sick time if the employee is paid for such unused sick time and the employer provides the employee with at least the legally required amount of paid sick time for such employee for the immediately subsequent Year on the first day of such Year.

An employee entitled to sick time pursuant to the PSSL may use sick time for any of the following:

- such employee's mental illness, physical illness, injury, or health condition or the care of such illness, injury, or condition or such employee's need for medical diagnosis or preventive medical care;
- such employee's care of a family member (an employee's child, spouse, domestic partner, parent, sibling, grandchild or grandparent, or the child or parent of an employee's spouse or domestic partner) who has a mental illness, physical illness, injury or health condition or who has a need for medical diagnosis or preventive medical care;
- closure of such employee's place of business by order of a public official due to a public health emergency; or
- such employee's need to care for a child whose school or childcare provider has been closed due to a public health emergency.

An employer must not require an employee, as a condition of taking sick time, to search for a replacement. However, an employer may require an employee to provide: reasonable notice of the need to use sick time; reasonable documentation that the use of sick time was needed for a reason above if for an absence of more than three consecutive work days; and/or written confirmation that an employee used sick time pursuant to the PSSL. However, an employer may not require documentation specifying the nature of a medical condition or otherwise require disclosure of the details of a medical condition as a condition of providing sick time and health information obtained solely due to an employee's use of sick time pursuant to the PSSL must be treated by the employer as confidential.

If an employer chooses to impose any permissible discretionary requirement as a condition of using sick time, it must provide to all employees a written policy containing those requirements, using a delivery method that reasonably ensures that employees receive the policy. If such employer has not provided its written policy, it may not deny sick time to an employee because of non-compliance with such a policy.

Sick time to which an employee is entitled must be paid no later than the payday for the next regular payroll period beginning after the sick time was used.

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### **Exemptions and Exceptions**

Notwithstanding the above, the PSLI does not apply to any of the following:

- an independent contractor who does not meet the definition of employee under section 190(2) of the New York State Labor Law;
- an employee covered by a valid collective bargaining agreement in effect on April 1, 2014 until the termination of such agreement;
- an employee in the construction or grocery industry covered by a valid collective bargaining agreement if the provisions of the PSLI are expressly waived in such collective bargaining agreement;
- an employee covered by another valid collective bargaining agreement if such provisions are expressly waived in such agreement and such agreement provides a benefit comparable to that provided by the PSLI for such employee;
- an audiologist, occupational therapist, physical therapist, or speech language pathologist who is licensed by the New York State Department of Education and who calls in for work assignments at will, determines his or her own schedule, has the ability to reject or accept any assignment referred to him or her, and is paid an average hourly wage that is at least four times the federal minimum wage;
- an employee in a work study program under Section 2753 of Chapter 42 of the United States Code;
- an employee whose work is compensated by a qualified scholarship program as that term is defined in the Internal Revenue Code, Section 117 of Chapter 20 of the United States Code; or
- a participant in a Work Experience Program (WEP) under section 336-c of the New York State Social Services Law.

### **Retaliation Prohibited**

An employer may not threaten or engage in retaliation against an employee for exercising or attempting in good faith to exercise any right provided by the PSLI. In addition, an employer may not interfere with any investigation, proceeding, or hearing pursuant to the PSLI.

### **Notice of Rights**

An employer must provide its employees with written notice of their rights pursuant to the PSLI. Such notice must be in English and the primary language spoken by an employee, provided that DCA has made available a translation into such language. Downloadable notices are available on DCA's website at <http://www.nyc.gov/html/dca/html/law/PaidSickLeave.shtml>.

Any person or entity that willfully violates these notice requirements is subject to a civil penalty in an amount not to exceed fifty dollars for each employee who was not given appropriate notice.

### **Records**

An employer must retain records documenting its compliance with the PSLI for a period of at least three years, and must allow DCA to access such records in furtherance of an investigation related to an alleged violation of the PSLI.

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### **Enforcement and Penalties**

Upon receiving a complaint alleging a violation of the PSL, DCA has the right to investigate such complaint and attempt to resolve it through mediation. Within 30 days of written notification of a complaint by DCA, or sooner in certain circumstances, the employer must provide DCA with a written response and such other information as DCA may request. If DCA believes that a violation of the PSL has occurred, it has the right to issue a notice of violation to the employer.

DCA has the power to grant an employee or former employee all appropriate relief as set forth in New York City Administrative Code 20-924(d). Such relief may include, among other remedies, treble damages for the wages that should have been paid, damages for unlawful retaliation, and damages and reinstatement for unlawful discharge. In addition, DCA may impose on an employer found to have violated the PSL civil penalties not to exceed \$500 for a first violation, \$750 for a second violation within two years of the first violation, and \$1,000 for each succeeding violation within two years of the previous violation.

### **More Generous Policies and Other Legal Requirements**

Nothing in the PSL is intended to discourage, prohibit, diminish, or impair the adoption or retention of a more generous sick time policy, or the obligation of an employer to comply with any contract, collective bargaining agreement, employment benefit plan or other agreement providing more generous sick time. The PSL provides minimum requirements pertaining to sick time and does not preempt, limit or otherwise affect the applicability of any other law, regulation, rule, requirement, policy or standard that provides for greater accrual or use by employees of sick leave or time, whether paid or unpaid, or that extends other protections to employees. The PSL may not be construed as creating or imposing any requirement in conflict with any federal or state law, rule or regulation.

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**CITY OF NEW YORK**

**FRANCHISE AND CONCESSION REVIEW COMMITTEE**

**(Cal. No. 5)**

**RESOLVED**, that the Franchise and Concession Review Committee authorizes the New York City Department of Parks and Recreation (Parks) to utilize a different procedure, pursuant to Section 1-16 of the Concession Rules of the City of New York, to enter into a Sole Source License Agreement (Agreement) with the Alliance for Downtown New York, Inc. (ADNY) to operate, manage and maintain an outdoor café in Coenties Slip Park, provide free recreational, educational or entertainment events or programs open to the general public, and maintain Coenties Slip Park, Manhattan. Parks anticipates that ADNY will enter into a sublicense agreement for the operation, management and maintenance of the outdoor café. ADNY shall issue a solicitation in the basic form of a Request for Proposals in order to select a sub-licensee. The terms and conditions of any such sublicense shall be subject to the prior written approval of Parks. All revenue, fees or other consideration received by ADNY from the café or from any sublicensee will be used by ADNY exclusively for the maintenance of Coenties Slip Park. The Agreement shall commence upon written notice to proceed and terminate one (1) year from the date of the notice to proceed, with four (4) one-year renewal options, exercisable at the mutual agreement of Parks and ADNY.

**THIS IS A TRUE COPY OF THE RESOLUTION ADOPTED BY THE  
FRANCHISE AND CONCESSION REVIEW COMMITTEE ON**

**March 8, 2017**

Date: \_\_\_\_\_

Signed: \_\_\_\_\_

Title: Director of the Mayor's Office of Contract Services

# CONCESSION AGREEMENT RECOMMENDATION FOR AWARD MEMORANDUM COVER SHEET

(Attach, in the following order, applicable CRFA Memo, Responsibility Determination Form, approved CPSR Cover Sheet and, if the selection procedure was not CSB, the CPSR Memo and CCPO Memo (if applicable))

<b>AGENCY:</b> New York City Department of Parks & Recreation (Parks)	<b>RECOMMENDED CONCESSIONAIRE:</b> <b>Name:</b> <u>Alliance for Downtown New York, Inc. (ADNY)</u> <b>Address:</b> <u>120 Broadway, Suite 3340, New York, NY 10271</u> <b>Telephone</b> <u>(212) 835-2777</u> <input checked="" type="checkbox"/> <b>EIN</b> <input type="checkbox"/> <b>SSN #:</b> <u>13-3791550</u>	<b>CONCESSION TITLE/DESCRIPTION:</b> <u>Concession to operate, manage and maintain an outdoor café in Coenties Slip Park, provide free recreational, educational or entertainment events or programs open to the general public, and maintain Coenties Slip Park, Manhattan</u>
<b># VOTES required for proposed action = <u>4</u></b> <input type="checkbox"/> N/A	<b>Not-for-Profit Organization</b> <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No <b>Certified by DSBS as M/WBE</b> <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	<b>CONCESSION I.D. #: MT-04-O</b>

LOCATION OF CONCESSION SITE(S\*) Address: Coenties Slip Park, Coenties Slip between Pearl and Water Streets,  
☐ N/A \*Attach additional sheet Borough: Manhattan C.B. 01 Block # N/A Lot(s) # N/A

## SELECTION PROCEDURE

(\*CCPO approval of CRFA required)

- ☐ Competitive Sealed Bids  
☐ Competitive Sealed Proposals\* (☐ FCRC approved Agency request to deviate from final recommendation of the Selection Committee on \_\_/\_\_/\_\_)  
☒ Different Selection Procedure: \* (☒ Sole Source Agreement ☐ Other > FCRC approved different selection procedure on 06/08/2016.  
☐ Negotiated Concession\*

## CONCESSION AGREEMENT TERM

**Initial Term:** One (1) year from Notice to Proceed  
  
**Renewal Option(s) Term:** Four (4) one-year renewal options, exercisable upon the mutual agreement of Parks and ADNY.  
  
**Total Potential Term:** Five (5) Years  
  
☐ \* >20 years – FCRC unanimously approved term on \_\_/\_\_/\_\_

## ANNUAL REVENUE

(Check all that apply)  
☐ Additional sheet (☐s) attached)

- ☐ Annual Fee(s) \$ \_\_\_\_\_  
☐ % Gross Receipts \_\_\_\_\_ %  
☐ The Greater of Annual Minimum Fee(s) of \$ \_\_\_\_\_ v. \_\_\_\_\_ % of Gross Receipts  
  
☒ Other: Parks anticipates that ADNY will enter into a sublicense agreement for the operation, management and maintenance of the outdoor café. All revenue, fees or other consideration received by ADNY from the café or from any sublicensee will be used by ADNY exclusively for the maintenance of Coenties Slip Park.

## NOTIFICATION REQUIREMENTS

**Subject concession was awarded by CSB or CSP.**

☐ YES ☒ NO

**If YES, check the applicable box(es) below:**

- ☐ The subject concession is a Significant Concession and the Agency completed its consultations with each affected CB/BP regarding the scope of the solicitation by \_\_/\_\_/\_\_, which was at least 30 days prior to its issuance.  
  
☐ The subject concession is a Significant Concession and the Agency included this concession in the Agency's Plan and completed consultations with each affected CB/BP pursuant to § 1-10 of the Concession Rules.  
  
☐ The subject concession was determined not to be a Major Concession and the Agency sent notification of such determination to each affected CB/BP by \_\_/\_\_/\_\_, which was at least 40 days prior to issuance of the solicitation.

**If NO, check the applicable box below:**

- ☒ The Agency certifies that each affected CB/BP received written notice by 04/29/2016, which was at least 40 days in advance of the FCRC meeting on 06/08/2016 at which the agency sought and received approval to use a different selection procedure.  
  
☐ The Agency certifies that each affected CB/BP received written notice on \_\_/\_\_/\_\_, at the time that a notice of intent to enter into negotiations was published for the subject concession, and provided a copy of such notification to the members of the Committee within five days on \_\_/\_\_/\_\_.  
  
☐ The Agency certifies that based on exigent circumstances the FCRC unanimously approved waiver of advance written notice to each affected CB/BP on \_\_/\_\_/\_\_.

Law Department approved concession agreement on \_\_\_\_/\_\_\_\_/\_\_\_\_

Award is a major concession.

☐ YES ☒ NO

If YES, award was approved pursuant to Sections 197-c and 197-d of the NYC Charter as follows:

☐ CPC approved on \_\_\_\_/\_\_\_\_/\_\_\_\_

☐ City Council approved on \_\_\_\_/\_\_\_\_/\_\_\_\_ or ☐ N/A

**AUTHORIZED AGENCY STAFF**

This is to certify that the information presented herein is accurate and that I find the proposed concessionaire to be responsible and approve of the award of the subject concession agreement.

If the concession was awarded by other than CSB or CSP, additionally check the applicable box below:

☒ The concession was approved by the FCRC on \_\_\_\_/\_\_\_\_/\_\_\_\_.

☐ The concession was not subject to the approval of the FCRC because it has a term of <30 days and is not subject to renewal.

Name Alexander Han

Title Director of Concessions

Signature \_\_\_\_\_

Date \_\_\_\_/\_\_\_\_/\_\_\_\_

**CERTIFICATE OF PROCEDURAL REQUISITES**

This is to certify that the agency has complied with the prescribed procedural requisites for award of the subject concession agreement.

Signature \_\_\_\_\_

Date \_\_\_\_/\_\_\_\_/\_\_\_\_

City Chief Procurement Officer

**RECOMMENDATION FOR AWARD OF CONCESSION AGREEMENT MEMORANDUM:**  
**CONCESSION AGREEMENT AWARDED BY OTHER THAN CSB OR CSP**

**SUMMARY OF PROPOSED CONCESSION USE (Attach Proposed Agreement)**

The New York City Department of Parks and Recreation (Parks) is seeking Franchise and Concession Review Committee (FCRC) approval to utilize a different procedure, pursuant to Section 1-16 of the Concession Rules of the City of New York (Concession Rules), to enter into a Sole Source License Agreement (Agreement) with the Alliance for Downtown New York, Inc. (ADNY) to operate, manage and maintain an outdoor café in Coenties Slip Park, provide free recreational, educational or entertainment events or programs open to the general public, and maintain Coenties Slip Park, Manhattan.

**Instructions:** *Provide all information requested below; check all applicable boxes.*

**A. SELECTION PROCEDURE**

☒ Sole Source

☐ Other *Describe:*

**B. NEGOTIATIONS**

**Instructions:** *Describe the nature of negotiations conducted, including negotiations with respect to the amount of revenue offered.*

The Agreement shall commence upon written notice to proceed and terminate one (1) year from the date of the notice to proceed, with four (4) one-year renewal options, exercisable at the mutual agreement of Parks and ADNY. Parks anticipates that ADNY will enter into a sublicense agreement for the operation, management and maintenance of the outdoor café. ADNY shall issue a solicitation in the basic form of a Request for Proposals in order to select a sub-licensee. The terms and conditions of any such sublicense shall be subject to the prior written approval of Parks. All revenue, fees or other consideration received by ADNY from the café or from any sublicensee will be used by ADNY exclusively for the maintenance of Coenties Slip Park.

**C. BASIS FOR AWARD** (If sole source award, attach the offer; if other than a sole source award, attach the three highest rated offers, if applicable.)

**The agency determined that award of the concession is in the best interest of the City because:**

ADNY manages the Lower Manhattan Business Improvement District with the mission to "create and promote a safe, clean live-work totally wired community, which showcases the nation's most historic neighborhood and serves as the financial capital of the world for the twenty-first century." ADNY will contribute to the downtown area by maintaining Coenties Slip Park on a year-round basis.

Maintenance performed by ADNY at Coenties Slip Park goes well beyond the level of maintenance Parks would be able to otherwise provide, particularly in this period of budget constraints. Maintenance performed by ADNY under this Agreement will include general cleaning, graffiti removal, snow removal, drains, sewers and catch basins will be cleaned regularly, and power washing. The outdoor café at Coenties Slip Park will enhance the economic activity of Lower Manhattan and ADNY's maintenance of the parkland add to the overall beautification of the area. In addition, the Agreement will alleviate the costs to the City associated with the maintenance of Coenties Slip Park.

**D. PUBLIC HEARING**

☒ N/A – Subject award NOT a significant concession]

**1. Publication & Distribution of Public Hearing Notice**

- ☐ Subject concession is a **Citywide** concession and Agency hereby certifies that a notice containing a summary of the terms and conditions of the proposed concession and stating the time, date and location of the public hearing was published once in the City Record on \_\_\_/\_\_\_/\_\_\_, which was not less than 15 days prior to the hearing date or a shorter period approved by the CCPO and was given to each affected CB-BP and the Committee Members on \_\_\_/\_\_\_/\_\_\_, which was not less than 15 days prior to the hearing date. Agency also published a public hearing notice twice in the two newspapers indicated below. A copy of each such notice was sent to each affected CB-BP by \_\_\_/\_\_\_/\_\_\_.

☐ \_\_\_\_\_, a NYC citywide newspaper on \_\_\_/\_\_\_/\_\_\_ and \_\_\_/\_\_\_/\_\_\_  
☐ \_\_\_\_\_, a NYC citywide newspaper on \_\_\_/\_\_\_/\_\_\_ and \_\_\_/\_\_\_/\_\_\_

**OR**

- ☐ Subject concession is **NOT a Citywide** concession and Agency hereby certifies that a notice containing a summary of the terms and conditions of the proposed concession and stating the time, date and location of the public hearing was published once in the City Record on \_\_\_/\_\_\_/\_\_\_, which was not less than 15 days prior to the hearing date or a shorter period approved by the CCPO and was given to each affected CB-BP and the Committee Members on \_\_\_/\_\_\_/\_\_\_, which was not less than 15 days prior to the hearing date. Agency additionally published a public hearing notice and summary of the terms and conditions of the proposed agreement twice in two newspapers indicated below. A copy of each such notice containing a summary of the terms and conditions of the proposed agreement was sent to each affected CB-BP by \_\_\_/\_\_\_/\_\_\_.

☐ \_\_\_\_\_, a NYC local newspaper published in the affected borough(s) on \_\_\_/\_\_\_/\_\_\_ and \_\_\_/\_\_\_/\_\_\_.  
☐ \_\_\_\_\_, a NYC local newspaper published in the affected borough(s) on \_\_\_/\_\_\_/\_\_\_ and \_\_\_/\_\_\_/\_\_\_.

**2. Public Hearing Date, Exception to Public Hearing Requirement**

- ☐ A Public Hearing was conducted on \_\_\_/\_\_\_/\_\_\_.

**OR**

- ☐ The Agency certifies that the total annual revenue to the City from the subject concession does not exceed one million dollars and a Public Hearing was not conducted because, pursuant to §1-13(q)(2) of the Concession Rules, the Agency gave notice of the hearing and did not receive any written requests to speak at such hearing or requests from the Committee that the Agency appear at the hearing. Furthermore, the Agency certifies that it published a notice in the City Record canceling such hearing on \_\_\_/\_\_\_/\_\_\_ and sent a copy of that notice to all Committee Members.

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LICENSE AGREEMENT

BETWEEN

**ALLIANCE FOR DOWNTOWN NEW YORK, INC.**

AND

**CITY OF NEW YORK  
DEPARTMENT OF  
PARKS & RECREATION**

*for*

**THE OPERATION, MANAGEMENT AND MAINTENANCE OF AN  
OUTDOOR CAFÉ AT COENTIES SLIP PARK AND THE MAINTENANCE  
OF COENTIES SLIP PARK**

**MANHATTAN, NEW YORK**

MT04-O

DATED: \_\_\_\_\_, 2017

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**LICENSE AGREEMENT** (“License Agreement” or “License”) made this \_\_\_day of \_\_\_\_\_, 2017 between the City of New York (the "City") acting by and through the Department of Parks & Recreation ("Parks"), whose address is The Arsenal, Central Park, 830 Fifth Avenue, New York, New York 10065 (Fax No. 212-360-3434), and Alliance for Downtown New York, Inc. (“Licensee”), a New York not-for-profit corporation, whose address is 120 Broadway, Suite 3340, New York, NY 10271 (Fax No. 212-566-6707).

**WHEREAS**, Parks has jurisdiction over parklands of the City and facilities therein pursuant to Section 533(a) of the City Charter and is charged with the duty to manage, maintain and operate City parks facilities; and

**WHEREAS**, Coenties Slip Park is property under the jurisdiction of Parks; and

**WHEREAS**, Parks desires to provide for the operation, management and maintenance of an outdoor café in Coenties Slip Park and the maintenance of Coenties Slip Park for the accommodation of and use by the public; and

**WHEREAS**, pursuant to its Certificate of Incorporation, Licensee was formed in 1995 for the purpose of managing the Downtown-Lower Manhattan Business Improvement District (the “BID”), an area which includes Coenties Slip Park, and, by Renewal Contract with the City of New York, Department of Small Business Services, dated January 1, 2005, Licensee presently provides certain Supplemental Services and Capital Improvements for the BID; and

**WHEREAS**, the City desires to encourage the participation of interested not-for-profit organizations in providing supplemental services, including maintenance, recreational and educational programs, for the benefit of the public; and

**WHEREAS**, Licensee and Parks have developed an effective public/private partnership through which Licensee, under the review and approval of the Commissioner, has undertaken substantial responsibility for public programming, specific maintenance, and capital improvements in Lower Manhattan; and

**WHEREAS**, Licensee has extensive experience performing maintenance activities in Lower Manhattan; and

**WHEREAS**, Licensee has strong relationships with businesses, community boards and other local organizations, providing meaningful input on the programs and operation of Lower Manhattan; and

**WHEREAS**, Licensee is willing to continue to perform responsibilities associated with maintaining and repairing Lower Manhattan, including parkland for the benefit of the public, including the provision of programs and activities that will increase public interest in and awareness of the parkland, including Coenties Slip Park; and

**WHEREAS**, the Franchise and Concession Review Committee (“FCRC”) authorized Parks to enter into a Sole Source License Agreement with Licensee for the operation, management and maintenance of an outdoor café in Coenties Slip Park and the maintenance of Coenties Slip Park for the accommodation of and use by the public; and

**WHEREAS**, the Licensee desires to operate, manage and maintain an outdoor café in Coenties Slip Park and maintain Coenties Slip Park in accordance with the terms set forth herein; and

**WHEREAS**, Parks and Licensee desire to enter into this License Agreement specifying rights and obligations with respect to the operation, management and maintenance of an outdoor café in Coenties Slip Park and the maintenance of Coenties Slip Park;

**NOW THEREFORE**, in consideration of the promises and covenants contained herein, the parties do hereby agree as follows:

### **GRANT OF LICENSE**

**1.1 (a)** Parks hereby grants to Licensee and Licensee hereby accepts from Parks this License to (i) operate, manage and maintain an outdoor café in Coenties Slip Park (the “Café”), (ii) provide free recreational, educational or entertainment events or programs open to the general public at Coenties Slip Park (the “Public Programs”) approved by Parks and (iii) maintain Coenties Slip Park for the use and enjoyment of the general public in accordance with the provisions herein and to the satisfaction of the Commissioner of Parks (“Commissioner”). Coenties Slip Park is also referred to herein as the “Licensed Premises” or “Premises” and is further denoted and described in Exhibit A, attached hereto. The “Licensed Premises” shall include the structures, as well as any improvements, constructed thereon, as well as all walkways, curbs, trees and landscaping.

**(b)** Licensee may sublicense a portion of Coenties Slip Park (the “Sublicensed Premises”) for the operation, management and maintenance of the Café to a sublicensee approved in advance in writing by Parks (the “Café Sublicensee”). The terms and conditions of any such sublicense shall be subject to the prior written approval of Parks (the “Café Sublicensee”). Any Café Sublicensee which is authorized hereunder shall be subject and subordinate to the terms and conditions of this License and Licensee shall require the Café Sublicensee to acknowledge in writing that it received a copy of this License and that it is bound by same. All provisions of this License applicable to Licensee with respect to the operation, management and maintenance of the Café shall be equally applicable to any Café Sublicensee. Licensee shall require any Café Sublicensee to agree in writing that it will comply with Parks’ directives and the provisions of this License applicable to Licensee with respect to the operation, management and maintenance of the Café, including, but not limited to, obtaining insurance required of Licensee under this License Agreement and indemnifying the City as set forth in Paragraph 19 herein, and shall be responsible for assuring such compliance. If any Café Sublicensee does not comply with this License insofar as applicable to it, Parks may direct Licensee to terminate that Café Sublicensee’s operations. No Café Sublicensee may be assigned without the prior written consent of Parks. Any subsequent Sublicense Agreement(s) will be

subject to the terms and conditions as set forth in this License. All revenue, fees or other consideration received by Licensee from the Café or from any Café Sublicensee will be used by Licensee exclusively for the maintenance of Coenties Slip Park, and Licensee shall submit such reports to Parks and permit Parks such audit of its books and records, as Parks shall reasonably require to assure that such revenue, fees and other consideration are so used. The Café Sublicensee may, with Parks' prior written approval and on such terms and conditions as Parks shall require, include operation of a mobile food unit such as a pushcart.

(c) In selecting a Café Sublicensee for Parks' approval, Licensee shall issue a solicitation in the basic form of a request for proposals ("RFP") with terms and conditions approved by Parks. The RFP shall be advertised in the City Record and other appropriate publication(s) approved by Parks. Parks shall require Licensee to conduct a background check of any proposed Café Sublicensee in accordance with Parks' usual procedures and requirements and subject to Parks' approval. Parks disapproval of the successful proposer shall be deemed reasonable if the successful proposer fails the background check.

(d) All plans, schedules, services, menu items, rates, fees, prices, and hours of operation of Licensee and any Café Sublicensee are subject to Parks' prior written approval.

**1.2** All menus and prices to be offered by Licensee or the Café Sublicensee must be approved in advance in writing by Parks. All food and beverages offered for sale at the Café must be of good quality. Any staff assigned by Licensee or any Café Sublicensee to sell food and beverages to the public must possess all Federal, State, and City authorizations and possess, and at all times display, appropriate New York City Department of Health and Mental Hygiene ("DOHMH") permits. Licensee and any Café Sublicensee may only operate the Café if they have obtained the appropriate, valid permits and authorizations required by DOHMH. At all times that the Café is operating, a staff person with a valid DOHMH food handler's license must be present. Licensee or any Café Sublicensee or any of their vendors operating without all necessary permits may be subject to fines and/or confiscation of goods.

**1.2.1** Licensee or any Café Sublicensee (as applicable) shall obtain a DOHMH Vendor License for each person designated as an operator of a mobile food unit and a DOHMH Mobile Food Vending Unit Permit for their mobile food unit(s). All persons designated as mobile food unit operators must have a valid DOHMH Vendor License in order to operate. All mobile food units must pass a DOHMH inspection in order to receive a DOHMH Mobile Food Vending Unit Permit. All mobile food units operating under this License Agreement or a Café Sublicensee must first pass a DOHMH inspection. Licensee or any Café Sublicensee (as applicable) must submit both a valid DOHMH Vendor License and a DOHMH Mobile Food Vending Unit Permit to Parks before the operation of a mobile food unit(s) can commence. Licensee or any Café Sublicensee (as applicable) must provide Parks with documentation that it has been issued a valid DOHMH Vendor License and DOHMH Mobile Food Vending Unit Permit for each mobile food unit. During the License Term, if Licensee or any Café Sublicensee operates a mobile food unit without a valid DOHMH Vendor License and a DOHMH Mobile Food Vending Unit Permit, Licensee and any Café Sublicensee will be instructed to cease operations and will be subject to fines. When warranted, Officers of the Parks Enforcement Police, New York City Police Department, FDNY and DOHMH may confiscate the mobile food unit(s), including goods.

**1.3** Licensee shall, and shall cause any Café Sublicensee to, obtain any and all approvals, permits, and other licenses required by Federal, State and City laws, rules, regulations and orders which are or may become necessary to manage, operate and maintain the Licensed Premises in accordance with the terms of this License. In order to be in compliance with this License Agreement, Licensee must fulfill all of its obligations contained herein, and any Café Sublicensee must fulfill all of its obligations contained herein and in any sublicense. Commissioner may deem as a default by Licensee any failure by Licensee to fulfill any of its obligations herein for any reason, and Commissioner may deem as a default by any Café Sublicensee any failure by any Café Sublicensee to fulfill any of its obligations herein or in any sublicense for any reason.

**1.4** It is expressly understood that no land, building, space, or equipment is leased or otherwise conveyed to Licensee or to any Café Sublicensee, but that, during the Term of this License, Licensee and any Café Sublicensee shall have the use of the Licensed Premises for the purposes herein provided. Except as herein provided, Licensee and any Café Sublicensee have the right to occupy and operate the Licensed Premises only so long as each and every term and condition in this License is strictly and properly complied with and so long as this License is not terminated by Commissioner.

**1.5** Licensee and any Café Sublicensee shall provide, at all times, full and free access to the Licensed Premises to the Commissioner or his representatives and to other City, State and Federal officials having jurisdiction, for inspection purposes and to ensure Parks' satisfaction with Licensee's and any Café Sublicensee's compliance with the terms of this License Agreement and any sublicense.

**1.6** Any proposed name for the Café is subject to Parks' approval. Parks will require that the City own the portion of any new name selected by Licensee or any Café Sublicensee for the Café that indicates Parks property or a preexisting facility name. The City will not own any portion of a new name that consists of the name, portrait or signature of a living or deceased individual or an identifier that is not otherwise associated with Parks' property.

## **DEFINITIONS**

**2.1** As used throughout this License, the following terms shall have the meanings set forth below:

- (a)** "Alteration" shall mean (excepting ordinary repair and maintenance):
  - (i)** any restoration (to original premises or in the event of fire or other cause), rehabilitation, modification, addition or improvement to Licensed Premises; or
  - (ii)** any work affecting the plumbing, heating, electrical, water, mechanical, ventilating or other systems of Licensed Premises.
- (b)** "City" shall mean the City of New York, its departments and political subdivisions.

(c) "Commissioner" shall mean the Commissioner of the New York City Department of Parks & Recreation or his designee.

(d) "Comptroller" shall mean the Comptroller of the City of New York.

(f) "Expendable Equipment" or "Personal Equipment" shall mean all equipment, other than Fixed and Additional Fixed Equipment provided by Licensee.

(g) "Fixed Equipment" shall mean any property affixed in any way to the Licensed Premises at the time Notice to Proceed is given, whether or not removal of said equipment would damage Licensed Premises.

(i) "Additional Fixed Equipment" shall mean Fixed Equipment affixed to Licensed Premises subsequent to the date Notice to Proceed is given.

(ii) "Fixed and Additional Fixed Equipment" shall refer to Fixed Equipment and Additional Fixed Equipment jointly and severally.

(h) (i) "Gross Receipts" shall include without limitation all funds received by Licensee and Café Sublicensee, without deduction or set-off of any kind, from the sale of food and beverages, wares, or services of any kind from the Café, provided that Gross Receipts shall exclude the amount of any Federal, State or City sales taxes which may now or hereafter be imposed upon or be required to be collected and paid by Café Sublicensee or Licensee. Gross Receipts shall include any orders placed or made at the Licensed Premises, although delivery of food and beverages or services may be made outside, or away from the Licensed Premises, and shall include all receipts of Licensee or any Sublicensee for services to be rendered or orders taken at the Licensed Premises for services to be rendered by Licensee or any Café Sublicensee outside thereof. For example, if Licensee or any Sublicensee receives a \$1,000 deposit for services to be provided at a later date, the deposit must be reported at the time of payment, regardless of when the service is provided. All sales made or services rendered from the Licensed Premises shall be construed as made and completed therein even though payment therefor may be made at some other place and although delivery of food and beverages sold or services rendered upon the Licensed Premises may be made other than at the Licensed Premises.

(ii) Gross Receipts shall include, with respect to the Café, receipts from all sponsorships, whether in cash or as discounts against the purchase price of materials, equipment or commodities. Gross Receipts shall also include all sales made by any other operator or operators using the Licensed Premises under a properly authorized sublicense or subcontract agreement, as provided in Section 1.1(b) herein, provided that Gross Receipts shall also include Licensee's income from rental and sublicense or subcontracting fees and commissions received by Licensee in connection with all services provided by Licensee's subcontractors or sublicensees.

(iii) Gross Receipts shall include sales made for cash or credit (credit sales shall be included in Gross Receipts as of the date of the sale) regardless of whether the sales are paid or uncollected, it being the distinct intention and agreement of the parties that all sums due to be received by Licensee and Café Sublicensee from all sources from the operation of the Café shall be included in Gross Receipts, provided however that any gratuities transmitted by Licensee or

Café Sublicensee directly or indirectly to employees and staff shall not be included within Gross Receipts. For purposes of this subsection (iii):

(a) With respect to non-catered food and beverage service, a “Gratuity” shall mean a charge that: (i) is separately stated on the bill or invoice given to Licensee’s or any Café Sublicensee’s customer or otherwise proffered by the customer, (ii) is specifically designated as a gratuity, or purports to be a gratuity, and (iii) Licensee or any Café Sublicensee receives and pays over in total to its employees (other than management) who are primarily engaged in the serving of food or beverages to guests, patrons or customers, including but not limited to, wait staff, bartenders, captains, bussing personnel and similar staff who are paid a cash wage as a “food service worker” pursuant to NY Labor Law §652(4). Licensee and any Café Sublicensee shall provide documentation reasonably satisfactory to Parks to prove that Gratuities were paid to employees in addition to their regular salaries, and were otherwise in accordance with the foregoing provisions. Such documentation shall be signed and verified by an officer of Licensee or any Café Sublicensee, as applicable. “Regular Salary” for purposes of this subsection shall mean the set hourly wage for the applicable employee.

(b) With respect to catered events, a “Gratuity” shall be an amount no greater than 20% of the catering food and beverage sales for the event, provided that such Gratuity is a charge that: (i) is separately stated on the bill or invoice given to Licensee’s or any Café Sublicensee’s customer, (ii) is specifically designated as a gratuity, or purports to be a gratuity, and (iii) is paid over by Licensee or any Café Sublicensee in total to its employees (other than management) who actually provide services at the event, and who are primarily engaged in the serving of food or beverages to guests, patrons or customers, including, but not limited to, wait staff, bartenders, captains, bussing personnel, and similar staff. Licensee or any Café Sublicensee (as applicable) shall provide documentation reasonably satisfactory to Parks to prove that Gratuities were paid to employees in addition to their regular salaries, and were otherwise in accordance with the foregoing provisions. Such documentation shall be signed and verified by an officer of Licensee or any Café Sublicensee (as applicable). “Regular Salary” for purposes of this subsection shall mean the set hourly wage for the applicable employee.

(i) “Licensed Premises” or “Premises” shall have the meaning as ascribed to them in Section 1.1(a).

(j) “Year” or “Operating Year” shall both refer to the period between the Commencement Date (or its anniversary in any year other than Year 1) in any calendar year and the day before the anniversary of the Commencement Date in the immediately following calendar year.

### **TERM OF LICENSE**

**3.1** This License shall become effective upon Parks giving written Notice to Proceed to Licensee (“Commencement Date”). There shall be four (4) one-year renewal options exercisable at the mutual agreement of Parks and Licensee. The License shall terminate upon the later of one (1) year from the Commencement Date or the expiration of any exercised renewal option unless terminated sooner in accordance with this agreement (“Termination Date” or “Expiration Date”). The period between the Commencement Date and the Termination Date shall be referred to as the “Term”.

**3.2** Notwithstanding any language contained herein, this License is terminable at will by the Commissioner at any time; however, such termination shall not be arbitrary and capricious. Such termination shall be effective after twenty-five (25) days written notice is sent to Licensee. The Commissioner, the City, its employees and agents shall not be liable for damages to Licensee or any Café Sublicensee in the event that this License is terminated by Commissioner as provided for herein.

**3.3** Parks may terminate this License for cause as follows:

(a) Should Licensee or any Café Licensee breach or fail to comply with any of the provisions of this License or any Federal, State or local law, rule, regulation or order affecting the License or the Licensed Premises with regard to any and all matters, Commissioner shall in writing order Licensee to remedy such breach or comply with such provision, law, rule, regulation or order, and in the event that Licensee or any Café Sublicensee fails to comply with such written notice or commence, in good faith and with due diligence, efforts to comply with such order within thirty days from the mailing thereof, subject to unavoidable delays beyond the reasonable control of Licensee or any Café Sublicensee, then this License shall immediately terminate. In the event such breach or failure to comply cannot be remedied within such thirty (30) day period due to reasons beyond Licensee's control, the cure period shall be extended for such period as may be reasonably necessary in the Commissioner's judgment to cure such breach. If said breach or failure to comply is corrected, and a repeated violation of the same provision, law, rule, regulation or order follows thereafter, Commissioner, by notice in writing, may revoke and terminate this License, such revocation and termination to be immediately effective on the mailing thereof.

(b) The following shall constitute events of default for which this License may be terminated on one day's notice: the appointment of any receiver of Licensee's assets; the making of a general assignment for the benefit of creditors by Licensee; the occurrence of any act which operates to deprive Licensee permanently of the rights, powers and privileges necessary for the proper conduct and operation of this License; the levy of any attachment or execution which substantially interferes with Licensee's operations under this License and which attachment or execution is not vacated, dismissed, stayed or set aside within a period of sixty days.

(c) Nothing contained in paragraphs (a) or (b) above shall be deemed to imply or be construed to represent an exclusive enumeration of circumstances under which Commissioner may terminate this License.

**3.4** Upon the expiration or sooner termination of this License by Commissioner, all rights of Licensee and any Café Sublicensee shall be forfeited without claim for loss, damages, refund of investment or any other payment whatsoever against Commissioner, Parks or City.

**3.5** **Reserved.**

**3.6** Licensee agrees that upon the expiration or sooner termination of this License, it shall immediately cease and cause any Café Sublicensee to cease all operations pursuant to this License and shall vacate and cause any Café Sublicensee to vacate the Premises without any further notice by City and without resort to any judicial proceeding by the City. Upon the expiration or sooner termination of this License, City reserves the right to take immediate possession of the Premises.

**3.7** Licensee shall, upon the expiration or sooner termination of this License, remove and shall cause any Café Sublicensee to remove all personal possessions from the Premises. Licensee acknowledges, and will cause any Café Sublicensee to acknowledge, that any personal property remaining on the Premises after the expiration or sooner termination of this License is intended by Licensee or any Café Sublicensee (as the case may be) to be abandoned. Licensee and any Café Sublicensee shall remain liable to the City for any damages, including lost revenues and the cost of removal or disposal of property, should Licensee or any Café Sublicensee fail to remove all possessions from the Premises during the time prescribed in this License Agreement.

**3.8** If this License is terminated as provided in Section 3.3 hereof, Parks may, without notice, re-enter and repossess the Licensed Premises using such force for that purpose as may be necessary without being liable to indictment, prosecution or damages therefor and may dispossess Licensee and any Café Sublicensee by summary proceedings or otherwise, without court order or other judicial approval.

**3.9** If this License is terminated as provided in Section 3.3 hereof, Parks may complete all repair, maintenance and construction work required to be performed by Licensee or any Café Sublicensee hereunder and may repair and alter any portion(s) of the Licensed Premises in such manner as Parks may deem necessary or advisable without relieving Licensee or any Café Sublicensee of any liability under this License Agreement or otherwise affecting any such liability, and/or relicense the Licensed Premises or any portion thereof for the whole or any part of the remainder of the Term or for a longer period. Parks shall in no way be responsible or liable for any failure to relicense any portion(s) of the Licensed Premises or for any failure to collect any fees due on any such relicensing, and no such failure to relicense or to collect fees shall operate to relieve Licensee or any Café Sublicensee of any liability under this License Agreement or to otherwise affect any such liability.

**3.10** No receipt of moneys by Parks from Licensee or any Café Sublicensee after the termination of this License Agreement, or after the giving of any notice of the termination of this License Agreement, shall reinstate, continue or extend the Term or affect any notice theretofore given to Licensee or any Café Sublicensee, or operate as a waiver of the right of Parks to recover possession of the Licensed Premises by proper remedy.

**3.11** In the event this License Agreement is terminated, Parks will not reimburse Licensee's or any Café Sublicensee's unamortized capital improvement cost.

### **FINANCIAL RECORDS**

**4.1** (a) On or before the thirtieth day following the end of each Operating Year, Licensee shall submit and shall require that Café Sublicensee submit to Parks, in a form satisfactory to Parks, a statement of Gross Receipts, signed and verified by an officer of Licensee and Café Sublicensee, reporting any Gross Receipts generated from the Café under this License and the Café Sublicense during the preceding Operating Year. The obligation to submit a final report of Gross Receipts shall survive the termination of this License or any sublicense.



(b) Licensee shall indicate and shall require that Café Sublicensee indicate on its statement of Gross Receipts whether or not these amounts are inclusive of sales tax collected.

(c) Licensee, except with respect to the Sublicensed Premises, and Café Sublicensee, with respect to the Sublicensed Premises, are solely responsible for the payment of all Federal, State and local taxes applicable to the operation of the Licensed Premises. With the exception of Federal, State and City sales tax, no such applicable taxes, including but not limited to the New York City Commercial Rent Tax, may be deducted from Gross Receipts.

**4.2** (a) Licensee and any Café Sublicensee, during the Term of this License, shall maintain a revenue control system to ensure the accurate and complete recording of all revenues, in a form and manner acceptable to the City. This revenue control system must maintain detailed sales information from each sales transaction. Specifically, sales information must be recorded electronically, via a computerized point-of-sale system, and must include, but is not limited to, details on each sales transaction, the item(s) sold, time, date of sale and price of the item sold. Licensee and any Café Sublicensee shall maintain all accounting and internal control related records for a minimum of ten (10) years from the date of creation of the record. Additionally, all books and records maintained pursuant to this License Agreement shall be conveniently segregated from other business matters of Licensee and any Café Sublicensee and shall include, but not be limited to: all federal, state and local tax returns and schedules of the Licensee and any Café Sublicensee; records of daily bank deposits of the entire receipts from transactions in, at, on or from the Licensed Premises; sales slips, daily dated cash register receipts, and sales books; and duplicate bank deposit slips and bank statements.

(b) Licensee and any Café Sublicensee shall use such accounting and internal control methods and procedures and keep such additional books and records as may be reasonably prescribed by Parks and/or the Comptroller, and Parks and/or the Comptroller shall have the right to examine the recordkeeping procedures of the Licensee and any Café Sublicensee prior to the commencement of the Term of this License, and at any time thereafter, in order to assure that the procedures are adequate to reveal the true, correct and entire business conducted by the Licensee and any Café Sublicensee. Licensee and any Café Sublicensee shall maintain each year's records, books of account and data for a minimum of ten (10) years from the date of creation of the record.

(c) The failure or refusal of the Licensee or any Café Sublicensee to furnish any of the statements required to be furnished under this Article within thirty (30) days after its due date, the failure or refusal of the Licensee or any Café Sublicensee to maintain adequate internal controls or to keep any of the records as reasonably required by this Article shall be presumed to be a failure to substantially comply with the terms and conditions of this License and a default hereunder, which shall entitle Parks, at its option, to terminate this License.

### **RIGHT TO AUDIT**

**5.1** Parks, the Comptroller and other duly authorized representatives of the City shall have the right to examine or audit the records, books of account and data of the Licensee and any Café Sublicensee for the purpose of examination, audit, review or any purpose they deem necessary.

Licensee and any Café Sublicensee shall also permit the inspection by Parks, Comptroller or other duly authorized representatives of the City of any equipment used by Licensee or any Café Sublicensee, including, but not limited to, cash registers and recording machines, and all reports or data generated from or by the equipment. Licensee and any Café Sublicensee shall cooperate fully with and assist Parks, the Comptroller or any other duly authorized representative of the City in any examination or audit thereof. In the event that the Licensee's or any Café Sublicensee's books and records, including supporting documentation, are situated at a location 50 miles or more from the City, the records must be brought to the City for examination and audit or Licensee or the Café Sublicensee (as applicable) must pay the food, board and travel costs incidental to two auditors conducting such examination or audit at said location.

**5.2** The failure or refusal of the Licensee or any Café Sublicensee to permit Parks, the Comptroller or any other duly authorized representative of the City to audit and examine the Licensee's or any Café Sublicensee's records, books of account and data or the interference in any way by the Licensee or any Café Sublicensee in such an audit or examination is presumed to be a failure to substantially comply with the terms and conditions of this License and a default hereunder which shall entitle Parks to terminate this License.

**5.3** Notwithstanding the foregoing, the parties acknowledge and agree that the powers, duties, and obligations of the Comptroller pursuant to the provisions of the New York City Charter shall not be diminished, compromised or abridged in any way.

### **INTENTIONALLY OMITTED**

**6.1** Intentionally omitted.

### **ALTERATIONS**

**7.1** (a) Licensee and any Café Sublicensee may alter Licensed Premises only in accordance with the requirements of subsection (b) of this Section. Alterations shall become property of City at its option upon their attachment, installation or affixing.

(b) In order to alter Licensed Premises, Licensee and any Café Sublicensee must:

(i) Obtain Commissioner's written approval (which shall not be unreasonably withheld) for whatever designs, plans, specifications, cost estimates, agreements and contractual understandings may pertain to contemplated purchases and/or work;

(ii) insure that work performed and alterations made on the Licensed Premises are undertaken and completed in accordance with submissions approved pursuant to section (i) of this Article, in a good and workmanlike manner, and within a reasonable time; and

(iii) notify Commissioner of completion of, and the making final payment for, any alteration within ten days after the occurrence of said completion or final payment.

(c) Commissioner may, in his discretion, make repairs, alterations, decorations, additions or improvements to Licensed Premises at the City's expense, but nothing herein shall be deemed to obligate or require Commissioner to make any repairs, alterations, decorations, additions, or improvements, nor shall this provision in any way affect or impair Licensee's or any Café Sublicensee's obligation herein in any respect.

## **FIXED AND EXPENDABLE EQUIPMENT**

**8.1** Licensee shall, to the reasonable satisfaction of the Commissioner and either at its sole cost and expense or through any Café Sublicensee, provide and replace, if necessary, all equipment and materials necessary for the successful operation of this License. Licensee and any Café Sublicensee shall put, keep, repair, preserve and maintain in good order all equipment found on, placed in, installed in or affixed to the Licensed Premises.

**8.2** City has title to all Fixed Equipment on the Premises as of the date of commencement of this License. Title to any Additional Fixed Equipment and to all construction, renovation, or improvements made to the Licensed Premises shall vest in and belong to the City at the City's option, which option may be exercised at any time after the substantial completion of the affixing of said equipment or the substantial completion of such construction, renovation or improvement. To the extent City chooses not to exercise such option it shall be the responsibility of Licensee to remove its or any Café Sublicensee's equipment (other than Fixed and Additional Fixed Equipment) and restore the Licensed Premises to the satisfaction of the Commissioner at the sole cost and expense of Licensee or any Café Sublicensee after the expiration or sooner termination of this License.

**8.3** Licensee and (where applicable) any Café Sublicensee shall supply at their own cost and expense all Expendable Equipment required for the proper operation of this License, and repair or replace same at their own cost and expense when reasonably requested by Commissioner. Licensee and (where applicable) any Café Sublicensee must acquire and use for the purpose intended any Expendable Equipment which the Commissioner reasonably determines is necessary to the operation of this License.

**8.4** Licensee and (where applicable) any Café Sublicensee must acquire, replace or repair, install or affix, at their sole cost and expense, any equipment, materials and supplies required for the proper operation of the Licensed Premises as described herein or as reasonably required by Commissioner.

**8.5** Title to all Expendable Equipment obtained by Licensee or any Café Sublicensee shall remain in Licensee or (where applicable) the Café Sublicensee and such equipment shall be removed by Licensee or (where applicable) the Café Sublicensee at the termination or expiration of this License. In the event such equipment remains in the Licensed Premises following such termination or expiration, Commissioner may treat such property as abandoned and charge all costs and expenses incurred in the removal thereof to Licensee or (if applicable) to any Café Sublicensee.

**8.6** Licensee acknowledges that it is acquiring this License to use the Licensed Premises and Fixed Equipment thereon solely in reliance on its own investigation, that no representations, warranties or statements have been made by the City concerning the fitness thereof, and that by taking possession of the Licensed Premises and Fixed Equipment, Licensee accepts them in their present condition "as is."

**8.7** The Equipment to be removed by Licensee and any Café Sublicensee pursuant to this Section 8 shall be removed from the Licensed Premises in such a way as shall cause no damage

to the Licensed Premises. Notwithstanding their vacating and surrender of the Licensed Premises, Licensee and any Café Sublicensee shall remain liable to City for any damage they may have caused to the Licensed Premises.

### **UTILITIES**

**9.1** Parks makes no representations regarding the adequacy of utilities currently in place at the Licensed Premises. Licensee and any Café Sublicensee, at their sole cost and expense, shall directly pay for all utility costs associated with Licensee's or any Café Sublicensee's operations at the Licensed Premises, including but not limited to all DEP water and sewer charges and all charges for electricity, except for water and electric used in the Coenties Slip Park irrigation system and any other facilities provided by Parks and unrelated to the Café operations. Licensee and any Café Sublicensee, at their sole cost and expense, shall connect to and/or, if necessary, upgrade any existing utility service or create a new utility system, and obtain the appropriate permits and approvals, and/or install or cause to be installed, and maintained, all gas, electric, sewer and telephone utilities, service lines, conduits, pipes, meters and supplies of power necessary for the proper operation of this License. This includes establishing a dedicated meter and/or submeter that captures utility usage on the Licensed Premises and an account with the appropriate service providers. Utilities, as described in this License Agreement, may include, but shall not be limited to, electricity, gas, heat, coolant, telephone, and water and sewer charges. Licensee and any Café Sublicensee shall not undertake the installation of any new utility lines without first having obtained all necessary permits and approvals from Parks and such other federal, state or City agencies or entities as have jurisdiction over the construction and operation of the Premises. Licensee and any Café Sublicensee shall remove any unsuitable existing materials as required. Licensee and any Café Sublicensee shall adhere to all DEP directives and restrictions regarding drought and water conservation issues during the Term.

### **OPERATIONS**

**10.1** Licensee and (where applicable) any Café Sublicensee shall provide a sufficient number of staff available at the Licensed Premises during regular operating hours having the requisite skills to ensure proper operation of the concession granted by this License. Café Sublicensee's employees at the Café shall be made to wear appropriate uniforms, subject to the approval of Parks, not to be unreasonably withheld, which shall be deemed granted if Parks does not respond to an approval request within fifteen (15) days. Licensee or any Café Sublicensee (as applicable) shall maintain adequate inventory to assure a constant supply of food and beverages at the Café.

**10.2** (a) Licensee and any Café Sublicensee may only operate the Café at the Licensed Premises when Coenties Slip Park is open. At a minimum, Licensee or (if applicable) any Café Sublicensee shall operate the Licensed Premises during such hours and on such days as Commissioner shall have approved in advance in writing, weather permitting. In regulating the hours of operation, the Commissioner may consider the hours of operation of other similar Parks facilities, the nature of the community and the environs of the concession, Parks Rules and Regulations of operations, the public health and safety, and other similar considerations.

(b) Licensee and Cafe Sublicensee must provide a public access seating area at the Licensed Premises approved by Parks and may also arrange restricted areas approved by Parks for wait service and self-service. The seating plan reflected on Exhibit A attached hereto is approved by Parks. The design, color, placement, and number of all tables, chairs, and umbrellas are subject to Parks' prior written approval. In no event shall table, chairs or umbrellas be placed on the glass pavers at the Coenties Ship Monument adjacent to the Licensed Premises.

**10.3 (a)** Under no circumstances may the Licensee or any Café Sublicensee advertise, sell or cause to be sold on or about the Licensed Premises alcohol, cigarettes, cigars, or other tobacco products, or electronic cigarettes, except as set forth in Section 10.3(d). In connection with the Licensed Premises, neither the Licensee nor any Café Sublicensee shall accept sponsorships of any kind on behalf of any kind of tobacco products or electronic cigarettes..

(b) Smoking anywhere on the Licensed Premises is strictly prohibited.

(c) Additionally, Licensee and any Café Sublicensee shall not use in their operations any polystyrene packaging or food containers.

(d) Licensee and any Café Sublicensee shall not sell any beverages in glass bottles. All beverages must be in non-glass, shatter-proof containers, except that Café Sublicensee may decant beverages into glassware, provided that such beverages are consumed in the wait-service area provided for in Section 10.2(b). Café Sublicensee is permitted to sell wine and beer and, in the wait service area, other alcoholic drinks with the appropriate license from the State Liquor Authority and any other agency having jurisdiction. Wine and beer shall be served in recyclable cups for consumption within the self-service area provided for in Section 10.2(b).

(e) Licensee and any Café Sublicensee shall adhere to and strictly enforce the provisions of this Section 10.3.

**10.4** Licensee shall, and/or shall cause any Café Sublicensee to, at their sole cost and expense, obtain, possess and display prominently at the Licensed Premises, or at an adjacent indoor facility of Café Sublicensee serving the Café operation, all approvals, permits, licenses, and certificates (including, without limitation, certificates of occupancy) from all Federal, State, and City agencies having jurisdiction that may be required for the operation, management and maintenance of the Café at the Licensed Premises and the maintenance of Coenties Slip Park in accordance with all applicable Federal, State and City laws, rules and regulations.

**10.5** Licensee and any Café Sublicensee shall obtain the written approval of Parks prior to entering into any marketing or sponsorship agreement with respect to operations at the Licensed Premises. In the event that Licensee or any Café Sublicensee breaches this provision, Licensee shall, or shall cause Café Sublicensee, as applicable, to take any action that the City may deem necessary to protect the City's interests.

**10.6** An officer of the Licensee shall personally operate this License or employ an operations manager who shall have supervisory authority over the Licensed Premises. The Licensee or manager must be available by telephone during all hours of operation, and Licensee shall continuously notify the Commissioner and the Parks Enforcement Patrol Communications Division of a 24-hour pager or cellular telephone number through which Parks may contact the manager or officer in the event of an emergency. Licensee shall replace any manager, officer, employee, subcontractor or sublicensee whenever reasonably requested by Commissioner.

**10.7** Licensee shall, and/or shall cause Café Sublicensee to, provide equipment which will provide security for all monies received. Licensee shall, and/or shall cause any Café Sublicensee to, provide for the transfer of all monies collected to the banking institution of Licensee or any Café Sublicensee (as appropriate). Licensee shall bear the loss of any lost, stolen, misappropriated or counterfeit monies derived from operations under this License.

**10.8** Licensee shall, and/or shall cause any Café Sublicensee to, at their sole cost and expense, provide, hire, train, supervise and be responsible for the acts of all personnel necessary for the proper operation of this License, including but not limited to:

- (a) collecting and safeguarding all monies generated under this License;
- (b) maintaining the Licensed Premises; and
- (c) conducting and supervising all activities to be engaged in upon the Licensed Premises.

**10.9** Licensee shall, and shall require Café Sublicensee to, include in their advertising and promotion programs, described in Section 10.13 below, a plan which describes how it intends to make facilities and services available at the Licensed Premises readily accessible and useable by individuals with disabilities. Such plan shall provide for compliance with the applicable provisions of the ADA and any other similarly applicable legislation.

**10.10** Licensee shall prepare and provide to Parks operational status reports and reports of major accidents or unusual incidents occurring on the Licensed Premises, on a regular basis and in a format acceptable to the Commissioner. Licensee shall promptly notify Parks, in writing, of any claim for injury, death, property damage or theft which shall be asserted against Licensee or any Café Sublicensee with respect to all or any part of the Licensed Premises. Licensee shall also designate a person to handle all such claims, including all insured claims for loss or damage pertaining to the operations of the Licensed Premises, and Licensee shall notify Parks in writing as to said person's name and address.

**10.11** Licensee shall promptly notify Commissioner of any unusual conditions that may develop in the course of the operation of this License such as, but not limited to, fire, flood, casualty and substantial damage of any character.

**10.12** Licensee and any Café Sublicensee shall maintain close liaison with the Parks Enforcement Patrol and New York City Police Department. Licensee and any Café Sublicensee shall cooperate with all efforts to enforce Parks Rules and Regulations at the Licensed Premises and adjacent areas. Licensee and any Café Sublicensee shall use their best efforts to prevent illegal activity on the Licensed Premises.

**10.13** Licensee and any Café Sublicensee may establish an advertising and promotion program. Licensee and any Café Sublicensee shall have the right to print or to arrange for the printing of programs or brochures containing any advertising matter except advertising matter

which in the sole discretion of the Commissioner is indecent, in obvious bad taste, which demonstrates a lack of respect for public morals or conduct, or which adversely effects the reputation of the Licensed Premises, Parks, or the City of New York. Licensee and any Café Sublicensee may release news items to the media as they sees fit. If the Commissioner in his discretion, however, finds any advertising or other releases to be unacceptable, then Licensee or the Café Sublicensee (as applicable) shall cease or alter such advertisements or releases as directed by the Commissioner. The Commissioner shall have prior approval as to design, content and distribution of all advertising and promotional materials.

**10.14 (a)** Licensee shall, and/or shall cause Café Sublicensee to, prominently display signage at the Licensed Premises listing all prices, rates, and hours of days of operation. The placement, design and contents of all signage, including signage which includes the Licensee's or Café Sublicensee's name, trade name(s) and/or logo(s), are subject to Parks' prior written approval. Signage shall also comply with Americans with Disabilities Act ("ADA") requirements.

**(b)** Neither Licensee nor any Café Sublicensee are permitted to place advertisements on the exterior of the concession area or on any building or structure on the Licensed Premises without Parks' prior written approval. All advertising utilized at the Licensed Premises is subject to Parks' prior written approval. Neither Licensee nor any Café Sublicensee shall advertise any product brands without Parks' prior approval. Licensee and any Café Sublicensee are prohibited from displaying, placing or permitting the display or placement of advertisements in the Licensed Premises without the prior written approval of Parks. The display or placement of tobacco or electronic cigarette advertising shall not be permitted. The display or placement of advertising of alcoholic beverages shall not be permitted, but Licensee or any Café Sublicensee may display signage approved by Parks setting forth its offerings of alcoholic beverages. In the event advertising is allowed, the following standards will apply: Any type of advertising which is false or misleading, which promotes unlawful or illegal goods, services or activities, or which is otherwise unlawful as determined by Parks, including but not limited to advertising that constitutes the public display of offensive sexual material in violation of Penal Law Section 245.11, shall also be prohibited. Any such prohibited material displayed or placed shall be immediately removed by the Licensee and any Café Sublicensee upon notice from Parks. Any sign posted at the Licensed Premises, or any advertisement used in connection with such facility, shall be subject to the approval of the Commissioner (which shall not be unreasonably withheld), shall be appropriately located, and shall state that the Licensed Premises are a New York City Parks & Recreation concession operated by the Licensee or the Café Sublicensee (as applicable). A sample of each new sign and/or advertisement shall be sent for Parks' approval to Parks' Revenue Division, 830 Fifth Avenue, Central Park, New York, NY 10065.

**10.15** Reserved.

**10.16** Reserved.

**10.17** Should Commissioner reasonably determine that Licensee or any Café Sublicensee is not operating the Licensed Premises in a satisfactory manner, Commissioner may in writing

order Licensee to improve operations or correct such conditions as Commissioner may deem unsatisfactory and/or cause the Café Sublicensee to do same. In the event that Licensee fails to comply with such written notice or respond in a manner reasonably satisfactory to Commissioner within the timeframe set forth in said notice, notwithstanding any other provisions herein, then Commissioner may terminate this License. If Licensee is prevented from complying with the written notice for reasons beyond its control, then Commissioner may not terminate this License until Licensee has been given a reasonable opportunity to comply and has failed to do so.

**10.18** Should Commissioner, in his sole judgment, determine that an unsafe or emergency condition exists on the Licensed Premises, after written notification, Licensee shall have 24 hours to correct such unsafe or emergency condition. During any period where the Commissioner determines that an unsafe or emergency condition exists on the Licensed Premises then the Commissioner may require a partial or complete suspension of operation in the area affected by the unsafe or emergency condition. If Licensee believes that such unsafe or emergency condition cannot be corrected within said period of time, the Licensee shall notify the Commissioner in writing and indicate the period within which such condition shall be corrected. Commissioner, in his sole discretion, which shall not be arbitrary or capricious, may then extend such period of time in order to permit Licensee to cure, under such terms and conditions as appropriate.

**10.19** Licensee and any Café Sublicensee shall comply with all national safety guidelines and Federal, State and City laws, rules and regulations related to the management and operation of the Licensed Premises.

**10.20** Inspectors from Parks will visit the Licensed Premises unannounced to inspect operations and ensure proper maintenance of the Licensed Premises. Based on their inspections, Parks may issue directives regarding deficiencies Licensee will be obligated to rectify in a timely fashion. Violations of the terms of this License Agreement may result in the assessment of liquidated damages. If Licensee fails to provide the cleaning, maintenance, and operational services required by this License Agreement, Parks shall notify Licensee in writing, and Licensee shall be required to correct such shortcomings within the timeframe set forth in such notice. If Licensee fails to cure the violation within the timeframe set in the notice, Parks may, at its option, in addition to any other remedies available to it, suspend or terminate this License Agreement and/or assess liquidated damages. Parks may impose a \$250 administrative fee for reinstatement of a suspended license. Liquidated damages will be assessed in accordance with the following schedule:

<b>Provision</b>	<b>Liquidated Damages Per Occurrence</b>
Unauthorized Menu Items	\$150
Missing or Unauthorized Price or Rate List	\$250
Overcharging	\$350
Expanding	\$350
Blocked exits	\$350
Improper Disposal (Noxious liquids, debris,	\$350



etc.)	
Mobile Food Unit leaking fluids	\$350
Structure or equipment or Mobile Food Unit obviously damaged or in poor repair	\$250
Graffiti , Dirty Mobile Food Unit or Umbrella	\$350
Unauthorized Advertising	\$350
Improper storage	\$350
Roving or vending at unauthorized location	\$250
Permit Decal expired or not displayed	\$250
311 sign not displayed	\$250
Vending without valid DOHMH Mobile Food Vendor's license	\$350
Vending without valid DOHMH mobile food unit permit	\$350
Vending without valid DOHMH food handler's license	\$350

**(b)** If an assessment is received for one of the above violations, there is a process by which the assessments may be appealed if Licensee feels that the assessment has been assessed in error. The procedure is outlined below:

#### 1. Filing an Appeal

If Licensee wishes to appeal the assessment, a notice of appeal must be delivered to Parks within ten (10) days along with a statement of reasons why it believes the assessment was erroneous. The statement of reasons must be notarized. Any evidence supporting Licensee's appeal (such as photographs, documents, witness statements, etc) should also be included.

If no appeal is received within 10 days of the date the assessment is mailed, the assessment shall be considered final and charged to Licensee's account.

#### 2. Adjudication of Appeal

The appeal shall be sent to the Director of Operations Management & Planning, whose office is located at the Arsenal, 830 Fifth Avenue, New York, NY 10065. The Commissioner has designated the Director of Operations Management & Planning to decide on the merits of these appeals. The decision of the Director of Operations Management & Planning shall constitute the final decision of Parks.

The Director of Operations Management & Planning is authorized to investigate the merits of the appeal, but is not required to hold a hearing or to speak to Licensee in person.

**10.21** Licensee and any Café Sublicensee shall not block any sidewalk, pathway, park entrance or other pedestrian walkway with Licensee's equipment or supplies. Licensee and any Café Sublicensee shall place their equipment and supplies in such manner that at least a six (6) foot walkway is available to pedestrians at all times.

**10.22** Licensee recognizes that this License Agreement does not grant it or Café Sublicensee the exclusive rights to sell in the park in which the Licensed Premises are located. Moreover, Parks may grant other licenses or permits to vendors to sell the same or similar items authorized under this License Agreement within the same park as that in which the Licensed Premises are located. Parks does not guarantee that illegal vendors, persons unauthorized by Parks or disabled veteran vendors will not compete with Licensee or any Café Sublicensee or operate near the Licensed Premises. Parks encourages concessionaires to report illegal vendors by calling 311.

**10.23** Parks makes no representations that there is adequate storage space at the Licensed Premises. Licensee and any Café Sublicensee shall be responsible for, at their sole cost and expense, obtaining any additional storage space required for the operation of the concession. Licensee and any Café Sublicensee will be required to store all outdoor equipment on a nightly basis and anytime the concession is closed.

**10.24** Licensee shall comply with the Earned Sick Time Act, also known as the Paid Sick Leave Law, as a concessionaire of the City of New York as set forth in the Paid Sick Leave Law Contract Rider annexed hereto as Exhibit C.

### **MAINTENANCE, SANITATION AND REPAIRS**

**11.1** Licensee, at its sole cost and expense (or through arrangements with a Café Sublicensee), will maintain and operate the Licensed Premises in a good and safe condition consistent with the Licensee obligations set forth in this Article. To ensure Parks' satisfaction with Licensee's compliance with the standards set forth in this Section 11 Licensee shall provide Parks with full and free access to the Licensed Premises. All such maintenance and repair shall be performed in a good and workman-like manner and in accordance with the following standards:

- (i) Dirt, litter and obstructions shall be removed as needed, and trash and leaves collected and removed as needed so as to maintain the Licensed Premises in a clean, neat and good condition.
- (ii) All walkways, sidewalks and all other improvements and facilities in the Licensed Premises shall be routinely cleaned so as to keep such improvements and facilities in a clean, neat and good condition.
- (iii) Graffiti shall be regularly painted over or removed, as appropriate to the nature of the surface.
- (iv) Drains, sewers and catch basins shall be cleaned regularly to prevent clogging.

(v) Power washing, as needed.

(vi) Snow and ice shall be removed within a reasonable period of time after each snowfall or accumulation of ice to the extent necessary to provide a walkway for safe passage. Sand and/or salt shall be spread as needed for such walkway.

**11.2** Licensee shall also water all trees, shrubs, plantings and grass-covered areas as necessary to maintain such vegetation in a healthy condition. Licensee shall provide additional seasonal plantings to supplement Parks' plantings at the Licensed Premises. Licensee shall submit detailed plans to Parks of all horticultural and landscaping work to be performed. All work to be performed at the Licensed Premises is subject to Parks' prior written approval. In addition, Licensee shall obtain all necessary permits, approvals, and authorizations from all City, State, and Federal agencies having jurisdiction over the Licensed Premises before any work is performed, and such work shall be of a quality which meets Parks' standards.

**11.3** Licensee shall promptly notify Parks of any benches, pavement or other special features of the Licensed Premises that are damaged or in disrepair for repair or replacement by Parks and shall promptly institute any appropriate safety measures to protect the public from harm, including but not limited to the erection of warning signs and temporary barriers around such safety hazards.

**11.4** Licensee (either directly or through any Café Sublicensee), at their sole cost and expense, shall be responsible for all security at the Licensed Premises and surrounding parkland year round and shall provide a 24 hour-a-day security system at the Licensed Premises in accordance with the plans described in Exhibit B attached hereto.

**11.5** Licensee (either directly or through a Café Sublicensee) shall, at its sole cost and expense, be responsible for the clean-up and removal of all waste, garbage, refuse, rubbish and litter from the Licensed Premises except for materials in recycling receptacles which are and will continue to be provided by Parks.

**11.6** At the expiration or sooner termination of this License, consistent with the maintenance responsibility required of Licensee by this License, Licensee shall turn over the Licensed Premises to Parks in a well maintained state, in good repair, ordinary wear and tear excepted.

**11.7** Licensee will be responsible for regular pest control inspections and extermination as needed. To the extent that Licensee applies pesticides to any property owned or leased by the City, Licensee or any subcontractor hired by Licensee shall comply with applicable laws, including Chapter 12 of Title 17 of the New York City Administrative Code and limit the environmental impact of its pesticide use.

**11.8** For any vehicle fuel dispensing tanks or underground heating oil storage tanks over 1,100 gallon capacity, Licensee shall maintain up-to-date Petroleum Bulk Storage ("PBS") registrations with New York State Department of Environmental Conservation and register such tanks with the DEP. The concessionaire will assume all registration and update costs. Licensee must keep a copy of the PBS Certificate on site and provide copies to Parks' 5-Boro Office on

Randall's Island, New York. Licensee shall perform or have performed a tightness test conducted at least once every five years, to comply with Parks monitoring leak detection checklists for the tank(s) and all other legal requirements. Any changes, removals or additions of tanks must be pre-approved by Parks.

### **APPROVALS**

**12.1** Licensee is solely responsible for obtaining all approvals, permits and licenses required by Federal, State and City laws, regulations, rules and orders for the lawful operation, management and maintenance of the concession granted by this License.

**12.2** Whenever any act, consent, approval or permission is required of the City or the Commissioner under this License, the same shall be valid only if it is, in each instance, in writing and signed by Commissioner or his duly authorized representative. No variance, alteration, amendment, or modification of this instrument shall be valid or binding upon the City, the Commissioner or their agents, unless the same is, in each instance, in writing and duly signed by the Commissioner or his duly authorized representative.

### **RESERVATION FOR SPECIAL EVENTS**

**13.1** For the purposes of this Section 13 the term "Parks' Special Event(s)" shall mean any event at the Licensed Premises, not to exceed two to three per Year, for which Parks has issued a Special Event Permit. Licensee shall, and shall require that any Café Sublicensee, cooperate with Parks in connection with Parks' Special Events and other unanticipated events at the Licensed Premises. Commissioner represents to Licensee that the Commissioner has not, as of the date hereof, granted to any other person or entity any license, permit, or right of possession or use which would prevent in any way Licensee from performing its obligations and realizing its rights under this License. It is expressly understood that this Section 13 shall in no way limit Parks' right to sponsor or promote Parks' Special Events, as defined herein, at the Licensed Premises, or to enter into agreements with third parties to sponsor or promote such events, provided that Parks will use its reasonable efforts to ensure that such third parties will be responsible for maintenance and clean-up associated with any such Parks' Special Event and further provided that Licensee and any Café Sublicensee shall not be required to operate during such Parks' Special Event. Such events shall not, without the prior written consent of Licensee, prohibit the Licensee from access to the Licensed Premises. In addition, Parks, acting on behalf of the City, reserves the right to host a number of annual events at the Licensed Premises, including benefits and other non-profit or public events. The dates of such events shall be mutually agreed upon by both parties and shall be reserved in writing not less than one month in advance.

### **PROHIBITION AGAINST TRANSFER; ASSIGNMENTS AND SUBLICENSES**

**14.1** Except for a sublicense with respect to the operation, management and maintenance of the Café approved by Parks, Licensee shall not sell, transfer, assign, sublicense or encumber in any way this License, ten percent or more of the shares of or interest in Licensee (unless it is agreed to, in writing, by Parks and signed by the Commissioner or Commissioner's designee), or

any equipment furnished as provided herein, or any interest therein, or consent, allow or permit any other person or party to use any part of the Licensed Premises, buildings, space or facilities covered by this License, nor shall this License be transferred by operation of law.

Should Licensee choose to assign or sublicense the management and operation of any element of the Licensed Premises to another party, Licensee shall seek the approval of the Commissioner (which shall not be unreasonably withheld) by submitting a written request including proposed assignment documents as provided herein. The Commissioner may request any additional information Commissioner deems necessary and Licensee shall promptly comply with such requests.

The term "assignment" shall be deemed to include any direct or indirect assignment, sublet, sale, pledge, mortgage, transfer of or change in more than ten percent in stock or voting control of or interest in Licensee, including any transfer by operation of law. No sale or transfer of the stock of or interest in Licensee may be made under any circumstance if such sale will result in a change of control of Licensee violative of the intent of this Section 14, without the prior written consent of Commissioner.

**14.2** No assignment or other transfer of any interest in this License Agreement shall be permitted which, alone or in combination with other prior or simultaneous transfers or assignments, would have the effect of changing the ownership or control, whether direct or indirect, of ten percent (10%) or more of the stock or voting control of Licensee in the Licensed Premises without the prior written consent of Commissioner. Licensee shall present to Commissioner the assignment or sublicense agreement for approval, together with any and all information as may be required by the City for such approval, including a statement prepared by a certified public accountant indicating that the proposed assignee or sublicensee has a financial net worth acceptable to the Commissioner together with a certification that it shall provide management control acceptable to the Commissioner for the management and operation of the Licensed Premises. The constraints contained herein are intended to assure the City that the Licensed Premises are operated by persons, firms and corporations which are experienced and reputable operators and are not intended to diminish Licensee's interest in the Licensed Premises.

**14.3** No consent to or approval of any assignment or sublicense granted pursuant to this Article 14 shall constitute consent to or approval of any subsequent assignment or sublicense. Failure to comply with this provision shall cause the immediate termination of this License.

**14.4** In addition to the foregoing requirements, Licensee shall immediately report to Parks any proposed change of five percent or more of the shares of or interest in Licensee when such change takes place.

### **PARKS CONSTRUCTION**

**15.1** Parks reserves the right to perform safety, maintenance or construction work deemed necessary by Commissioner in the Commissioner's sole discretion at or throughout the Licensed Premises at any time during the Term. Licensee and any Café Sublicensee agree to

cooperate with Parks to accommodate any such work by Parks and provide public and construction access through the Licensed Premises as deemed necessary by the Commissioner. Parks shall use its reasonable efforts to give Licensee and any Café Sublicensee at least one week notice of any such work and not to interfere substantially with Licensee's and any Café Sublicensee's operations or use of the Licensed Premises. Parks may temporarily close a part or all of the Licensed Premises for a Parks purpose as determined by the Commissioner. In the event that Licensee must close the Licensed Premises for the purposes provided for in this License because of such Parks' work, then Licensee may propose and submit for the Commissioner's approval a plan to equitably address the impact of the closure. Licensee shall be responsible for the security of all Licensee's property on the Licensed Premises at all times, and any Café Sublicensee shall be responsible for the security of all of its property on the Licensed Premises at any time. Parks shall be solely responsible for claims, damages, or injury resulting from its work hereunder, except to the extent such claims, damages and injury are caused by the negligence or willful misconduct of Licensee or any Café Sublicensee.

### **COMPLIANCE WITH LAWS**

**16.1** Licensee shall comply and cause its employees and agents and any Café Sublicensee to comply with all laws, rules, regulations and orders now or hereafter prescribed by Commissioner, and to comply with all laws, rules, regulations and orders of any City, State or Federal agency or governmental entity having jurisdiction over operations of the License and the Licensed Premises and/or Licensee's use and occupation thereof.

**16.2** Licensee shall not use or allow the Licensed Premises, or any portion thereof, to be used or occupied for any unlawful purpose or in any manner violative of a certificate pertaining to occupancy or use during the Term.

### **NON-DISCRIMINATION**

**17.1** Licensee and any Café Sublicensee shall not unlawfully discriminate against any employee, applicant for employment or patron because of race, creed, color, national origin, age, sex, handicap, marital status, or sexual orientation.

**17.2** All advertising for employment shall indicate that Licensee and any Café Sublicensees are Equal Opportunity Employers.

### **NO WAIVER OF RIGHTS**

**18.0** No acceptance by Commissioner of any compensation, fees, penalty sums, charges or other payments in whole or in part for any periods after a default of any terms and conditions herein shall be deemed a waiver of any right on the part of Commissioner to terminate this License. No waiver by Commissioner of any default on the part of Licensee in performance of any of the terms and conditions herein shall be construed to be a waiver of any other or subsequent default in the performance of any of the said terms and conditions.

**RESPONSIBILITY FOR SAFETY, INJURIES OR DAMAGE, AND  
INDEMNIFICATION**

**19.1** A. Licensee shall be solely responsible for the safety and protection of its employees, agents, servants, sublicensees, contractors, and subcontractors, and for the safety and protection of the employees, agents, or servants of its sublicensees, contractors or subcontractors.

B. Licensee shall be solely responsible for taking all reasonable precautions to protect the persons and property of the City or others from damage, loss or injury resulting from any and all operations under this License.

C. Licensee shall be solely responsible for injuries to any and all persons, including death, and damage to any and all property arising out of or related to the operations under this License, whether or not due to the negligence of the Licensee, including but not limited to injuries or damages resulting from the acts or omissions of any of its employees, agents, servants, sublicensees, contractors, subcontractors, or any other person.

D. Licensee shall use the Licensed Premises in compliance with, and shall not cause or permit the Licensed Premises to be used in violation of, any and all federal, state or local environmental, health and/or safety-related laws, regulations, standards, decisions of the courts, permits or permit conditions, currently existing or as amended or adapted in the future which are or become applicable to Licensee or the Licensed Premises (collectively “Environmental Laws”). Except as may be agreed by the City as part of this License, Licensee shall not cause or permit, or allow any of Licensee’s personnel to cause or permit, any Hazardous Materials to be brought upon, store, used generated, treated or disposed of on the Licensed Premises. As used herein, “Hazardous Materials” means any chemical, substance or material which is now or becomes in the future listed, defined or regulated in any manner by any Environmental Law based upon, directly or indirectly, its properties or effects.

**19.2** A. To the fullest extent permitted by law, Licensee shall indemnify, defend and hold the City and its officials and employees harmless against any and all claims, liens, demands, judgments, penalties, fines, liabilities, settlements, damages, costs and expenses of whatever kind or nature (including, without limitation, attorneys' fees and disbursements) arising out of or related to any of the operations under this License (regardless of whether or not Licensee itself has been negligent) and/or Licensee’s failure to comply with the law or any of the requirements of this License. Insofar as the facts or law relating to any of the foregoing would preclude the City or its officials and employees from being completely indemnified by Licensee, the City and its officials and employees shall be partially indemnified by Licensee to the fullest extent permitted by law.

B. Licensee’s obligation to defend, indemnify and hold the City and its officers and employees harmless shall not be (i) limited in any way by Licensee’s obligations to obtain and maintain insurance under this Licensee, nor (ii) adversely affected by any failure on the part of the City or its officers and employees to avail themselves of the benefits of such insurance.

## **INSURANCE**

**20.1** A. Throughout the Term Licensee shall ensure that the types of insurance indicated in this Article are obtained and remain in force, and that such insurance adheres to all requirements herein. The City may require other types of insurance and/or higher liability limits and other terms if, in the opinion of Commissioner, Licensee's operations warrant it.

B. Licensee is authorized to undertake or maintain operations under this License only during the effective period of all required coverage.

**20.2** A. Licensee shall maintain Commercial General Liability insurance in the amount of at least One Million Dollars (\$1,000,000) per occurrence. In the event such insurance contains an aggregate limit, the aggregate shall apply on a per-location basis applicable to the Licensed Premises and such per-location aggregate shall be at least Two Million Dollars (\$2,000,000). This insurance shall protect the insureds from claims for property damage and/or bodily injury, including death, that may arise from any of the operations under this License. Coverage shall be at least as broad as that provided by the most recently issued Insurance Services Office ("ISO") Form CG 0001, shall contain no exclusions other than as required by law or as approved by the Commissioner, and shall be "occurrence" based rather than "claims-made." Policies providing such insurance may not include any endorsements excluding coverage relating to the emission of asbestos, lead, mold, or pollutants.

B. Such Commercial General Liability insurance shall name the City, together with its officials and employees, as an Additional Insured for claims that may arise from any of the operations under this License. Coverage shall be at least as broad as the most recent edition of ISO Form CG 2026. "Blanket" or other forms are also acceptable if they provide the City, together with its officials and employees, with coverage at least as broad as ISO Form CG 2026.

C. If Licensee or a contractor or sublicensee of Licensee serves alcoholic beverages anywhere on the Licensed Premises, Licensee shall carry or cause to be carried liquor law liability coverage in an amount not less than Two Million Dollars (\$2,000,000) per occurrence and name the City, together with its officials and employees, as an additional insured. Such insurance shall be effective prior to the commencement of any such operations and continue throughout such operations. The Commissioner may increase or decrease the limit(s) if the Commissioner reasonably believes that the nature of such operations merits an increase or decrease.

**20.3** Licensee shall maintain Workers' Compensation insurance, Employers Liability insurance, and Disability Benefits insurance on behalf of, or with regard to, all employees involved in the Licensee's operations under this License, and such insurance shall comply with the laws of the State of New York.



**20.4** A. With regard to all operations under this License, Licensee shall maintain or cause to be maintained Commercial Automobile Liability insurance in the amount of at least One Million Dollars (\$1,000,000) each accident (combined single limit) for liability arising out of the ownership, maintenance or use of any owned, non-owned or hired vehicles. Coverage shall be at least as broad as the latest edition of ISO Form CA0001.

B. If vehicles are used for transporting hazardous materials, such Business Automobile Liability insurance shall be endorsed to provide pollution liability broadened coverage for covered vehicles (endorsement CA 99 48) as well as proof of MCS-90.

**20.5** A. Licensee shall maintain comprehensive broad-form property insurance (such as an "All Risk" policy) covering all buildings, structures, equipment and fixtures on the Licensed Premises ("Concession Structures"), whether existing at the Commencement Date or built at any time before the Termination Date. Such insurance shall provide full Replacement Cost coverage for the Concession Structures (without depreciation or obsolescence clause) and include, without limitation, coverage for loss or damage by acts of terrorism, water (other than flood-related), wind, subsidence and earthquake. Such insurance shall be "occurrence" (rather than "claims-made") based and shall designate the Licensee as Named Insured and the City as Loss Payee as their interests may appear.

B. This section does not require coverage for damage caused by flooding.

C. The limit of such property insurance shall be no less than the full Replacement Cost of all Concession Structures, including, without limitation, the costs of post-casualty debris removal and soft costs, to the extent that such costs can be covered by an "all risk" or "special perils form" insurance policy. If such insurance contains an aggregate limit, it shall apply separately to the Concession Structures.

D. In the event of any loss to any of the Concession Structures, Licensee shall provide the insurance company that issued such property insurance with prompt, complete and timely notice, and simultaneously provide the Commissioner with a copy of such notice. With regard to any Concession Structure that the City owns or in which the City has an interest, Licensee shall also (i) take all appropriate actions in a timely manner to adjust such claim on terms that provide the City with the maximum possible payment for the loss, and (ii) either provide the City with the opportunity to participate in any negotiations with the insurer regarding adjustments for claims or, at the Commissioner's discretion, allow the City itself to adjust such claim.

**20.6** Licensee represents and warrants that its operations at the Licensed Premises will not involve asbestos, lead, pcb's or any other hazardous materials.

**20.7** A. Policies of insurance required under this Article shall be provided by companies that may lawfully issue such policy and have an A.M. Best rating of at least A- / "VII" or a Standard and Poor's rating of at least A, unless prior written approval is obtained from the Commissioner.

B. Policies of insurance required under this Article shall be primary and non-contributing to any insurance or self-insurance maintained by the City.

C. Wherever this Article requires that insurance coverage be “at least as broad” as a specified form (including all ISO forms), there is no obligation that the form itself be used, provided that Licensee can demonstrate that the alternative form or endorsement contained in its policy provides coverage at least as broad as the specified form.

D. There shall be no self-insurance program or self-insured retention with regard to any insurance required under this Article unless approved in writing by the Commissioner. Under no circumstances shall the City be responsible for the payment of any self-insured retention (or any other aspect of a self-insurance program). Further, Licensee shall ensure that any such self-insurance program provides the City with all rights that would be provided by traditional insurance under this Article, including but not limited to the defense and indemnification obligations that insurers are required to undertake in liability policies.

E. The City’s limits of coverage for all types of insurance required under this Article shall be the greater of (i) the minimum limits set forth in this Article or (ii) the limits provided to Licensee under all primary, excess and umbrella policies covering operations under this License Agreement.

F. All required policies, except for Workers’ Compensation insurance, Employers Liability insurance, and Disability Benefits insurance, shall contain an endorsement requiring that the issuing insurance company endeavor to provide the City with advance written notice in the event such policy is to expire or be cancelled or terminated for any reason, and to mail such notice to both the Commissioner, City of New York Department of Parks and Recreation, Arsenal, 830 Fifth Avenue, New York, NY 10065 and the New York City Comptroller, Attn: Office of Contract Administration, Municipal Building, One Centre Street, Room 1005, New York, New York 10007. Such notice is to be sent at least (30) days before the expiration, cancellation or termination date, except in cases of non-payment, where at least ten (10) days written notice would be provided.

G. All required policies, except Workers’ Compensation, Employers Liability, and Disability Benefits, shall include a waiver of the right of subrogation with respect to all insureds and loss payees named therein.

**20.8** A. Certificates of Insurance for all insurance required in this Article must be submitted to and accepted by the Commissioner prior to execution of this License Agreement.

B. For Workers’ Compensation, Employers Liability Insurance, and Disability Benefits insurance policies, Licensee shall submit one of the following:

1. C-105.2 Certificate of Worker’s Compensation Insurance;
2. U-26.3 -- State Insurance Fund Certificate of Workers’ Compensation Insurance;
3. Request for WC/DB Exemption (Form CE-200);

4. Equivalent or successor forms used by the New York State Workers' Compensation Board; or
5. Other proof of insurance in a form acceptable to the City. ACORD forms are not acceptable proof of workers' compensation coverage.

C. For all insurance required under this Article other than Workers Compensation, Employers Liability, and Disability Benefits insurance, Licensee shall submit one or more Certificates of Insurance in a form acceptable to the Commissioner. All such Certificates of Insurance shall (a) certify the issuance and effectiveness of such policies of insurance, each with the specified minimum limits; and (b) be accompanied by the provision(s) or endorsement(s) in the Licensee's policy/ies (including its general liability policy) by which the City has been made an additional insured or loss payee, as required herein. All such Certificates of Insurance shall be accompanied by either a duly executed "Certification by Insurance Broker or Agent" in the form annexed hereto as Exhibit D or as otherwise required by the Commissioner or certified copies of all policies referenced in such Certificate of Insurance.

D. Certificates of Insurance confirming renewals of insurance shall be submitted to the Commissioner prior to the expiration date of coverage of all policies required under this Concession. Such Certificates of Insurance shall comply with subsections (B) and (C) directly above.

E. Acceptance or approval by the Commissioner of a Certificate of Insurance or any other matter does not waive Concessionaire's obligation to ensure that insurance fully consistent with the requirements of this Article is secured and maintained, nor does it waive Licensee's liability for its failure to do so.

F. Licensee shall be obligated to provide the City with a copy of any policy of insurance required under this Article upon request by the Commissioner or the New York City Law Department.

**20.9** A. Licensee may satisfy its insurance obligations under this Article through primary policies or a combination of primary and excess/umbrella policies, so long as all policies provide the scope of coverage required herein.

B. In the event Licensee requires any contractor or sublicensee to procure insurance with regard to any operations under this License and to name Licensee as an Additional Insured thereunder, Licensee shall ensure that such contractor or sublicensee also name the City, including its officials and employees, as an Additional Insured with coverage at least as broad as the most recent edition of ISO Form CG 20 26.

C. Licensee shall be solely responsible for the payment of all premiums for all policies and all deductibles or self-insured retentions to which they are subject, whether or not the City is an insured under the policy.

D. Where notice of loss, damage, occurrence, accident, claim or suit is required under a policy maintained in accordance with this Article, Licensee shall notify in writing all

insurance carriers that issued potentially responsive policies of any such event relating to any operations under this License Agreement (including notice to Commercial General Liability insurance carriers for events relating to Licensee's own employees) no later than 20 days after such event. For any policy where the City is an Additional Insured, such notice shall expressly specify that "this notice is being given on behalf of the City of New York as Insured as well as the Named Insured." Such notice shall also contain the following information: the number of the insurance policy, the name of the named insured, the date and location of the damage, occurrence, or accident, and the identity of the persons or things injured, damaged or lost. Licensee shall simultaneously send a copy of such notice to the City of New York c/o Insurance Claims Specialist, Affirmative Litigation Division, New York City Law Department, 100 Church Street, New York, New York 10007.

E. Licensee's failure to secure and maintain insurance in complete conformity with this Article, or to give the insurance carrier timely notice on behalf of the City, or to do anything else required by this Article shall constitute a material breach of this License Agreement. Such breach shall not be waived or otherwise excused by any action or inaction by the City at any time.

F. Insurance coverage in the minimum amounts provided for in this Article shall not relieve the Licensee of any liability under this License Agreement, nor shall it preclude the City from exercising any rights or taking such other actions as are available to it under any other provisions of this License Agreement or the law.

G. In the event of any loss, accident, claim, action, or other event that does or can give rise to a claim under any insurance policy required under this Article, Licensee shall at all times fully cooperate with the City with regard to such potential or actual claim.

H. Apart from damages or losses Covered by Workers' Compensation Insurance, Employers Liability Insurance, Disability Benefits Insurance or Commercial Automobile Insurance, Licensee waives all rights against the City, including its officials and employees, for any damages or losses that are covered under any insurance required under this Article (whether or not such insurance is actually procured or claims are paid thereunder) or any other insurance applicable to the operations of Licensee and/or its employees, agents, or servants of its contractors or subcontractors.

I. In the event Licensee requires any entity, by contract or otherwise, to procure insurance with regard to any operations under this License Agreement and requires such entity to name Licensee as an additional insured under such insurance, Licensee shall ensure that such entity also names the City, including its officials and employees, as an additional insured with coverage at least as broad as ISO form CG 20 26.

J. In the event Licensee receives notice, from an insurance company or other person, that any insurance policy required under this Article shall expire or be cancelled or terminated (or has expired or been cancelled or terminated) for any reason, Licensee shall immediately forward a copy of such notice to both the Commissioner, City of New York Department of Parks and Recreation, Arsenal, 830 Fifth Avenue, New York, NY 10065 and the New York City

Comptroller, attn: Office of Contract Administration, Municipal Building, One Centre Street, room 1005, New York, New York 10007. Notwithstanding the foregoing, Licensee shall ensure that there is no interruption in any of the insurance coverage required under this Article.

### **WAIVER OF COMPENSATION**

**21.1** Licensee hereby expressly waives any and all claims for compensation for any and all loss or damage sustained by reason of any defects, including, but not limited to, deficiency or impairment of the water supply system, gas mains, electrical apparatus or wires furnished for the Licensed Premises, or by reason of any loss of any gas supply, water supply, heat or current which may occur from time to time, or for any loss resulting from fire, water, windstorm, tornado, explosion, civil commotion, strike or riot, and Licensee hereby expressly releases and discharges Commissioner, his agents, and City from any and all demands, claims, actions, and causes of action arising from any of the causes aforesaid.

**21.2** Licensee further expressly waives any and all claims for compensation, loss of profit, or refund of its investment, if any, or any other payment whatsoever, in the event this License is terminated by Commissioner sooner than the fixed term because the Licensed Premises are required for any park or other public purpose, or because the License was terminated or revoked for any reason as provided herein.

### **INVESTIGATIONS**

**22.1 (a)** The parties to this license shall cooperate fully and faithfully with any investigation, audit or inquiry conducted by a State of New York (hereinafter "State") or City governmental agency or authority that is empowered directly or by designation to compel the attendance of witnesses and to examine witnesses under oath, or conducted by the Inspector General of a governmental agency that is a party in interest to the transaction, submitted bid, submitted proposal, contract, lease, permit, or license that is the subject of the investigation, audit or inquiry.

**(b) (i)** If any person who has been advised that his or her statement, and any information from such statement, will not be used against him or her in any subsequent criminal proceeding refuses to testify before a grand jury or other governmental agency or authority empowered directly or by designation to compel the attendance of witnesses and to examine witnesses under oath concerning the award of or performance under any transaction, agreement, lease, permit, contract, or license entered into with the City, the State, or any political subdivision or public authority thereof, or the Port Authority of New York and New Jersey, or any local development corporation within the City, or any public benefit corporation organized under the laws of the State of New York; or

**(ii)** If any person refuses to testify for a reason other than the assertion of his or her privilege against self-incrimination in an investigation, audit or inquiry conducted by a City or State governmental agency or authority empowered directly or by designation to compel the attendance of witnesses and to take testimony concerning the award of, or performance under, any transaction, agreement, lease, permit, contract, or license entered into with the City,

the State, or any political subdivision thereof or any local development corporation within the City, then

(A) The Commissioner or agency head whose agency is a party in interest to the transaction, submitted bid, submitted proposal, contract, lease, permit, or license shall convene a hearing, upon not less than five days' written notice to the parties involved to determine if any penalties should attach for the failure of any person to testify.

(B) If any non-governmental party to the hearing requests an adjournment, the Commissioner or agency head who convened the hearing may, upon granting the adjournment, suspend any contract, lease, permit, or license pending the final determination pursuant to Section 22 (d) below without the City incurring any penalty or damages for delay or otherwise.

(c) The penalties which may attach after a final determination by the Commissioner or agency head may include but shall not exceed:

(i) The disqualification for a period not to exceed five years from the date of an adverse determination of any person or entity of which such person was a member at the time the testimony was sought, from submitting bids for, or transacting business with, or entering into or obtaining any contract, lease, permit or license with or from the City; and/or

(ii) The cancellation or termination of any and all existing City contracts, leases, permits, or licenses that the refusal to testify concerns and that have not been assigned as permitted under this license, nor the proceeds of which pledged, to an unaffiliated and unrelated institutional lender for fair value prior to the issuance of the notice scheduling the hearing, without the City incurring any penalty or damages on account of such cancellation or termination; monies lawfully due for goods delivered, work done, rentals, or fees accrued prior to the cancellation or termination shall be paid by the City.

(d) The Commissioner or agency head shall consider and address in reaching his or her determination and in assessing an appropriate penalty the factors in Section 22(d) (i) and (ii) below. He or she may also consider, if relevant and appropriate, the criteria established in Sections 22(d) (iii) and (iv) below in addition to any other information which may be relevant and appropriate.

(i) The party's good faith endeavors or lack thereof to cooperate fully and faithfully with any governmental investigation or audit, including but not limited to the discipline, discharge, or disassociation of any person failing to testify, the production of accurate and complete books and records, and the forthcoming testimony of all other members, agents, assignees or fiduciaries whose testimony is sought.

(ii) The relationship of the person who refused to testify to any entity that is a party to the hearing, including, but not limited to, whether the person whose testimony is sought has an ownership interest in the entity and/or the degree of authority and responsibility the person has within the entity.

(iii) The nexus of the testimony sought to the subject entity and its contracts, leases, permits or licenses with the City.

(iv) The effect a penalty may have on an unaffiliated and unrelated party or entity that has a significant interest in an entity subject to penalties under (c) above, provided that the party or entity has given actual notice to the Commissioner or agency head upon the acquisition of the interest, or at the hearing called for in (b) (ii)(A) above gives notice and proves that such interest was previously acquired. Under either circumstance the party or entity must present evidence at the hearing demonstrating the potentially adverse impact a penalty will have on such person or entity.

(e) (i) The term "license" or "permit" as used herein shall be defined as a license, permit, franchise or concession not granted as a matter of right.

(ii) The term "person" as used herein shall be defined as any natural person doing business alone or associated with another person or entity as a partner, director, officer, principal or employee.

(iii) The term "entity" as used herein shall be defined as any firm, partnership, corporation, association, or person that receives monies, benefits, licenses, leases, or permits from or through the City or otherwise transacts business with the City.

(iv) The term "member" as used herein shall be defined as any person associated with another person or entity as a partner, director, officer, principal or employee.

(f) In addition to and notwithstanding any other provision of this License the Commissioner or agency head may in his or her sole discretion terminate this agreement upon not less than three days written notice in the event Licensee fails to promptly report in writing to the Commissioner of Investigation of the City of New York any solicitation of money goods requests for future employment or other benefit or thing of value, by or on behalf of any employee of the City of other person, firm, corporation or entity for any purpose which may be related to the procurement or obtaining of this agreement by the Licensee, or affecting the performance or this License Agreement.

### **CHOICE OF LAW, CONSENT TO JURISDICTION AND VENUE**

**23.1** This License Agreement shall be deemed to be executed in the City of New York, State of New York, regardless of the domicile of the Licensee, and shall be governed by and construed in accordance with the laws of the State of New York.

**23.2** Any and all claims asserted by or against the City arising under this License or related thereto shall be heard and determined either in the courts of the United States located in New York City ("Federal Courts") or in the courts of the State of New York ("New York State Courts") located in the City and County of New York. To effect this License Agreement and its intent, Licensee agrees:

(a) If the City initiates any action against the Licensee in Federal Court or in New York State Court, service of process may be made on the Licensee either in person, wherever such Licensee may be found, or by registered mail addressed to the Licensee at its address set forth in this License, or to such other address as the Licensee may provide to the City in writing; and

(b) With respect to any action between the City and the Licensee in New York State Court, the Licensee hereby expressly waives and relinquishes any rights it might otherwise have (i) to move to dismiss on grounds of forum non conveniens, (ii) to remove to Federal Court; and (iii) to move for a change of venue to a New York State Court outside New York County.

**23.3** With respect to any action between the City and the Licensee in Federal Court located in New York City, the Licensee expressly waives and relinquishes any right it might otherwise have to move to transfer the action to a United States Court outside the City of New York.

**23.4** If the Licensee commences any action against the City in a court located other than in the City and State of New York, upon request of the City, the Licensee shall either consent to a transfer of the action to a court of competent jurisdiction located in the City and State of New York or, if the court where the action is initially brought will not or cannot transfer the action, the Licensee shall consent to dismiss such action without prejudice and may thereafter reinstitute the action in a court of competent jurisdiction in New York City.

### **WAIVER OF TRIAL BY JURY**

**24.1** (a) Licensee hereby waives trial by jury in any action, proceeding, or counterclaim brought by the City against Licensee in any matter related to this License.

(b) No action at law or proceeding in equity against the City shall lie or be maintained upon any claim based upon this License Agreement or arising out of this License Agreement or in any way connected with this License Agreement unless Licensee shall have strictly complied with all requirements relating to the giving of notice and of information with respect to such claims, all as herein provided.

(c) No action shall lie or be maintained against the City by Licensee upon any claims based upon this License unless such action shall be commenced within six (6) months of the termination or conclusion of this License, or within six (6) months after the accrual of the cause of action, whichever first occurs.

(d) In the event any claim is made or any action brought in any way relating to this License Agreement herein other than an action or proceeding in which Licensee and the City are adverse parties, Licensee shall diligently render to the City without additional compensation any and all assistance which the City may reasonably require of Licensee.

### **CUMULATIVE REMEDIES - NO WAIVER**

**25.0** The specific remedies to which the City may resort under the terms of this License are cumulative and are not intended to be exclusive of any other remedies or means of redress to which it may be lawfully entitled in case of any other default hereunder. The failure of the City to insist in any one or more cases upon the strict performance of any of the covenants of this



License, or to exercise any option herein contained, shall not be construed as a waiver or relinquishment for the future of such covenants or option.

### **EMPLOYEES**

**26.0** All experts, consultants and employees of Licensee who are employed by Licensee to perform work under this License are neither employees of the City nor under contract to the City, and Licensee alone is responsible for their work, direction, compensation and personal conduct while engaged under this License. Nothing in this License shall impose any liability or duty on the City for acts, omissions, liabilities or obligations of Licensee or any person, firm, company, agency, association, corporation or organization engaged by Licensee as expert, consultant, independent contractor, specialist, trainee, employee, servant, or agent or for taxes of any nature including but not limited to unemployment insurance, workers' compensation, disability benefits and social security.

### **INDEPENDENT STATUS OF LICENSEE**

**27.0** Licensee is not an employee of the City and in accordance with such independent status neither Licensee nor its employees or agents will hold themselves out as, nor claim to be officers, employees, or agents of the City, or of any department, agency, or unit thereof, and they will not make any claim, demand, or application to or for any right or privilege applicable to an officer of, or employee of, the City, including but not limited to, workers' compensation coverage, unemployment insurance benefits, social security coverage or employee retirement membership or credit.

### **CREDITOR-DEBTOR PROCEEDINGS**

**28.0** Deliberately omitted.

### **CONFLICT OF INTEREST**

**29.0** Licensee represents and warrants that neither it nor any of its directors, officers, members, partners or employees, has any interest nor shall they acquire any interest, directly or indirectly, which would or may conflict in any manner or degree with the performance or rendering of the services herein provided. Licensee further represents and warrants that in the performance of this License no person having such interest or possible interest shall be employed by it. No elected official or other officer or employee of the City, nor any person whose salary is payable, in whole or part, from the City treasury, shall participate in any decision relating to this License which affects his/her personal interest or the interest of any corporation, partnership or association in which he/she is, directly or indirectly, interested nor shall any such person have any interest, direct or indirect, in this License or in the proceeds thereof.

### **PROCUREMENT OF AGREEMENT**

**30.1** Licensee represents and warrants that no person or selling agency has been employed or retained to solicit or secure this License upon an agreement or understanding for a commission, percentage, brokerage fee, contingent fee or any other compensation. Licensee further represents

and warrants that no payment, gift or thing of value has been made, given or promised to obtain this or any other agreement between the parties. Licensee makes such representations and warranties to induce the City to enter into this License and the City relies upon such representations and warranties in the execution hereof.

**30.2** For a breach or violation of such representations or warranties, the Commissioner shall have the right to annul this License without liability, entitling the City to recover all monies paid hereunder, if any, and the Licensee shall not make any claim for, or be entitled to recover, any sum or sums due under this License. This remedy, if effected, shall not constitute the sole remedy afforded the City for the falsity or breach, nor shall it constitute a waiver of the City's right to claim damages or refuse payment or to take any other action provided by law or pursuant to this License.

#### **NO CLAIM AGAINST OFFICERS, AGENTS OR EMPLOYEES**

**31.0** No claim whatsoever shall be made by the Licensee against any officer, agent or employee of the City for, or on account of, anything done or omitted in connection with this License.

#### **ALL LEGAL PROVISIONS DEEMED INCLUDED**

**32.0** Each and every provision of law required to be inserted in this License shall be and is inserted herein. Every such provision is to be deemed to be inserted herein, and if, through mistake or otherwise, any such provision is not inserted, or is not inserted in correct form, then this License shall, forthwith upon the application of either party, be amended by such insertion so as to comply strictly with the law and without prejudice to the rights of either party hereunder.

#### **SEVERABILITY: INVALIDITY OF PARTICULAR PROVISIONS**

**33.0** If any term or provision of this License or the application thereof to any person or circumstances shall, to any extent, be invalid or unenforceable, the remainder of this License, or the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and each term and provision of this License shall be valid and enforceable to the fullest extent permitted by law.

#### **JUDICIAL INTERPRETATION**

**34.0** Should any provision of this License require judicial interpretation, it is agreed that the court interpreting or considering same shall not apply the presumption that the terms hereof shall be more strictly construed against a party by reason of the rule of construction that a document should be construed more strictly against the party who itself or through its agent prepared the same, it being agreed that all parties hereto have participated in the preparation of this License and that legal counsel was consulted by each responsible party before the execution of this License.

### **MODIFICATION OF AGREEMENT**

**35.0** This License Agreement constitutes the whole of the agreement between the parties hereto, and no other representation made heretofore shall be binding upon the parties hereto. This License Agreement may only be modified by an agreement in writing and duly executed by the party or parties affected by said modification.

### **NOTICES**

**36.0** Where provision is made herein for notice or other communication to be given in writing, the same shall be given by hand delivery or by mailing a copy of such notice or other communication by certified mail, return receipt requested, addressed to Commissioner or to the attention of Licensee at their respective addresses provided at the beginning of this License Agreement, or to any other address that Licensee shall have filed with Commissioner. Notices may also be given by facsimile transmission to the fax numbers for each party provided at the beginning of this License Agreement.

### **LICENSEE ORGANIZATION, POWER AND AUTHORITY**

**37.0** Licensee and the individual executing this License Agreement on behalf of Licensee each represents and warrants that Licensee is a not-for-profit corporation duly organized, validly existing and in good standing under the laws of the State of New York and has the power and authority to enter into this License Agreement and perform its obligations hereunder. This is a continuing representation and warranty.

### **MISCELLANEOUS**

**38.0** The headings of sections and paragraphs are inserted for convenience only and shall not be deemed to constitute part of this License Agreement or to affect the construction thereof. The

use in this License Agreement of singular, plural, masculine, feminine and neuter pronouns shall include the others as the context may require.

**IN WITNESS WHEREOF**, the parties hereto have caused this License Agreement to be signed and sealed on the day and year first above written.

CITY OF NEW YORK DEPARTMENT OF  
PARKS & RECREATION

ALLIANCE FOR DOWNTOWN NEW  
YORK, INC.

By:\_\_\_\_\_

By:\_\_\_\_\_  
Jessica Lappin  
President

Dated:\_\_\_\_\_

Dated:\_\_\_\_\_

APPROVED AS TO FORM AND  
CERTIFIED AS TO LEGAL AUTHORITY

\_\_\_\_\_  
Acting Corporation Counsel

STATE OF NEW YORK

ss:

COUNTY OF NEW YORK

On this       day of       , 2017 before me personally came  
\_\_\_\_\_ to me known, and known to be the  
\_\_\_\_\_ of the Department of Parks and Recreation of  
the City of New York, and the said person described in and who executed the foregoing  
instrument and (s)he acknowledged that (s)he executed the same in her/his official capacity and  
for the purpose mentioned therein.

\_\_\_\_\_  
Notary Public

STATE OF NEW YORK

ss:

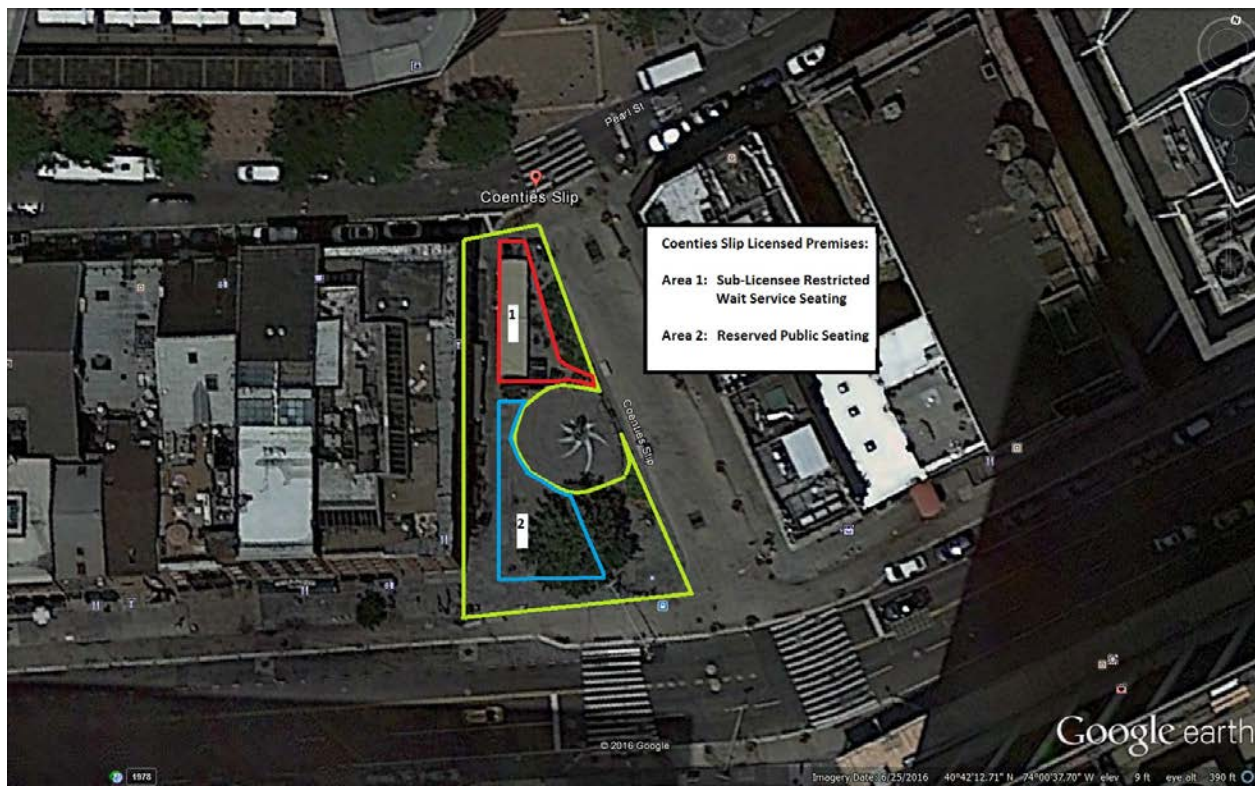
COUNTY OF

On this    day of       , 2017 before me personally came Jessica Lappin to me known  
and who, being duly sworn by me, did depose and say that (s)he is the President of Alliance for  
Downtown New York, Inc. and that (s)he was authorized to execute the foregoing instrument on  
behalf of that company and acknowledged that (s)he executed the same on behalf of that  
company for the purposes mentioned therein.

\_\_\_\_\_  
Notary Public

**EXHIBIT A**

**LICENSED PREMISES**



**EXHIBIT B**  
**SECURITY PLAN**

Licensee will provide 24 hour-a-day security coverage for the Licensed Premises as part of its patrols of the Downtown-Lower Manhattan Business Improvement District (the “BID”). The Downtown Alliance Public Safety office patrols the streets in the BID on a daily basis to assist in the City’s efforts to address quality of life and potential crime conditions.

Public Safety Officers operate on foot patrol along with vans, bicycles, and a scooter. Licensee’s public safety staff is trained to deal with a myriad of conditions ranging from visitor questions to reporting street level conditions and through special NYPD training report on suspicious activity related to terrorism.

Each Patrol Post is the area that a public safety officer patrols on foot for the majority of their assigned tour. These posts are the streets within the BID that have the most foot traffic throughout the day. These are the areas of highest visibility for Licensee’s staff. The Licensed Premises will be included on a Patrol Post and will be visited periodically during day shifts on weekdays (approximately 7:00am to 7:00pm). At other times the Licensed Premises is periodically observed by patrolling vehicles. As with NYPD patrols, Downtown Alliance Public Safety Officers cover a large area in Lower Manhattan and patrol coverage is not provided for particular locations at all times. Patrols are adjusted subject to varying needs and site conditions on particular days.

## EXHIBIT C

### **PAID SICK LEAVE LAW** **CONCESSION AGREEMENT RIDER**

#### Introduction and General Provisions

The Earned Sick Time Act, also known as the Paid Sick Leave Law (“PSLL”), requires covered employees who annually perform more than 80 hours of work in New York City to be provided with paid sick time.<sup>1</sup> Concessionaires of the City of New York or of other governmental entities may be required to provide sick time pursuant to the PSLL.

The PSLL became effective on April 1, 2014, and is codified at Title 20, Chapter 8, of the New York City Administrative Code. It is administered by the City’s Department of Consumer Affairs (“DCA”); DCA’s rules promulgated under the PSLL are codified at Chapter 7 of Title 6 of the Rules of the City of New York (“Rules”).

The Concessionaire agrees to comply in all respects with the PSLL and the Rules, and as amended, if applicable, in the performance of this agreement. The Concessionaire further acknowledges that such compliance is a material term of this agreement and that failure to comply with the PSLL in performance of this agreement may result in its termination.

The Concessionaire must notify the Concession Manager in writing within ten (10) days of receipt of a complaint (whether oral or written) regarding the PSLL involving the performance of this agreement. Additionally, the Concessionaire must cooperate with DCA’s education efforts and must comply with DCA’s subpoenas and other document demands as set forth in the PSLL and Rules.

The PSLL is summarized below for the convenience of the Concessionaire. The Concessionaire is advised to review the PSLL and Rules in their entirety. On the website [www.nyc.gov/PaidSickLeave](http://www.nyc.gov/PaidSickLeave) there are links to the PSLL and the associated Rules as well as additional resources for employers, such as Frequently Asked Questions, timekeeping tools and model forms, and an event calendar of upcoming presentations and webinars at which the Concessionaire can get more information about how to comply with the PSLL. The Concessionaire acknowledges that it is responsible for compliance with the PSLL notwithstanding any inconsistent language contained herein.

Pursuant to the PSLL and the Rules:

#### Applicability, Accrual, and Use

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<sup>1</sup> Pursuant to the PSLL, if fewer than five employees work for the same employer, as determined pursuant to New York City Administrative Code §20-912(g), such employer has the option of providing such employees uncompensated sick time.



An employee who works within the City of New York for more than eighty hours in any consecutive 12-month period designated by the employer as its “calendar year” pursuant to the PSLL (“Year”) must be provided sick time. Employers must provide a minimum of one hour of sick time for every 30 hours worked by an employee and compensation for such sick time must be provided at the greater of the employee’s regular hourly rate or the minimum wage. Employers are not required to provide more than forty hours of sick time to an employee in any Year.

An employee has the right to determine how much sick time he or she will use, provided that employers may set a reasonable minimum increment for the use of sick time not to exceed four hours per day. In addition, an employee may carry over up to forty hours of unused sick time to the following Year, provided that no employer is required to allow the use of more than forty hours of sick time in a Year or carry over unused paid sick time if the employee is paid for such unused sick time and the employer provides the employee with at least the legally required amount of paid sick time for such employee for the immediately subsequent Year on the first day of such Year.

An employee entitled to sick time pursuant to the PSLL may use sick time for any of the following:

- such employee’s mental illness, physical illness, injury, or health condition or the care of such illness, injury, or condition or such employee’s need for medical diagnosis or preventive medical care;
- such employee’s care of a family member (an employee’s child, spouse, domestic partner, parent, sibling, grandchild or grandparent, or the child or parent of an employee’s spouse or domestic partner) who has a mental illness, physical illness, injury or health condition or who has a need for medical diagnosis or preventive medical care;
- closure of such employee’s place of business by order of a public official due to a public health emergency; or
- such employee’s need to care for a child whose school or childcare provider has been closed due to a public health emergency.

An employer must not require an employee, as a condition of taking sick time, to search for a replacement. However, an employer may require an employee to provide: reasonable notice of the need to use sick time; reasonable documentation that the use of sick time was needed for a reason above if for an absence of more than three consecutive work days; and/or written confirmation that an employee used sick time pursuant to the PSLL. However, an employer may not require documentation specifying the nature of a medical condition or otherwise require disclosure of the details of a medical condition as a condition of providing sick time and health information obtained solely due to an employee’s use of sick time pursuant to the PSLL must be treated by the employer as confidential.

If an employer chooses to impose any permissible discretionary requirement as a condition of using sick time, it must provide to all employees a written policy containing those requirements, using a delivery method that reasonably ensures that employees receive the policy. If such

employer has not provided its written policy, it may not deny sick time to an employee because of non-compliance with such a policy.

Sick time to which an employee is entitled must be paid no later than the payday for the next regular payroll period beginning after the sick time was used.

### Exemptions and Exceptions

Notwithstanding the above, the PSLI does not apply to any of the following:

- an independent contractor who does not meet the definition of employee under section 190(2) of the New York State Labor Law;
- an employee covered by a valid collective bargaining agreement in effect on April 1, 2014 until the termination of such agreement;
- an employee in the construction or grocery industry covered by a valid collective bargaining agreement if the provisions of the PSLI are expressly waived in such collective bargaining agreement;
- an employee covered by another valid collective bargaining agreement if such provisions are expressly waived in such agreement and such agreement provides a benefit comparable to that provided by the PSLI for such employee;
- an audiologist, occupational therapist, physical therapist, or speech language pathologist who is licensed by the New York State Department of Education and who calls in for work assignments at will, determines his or her own schedule, has the ability to reject or accept any assignment referred to him or her, and is paid an average hourly wage that is at least four times the federal minimum wage;
- an employee in a work study program under Section 2753 of Chapter 42 of the United States Code;
- an employee whose work is compensated by a qualified scholarship program as that term is defined in the Internal Revenue Code, Section 117 of Chapter 20 of the United States Code; or
- a participant in a Work Experience Program (WEP) under section 336-c of the New York State Social Services Law.

### Retaliation Prohibited

An employer may not threaten or engage in retaliation against an employee for exercising or attempting in good faith to exercise any right provided by the PSLI. In addition, an employer may not interfere with any investigation, proceeding, or hearing pursuant to the PSLI.

### Notice of Rights

An employer must provide its employees with written notice of their rights pursuant to the PSLI. Such notice must be in English and the primary language spoken by an employee, provided that DCA has made available a translation into such language. Downloadable notices are available on DCA's website at <http://www.nyc.gov/html/dca/html/law/PaidSickLeave.shtml>.

Any person or entity that willfully violates these notice requirements is subject to a civil penalty in an amount not to exceed fifty dollars for each employee who was not given appropriate notice.

### Records

An employer must retain records documenting its compliance with the PSLI for a period of at least three years, and must allow DCA to access such records in furtherance of an investigation related to an alleged violation of the PSLI.

### Enforcement and Penalties

Upon receiving a complaint alleging a violation of the PSLI, DCA has the right to investigate such complaint and attempt to resolve it through mediation. Within 30 days of written notification of a complaint by DCA, or sooner in certain circumstances, the employer must provide DCA with a written response and such other information as DCA may request. If DCA believes that a violation of the PSLI has occurred, it has the right to issue a notice of violation to the employer.

DCA has the power to grant an employee or former employee all appropriate relief as set forth in New York City Administrative Code 20-924(d). Such relief may include, among other remedies, treble damages for the wages that should have been paid, damages for unlawful retaliation, and damages and reinstatement for unlawful discharge. In addition, DCA may impose on an employer found to have violated the PSLI civil penalties not to exceed \$500 for a first violation, \$750 for a second violation within two years of the first violation, and \$1,000 for each succeeding violation within two years of the previous violation.

### More Generous Policies and Other Legal Requirements

Nothing in the PSLI is intended to discourage, prohibit, diminish, or impair the adoption or retention of a more generous sick time policy, or the obligation of an employer to comply with any contract, collective bargaining agreement, employment benefit plan or other agreement providing more generous sick time. The PSLI provides minimum requirements pertaining to sick time and does not preempt, limit or otherwise affect the applicability of any other law, regulation, rule, requirement, policy or standard that provides for greater accrual or use by employees of sick leave or time, whether paid or unpaid, or that extends other protections to employees. The PSLI may not be construed as creating or imposing any requirement in conflict with any federal or state law, rule or regulation.

## **EXHIBIT D**

### **CERTIFICATES OF INSURANCE**

#### **Instructions to New York City Agencies, Departments, and Offices**

All certificates of insurance (except certificates of insurance solely evidencing Workers' Compensation Insurance, Employer's Liability Insurance, and/or Disability Benefits Insurance) must be accompanied by one of the following:

- (1) the Certification by Insurance Broker or Agent on the following page setting forth the required information and signatures;

-- OR --

- (2) copies of all policies as certified by an authorized representative of the issuing insurance carrier that are referenced in such certificate of insurance. If any policy is not available at the time of submission, certified binders may be submitted until such time as the policy is available, at which time a certified copy of the policy shall be submitted.

**CITY OF NEW YORK**  
**CERTIFICATION BY INSURANCE BROKER OR AGENT**

The undersigned insurance broker or agent represents to the City of New York that the attached Certificate of Insurance is accurate in all material respects.

\_\_\_\_\_  
[Name of broker or agent (typewritten)]

\_\_\_\_\_  
[Address of broker or agent (typewritten)]

\_\_\_\_\_  
[Email address of broker or agent (typewritten)]

\_\_\_\_\_  
[Phone number/Fax number of broker or agent (typewritten)]

\_\_\_\_\_  
[Signature of authorized official, broker, or agent]

\_\_\_\_\_  
[Name and title of authorized official, broker, or agent (typewritten)]

State of .....)

) ss.:

County of .....)

Sworn to before me this \_\_\_\_ day of \_\_\_\_\_ 20\_\_

\_\_\_\_\_  
NOTARY PUBLIC FOR THE STATE OF \_\_\_\_\_