

Request for Council Action

Date: September 8

To: East Grand Forks City Council Mayor Lynn Stauss, President Mark Olstad, Council Vice President Chad Grassel, Council Members: Clarence Vetter, Mike Pokrzywinski, Craig Buckalew, Henry Tweten, and Marc DeMers.

Cc: File

From: City Administrator David Murphy

RE: Midcontinent Cable Franchise Renewal.

Background

The cable franchise agreement has expired and an extension has been granted. Council directed staff to review other, recent franchise agreements and determine if any items are missing from our existing contract.

The City of Bemidji is the closest City to have renewed its franchise agreement with Midcontinent (2014). I have reviewed the contract provided by the City of Bemidji and the proposed agreement submitted by Dan Nelson (Midcontinent Representative). The contracts have also been provided to City Attorney Galstad for his review. A copy of Bemidji's contract and the proposed East Grand Forks Contract are included in your packet (the changes are highlighted).

I went paragraph by paragraph with Mr. Nelson on both the Bemidji contract and the proposed contract. The contracts appear to be substantively the same as Bemidji's.

Budget Impact

The proposed agreement contains a franchise fee to be paid to the City of 5% of annual gross revenues. Mr. Nelson claims that this is the maximum allowed by law and is the same amount authorized in Bemidji's contract. The Franchise Fees are roughly \$12,000 per month and are deposited into the General fund as General Revenue.

Action Required

Discussion and questions to staff..

FRANCHISE AGREEMENT

FOR

THE CITY OF EAST GRAND FORKS, MINNESOTA

TABLE OF CONTENTS

<u>SECTION 1. GENERAL PROVISION</u>	3
1.1 Grant	3
1.2 Definitions.....	4
1.3 Effective Date	4
1.4 Term.....	4
1.5 Written Notice	4
1.6 Conflict with Cable Services Code and Reservation of Rights	5
1.7 Service Area.....	5
1.8 Police Powers	5
1.9 Level Playing Field	5
<u>SECTION 2. GENERAL REQUIREMENTS</u>	5
2.1 Franchise Fees.....	5
<u>SECTION 3. INSURANCE AND INDEMNIFICATION</u>	5
3.1 Insurance and Indemnification	6
<u>SECTION 4. PERFORMANCE GUARANTEES AND REMEDIES</u>	6
4.1 Security Fund	6
4.2 Required Reports.....	6
<u>SECTION 5. SYSTEM SPECIFICATIONS</u>	6
5.1 System Specifications	6
5.2 Public, Educational and Government Access Channels	7
5.3 Additional Requirements Regarding Access Channels.....	7
5.4 Geographical Coverage.....	7
5.5 Programming	8
5.6 Emergency Alert System	8
5.7 Technical Standards	8
5.8 Right of Inspection	8
<u>SECTION 6. MISCELLANEOUS PROVISIONS</u>	8
6.1 Periodic Evaluation	8
6.2 Rights of the Franchisee.....	9
6.3 Changes in Federal Law.....	9
6.4 Entire Agreement.....	9
6.5 Severability.....	9
6.6 Governing Law.....	9
6.7 Modification.....	10
6.8 Acceptance and Effective Date.....	10
APPENDIX A: Map of the System and City.....	13
APPENDIX B: Broad Categories of Programming.....	13

FRANCHISE AGREEMENT

THIS AGREEMENT IS MADE AND ENTERED INTO AS OF THIS ___ DAY OF _____, BY AND BETWEEN MIDCONTINENT COMMUNICATIONS, G.P. ("FRANCHISEE") AND THE CITY OF EAST GRAND FORKS, MINNESOTA ("CITY").

THIS AGREEMENT is subject to the laws of the State of Minnesota, the rules and regulations of the Federal Communications Commission ("FCC"), the Communications Act of 1934, the Cable Communications Policy Act of 1984, the Cable Television Consumer Protection and Competition Act of 1992, and the Telecommunications Act of 1996, as amended, or as superseded by new statutes.

WHEREAS, the City adopted a Cable Television Franchise Ordinance on _____, 2005 (the "Ordinance"), which authorizes the City to issue a Franchise to operate a Cable System in the City; and

WHEREAS, Midcontinent Communications, G.P. has requested that its existing Franchise in the City be renewed in accordance with applicable law; and

WHEREAS, the City has determined that Franchisee has offered an acceptable renewal proposal for the provision of Cable Service within the City; and

WHEREAS, the City Council has determined that the renewal of the Franchise to Franchisee should be approved and that the Franchise hereinafter set forth should be adopted;

NOW, THEREFORE, In consideration of the faithful performance and strict observance by the Franchisee of all the terms hereinafter set forth or provided for, and in consideration of the grant to the Franchisee of the Franchise by the City, the parties agree as follows:

SECTION 1. GENERAL PROVISIONS

1.1 Grant.

A. The City hereby grants to the Franchisee a non-exclusive Franchise to construct, operate, and maintain a Cable System within the Rights-of-Way of the City in accordance with the terms and conditions of this Franchise.

B. The Franchisee agrees to abide by all the provisions of this Franchise, Cable Services Regulatory Ordinance _____, as it existed on its effective date, and other relevant and generally applicable regulations and supplemental specifications as to construction, operation, or maintenance promulgated by the City. The Franchisee hereby acknowledges that it has examined all the provisions of the Ordinance and agrees that the provisions thereof are valid, binding at this time, and enforceable as of the effective date of this Franchise.

C. The Franchisee hereby agrees that it has negotiated this Franchise Agreement in good faith and with due knowledge of its rights and responsibilities under relevant local, state, and federal laws.

D. The Franchisee hereby acknowledges that it accepts the rights granted herein in reliance upon its independent and personal investigation and understanding of the power and authority of the City to enter into this Franchise with Franchisee.

E. All other Franchises or parts of Franchises between the City of East Grand Forks and Franchisee are hereby repealed and superceded by this Franchise.

1.2 Definitions.

The definitions contained in the Ordinance are incorporated herein by reference and adopted as fully as if set out verbatim.

1.3 Effective Date.

This Franchise will become effective based on compliance with Section 6.8 of this Franchise Agreement.

1.4 Term.

This Franchise Agreement will commence upon its effective date, as provided in Section 1.3 above, and will expire ten (10) years thereafter on _____, 2015, unless renewed, revoked, or terminated sooner as herein provided.

1.5 Written Notice.

All notices, reports, or demands required to be given in writing under this Franchise Agreement will be deemed to be given when delivered personally to the Person designated below, or when five days have elapsed after it is deposited in United States mail in a sealed envelope, with registered or certified mail, postage prepaid thereon, or on the next business day if sent by express mail or overnight air courier addressed to the party to which notice is being given, as follows:

If to City: City Clerk
 City of East Grand Forks
 City Hall
 600 Demers Avenue NW
 East Grand Forks, Minnesota 56721

If to Franchisee: W. Tom Simmons
Vice President of Public Policy
Midcontinent Communications, G.P.
5001 W. 41st Street
Sioux Falls, S.D. 57106-1424

Such addresses may be changed by either party upon notice to the other party given as provided in this Section.

1.6 Conflict with Cable Services Code and Reservation of Rights.

The provisions of the Ordinance are incorporated herein by reference as if set out in full, and form part of the terms and conditions of this Franchise Agreement. In the event of any conflict between the terms and conditions of this Franchise Agreement and the provisions of the Ordinance, the specific terms or provisions of this Franchise Agreement that conflict with a term of provision of the Ordinance will control subject to applicable laws. The City and Franchisee reserve all rights that they may possess under the law unless expressly waived herein.

1.7 Service Area.

This Franchise is granted for the entire geographic area of the City. In the event of annexation by the City, any new territory will immediately become part of the Service Area covered ~~provided that residences number at least seven (7) per 1320 feet-~~ See Appendix A which includes a current map of the system and the City.

1.8 Police Powers.

Franchisee's rights are subject to the police powers of the City to adopt and enforce ordinances of general applicability necessary to the health, safety, and welfare of the public. Franchisee will comply with all such generally applicable laws and ordinances enacted by the City pursuant to that power.

1.9 Level Playing Field

In addition to the requirements of the Cable Regulatory Ordinance, all Franchises granted by the City shall contain substantially similar terms and conditions and shall specifically require that the Franchisee serve the entire Franchise Area

SECTION 2. GENERAL REQUIREMENTS

2.1 Franchise Fees.

The Franchisee will pay the City a Franchise fee in the amount of 5% of its annual Gross Revenues, as required by Section 6 of the Ordinance.

SECTION 3. INSURANCE AND INDEMNIFICATION

3.1 Franchisee shall comply with the provisions of Section 5 of the Ordinance applicable to insurance and indemnification.

SECTION 4. PERFORMANCE GUARANTEES AND REMEDIES

4.1 Security Fund.

A. Upon request by the City, Franchisee will establish and provide to City, as security for the faithful performance by Franchisee of all material provisions of this Franchise, an irrevocable letter of credit or a cash deposit, in the amount of five thousand dollars (\$5,000), and in a form that is acceptable to the City Attorney. The City shall comply with the terms of Section 8 the Ordinance as a condition precedent to any withdrawal of funds from the Security Fund.

B. Nothing herein will be deemed a waiver of the normal permit and bonding requirements made of all contractors working within the City's Rights-of-Way, except as may be waived in accordance with the Ordinance.

4.2 Required Reports.

Franchisee is required to submit the City all reports and information as provided in the Ordinance.

SECTION 5. SYSTEM SPECIFICATIONS

5.1 System Specifications.

The System has the following characteristics:

- a.) ~~The System was rebuilt/upgraded in 1997. During the upgrade most of the active and passive equipment was replaced, some of the coaxial cable was replaced and fiber optic technology was deployed. The system located in the City is constructed as a single trunk and single feeder system that is intended to be used for the delivery of subscriber services in the downstream, headend to home, mode of operation. The design incorporates a branching network system with signals that emanates from the System's headend, which is the antenna site for the reception of both satellite and terrestrial based signals and programming inserted into the system locally.~~
- b.) The System meets or exceeds Federal Communications Commission ("FCC") Technical Standards.
- c.) ~~The System employs fiber optic technology, including 7 nodes in the City.~~

- d.) The System utilizes analog and digital addressable control for the delivery of premium, pay-per-view, digital and video on demand (“VOD”) services.
- e.) The System is capable of passing signals of up to 750 MHz.
- f.) The upstream, home to headend, portion of the System has been activated.
- g.) The system will have standby power to assure service a minimum of 95% of the time within any week.

5.2 Public, Educational and Government Access Channels.

Consistent with applicable law, Franchisee shall offer the following access channels to each of its Subscribers who receive all or any part of the Cable Services offered on the Cable System. With the exception of this requirement, Franchisee shall have no further responsibility for or obligations to PEG Access.

A. In accordance with Section 611 of the Cable Act (47 U.S.C. §531) and Minnesota Statutes, Section 238.084, Subd 1, the Franchisee agrees to provide as of the Effective Date of the Agreement one (1) video Channel to be designated solely for non-commercial public, educational and governmental (PEG) use (“PEG Access Channel”). ~~The existing Channel 3 shall be the aforesaid channel and will be used for the University of North Dakota consistent with Minnesota law. An additional channel may be made available for local government use upon agreement of the company and the City.~~

B. A program origination signal input point shall be made available by Franchisee for live program origination at City Hall to enable program origination on the PEG Access Channel.

C. No charges may be assessed by Franchisee for Channel time or playback of pre-recorded programming on the PEG Access Channel.

5.3 Additional Requirements Regarding Access Channels.

- A. The PEG Access Channel will be provided to all Subscribers by Franchisee as a part of the Basic Cable Service.
- B. The PEG Access Channel will be made available by Franchisee for use by the City in accordance with the rules and procedures established by the City or any lawfully designated Person, group, organization, or agency authorized by the City for that purpose.
- C. The location of the PEG Access Channel shall not be changed without sixty (60) days notice to the City.
- D. Franchisee shall insure that all PEG Access Channels meet the technical standards of the FCC; provided, however, the Franchisee shall not be responsible for

defects, flaws or other impairments in the programming delivered to the Franchisee.

5.4 Geographical Coverage.

Throughout the term of this Franchise Agreement, Franchisee will extend service to every residence within ninety (90) days after a request is made for service, weather permitting, and the service location is within one hundred fifty feet (150) of an existing service line.

5.5 Programming.

Programming decisions are within the sole discretion of Franchisee subject to federal law regarding notice to the City and Subscribers prior to any Channel additions, deletions, or realignments. Franchisee will make available, in keeping with the requirements of Appendix A, at least the broad categories of programming set forth therein.

5.6 Emergency Alert System.

In accordance with and at the time required by the provisions of FCC Regulations Part 11, Subpart D, Section 11.51 and its other provisions which may from time to time be amended, the Franchisee shall install, if it has not already done so, and maintain an Emergency Alert System (EAS) for use in transmitting Emergency Act Notifications (EAN) and Emergency Act Terminations (EAT) in local and statewide situations as may be designated to be an emergency by the Local Primary (LP), the State Primary (SP), and/or the State Emergency Operation Center (SEOC), as those authorities are identified and defined within FCC Regulations, Section 11.18.

5.7 Technical Standards.

To the extent required by applicable law, the Franchisee will comply with FCC regulations, Part 76, Subpart K (Technical Standards), as may be amended from time to time.

5.8 Right of Inspection.

The City will have the right to inspect all construction, reconstruction, or Installation work performed by Franchisee under the provisions of the Franchise and other pertinent provisions of law, to ensure Franchisee's compliance and to protect the public health, safety, and welfare of City's citizens. Franchisee will have the right to be present at such inspection.

SECTION 6. MISCELLANEOUS PROVISIONS

6.1 Periodic Evaluation.

The field of cable communications is rapidly changing and may see many regulatory, technical, financial, marketing, and legal changes during the term of this Franchise. Therefore, in order to provide for a maximum degree of flexibility in this Franchise, and to help achieve a continued advanced and modern System, the following evaluation provisions shall apply:

A. Upon thirty (30) days written notice to Franchisee, the City may require an evaluation session. Evaluation sessions may occur no more than once annually beginning one year from the Effective Date of this Franchise.

B. All evaluation sessions shall be open to the public and notice of sessions published in the same way as a legal notice.

C. Topics which may be discussed at any evaluation session may include, but are not limited to, application of new technologies, System performance, programming offered, access channels, facilities and support, municipal uses of cable, customer complaints, amendments to this Franchise, judicial rulings, FCC rulings, line extension policies, and any other topics City and Franchisee deemed relevant.

D. As a result of a periodic review or evaluation session, City and Franchisee, in good faith, may develop such changes and modifications to the terms and conditions of the Franchise as are mutually agreed upon.

6.2 Rights of the Franchisee.

A. The Franchisee will have the right to construct, erect, operate, and maintain in, on, along, across, above, over, and under the Rights-of-Way of the City, poles, wires, cable, underground conduits, manholes, and other conductors and fixtures necessary for the maintenance and operation in the City of a Cable System as provided in the Ordinance and this Franchise Agreement.

B. The rights herein granted will be subject to the provisions, terms, conditions, and limitations described in the Ordinance and this Franchise Agreement.

6.3 Changes in Federal Law.

The City reserves the right to regulate the Franchisee to the extent permitted by federal law as amended from time to time, during the term of this Franchise.

6.4 Entire Agreement.

The Ordinance and this Franchise represent the entire understanding and agreement between the parties hereto with respect to the subject matter hereof. The Franchise Agreement may only be amended, supplemented, modified, or changed by a written document executed by the parties.

6.5 Severability.

If any section, subsection, sentence, clause, phrase, or other portion of this Franchise Agreement is, for any reason, declared invalid, in whole or in part, by any court, agency, commission, legislative body or other authority of competent jurisdiction, such portion shall be deemed by a separate, distinct and independent portion. Such declaration shall not affect the

validity of the remaining portions hereof, which other portions shall continue in full force and effect.

6.6 Governing Law.

This Franchise Agreement shall be deemed to be executed in the State of Minnesota, and shall be governed in all respects, including validity, interpretation and effect, and construed in accordance with, the laws of the State of Minnesota as applicable to contracts entered into and performed entirely within the State.

6.7 Modification.

No provision of this Franchise Agreement shall be amended or otherwise modified, in whole or in part, except by an instrument, in writing, duly executed by the City and the Franchisee, which amendment shall be authorized on behalf of the City through the adoption of an appropriate resolution or order by the City, as required by applicable law.

6.8 Acceptance and Effective Date.

A. Franchisee shall accept, in writing, this Franchise within thirty (30) days after approval by the City or within such additional time as may be approved by the City. This Franchise will be signed and accepted by Franchisee in accordance with the provisions of Section 12 of the Ordinance.

B. This Franchise shall be effective upon the date of written acceptance by Franchisee, the Effective Date, and shall supersede any existing Franchise between City and Franchisee.

IN WITNESS WHEREOF, the City and Franchisee have executed this Franchise on the date and year first above written.

CITY OF EAST GRAND FORKS, MINNESOTA

Mayor

Date: _____

ATTEST:

City Clerk

(Date)

Acceptance:

Midcontinent Communications, G.P.

W. Tom Simmons
Vice President of Public Policy
Midcontinent Communications, G.P.
5001 W. 41st Street
Sioux Falls, SD 57106-1424
Date: _____

APPENDIX A Map of the System and City

APPENDIX B

BROAD CATEGORIES OF PROGRAMMING

The communications industry is rapidly changing. New programming and other services are continually emerging. The City acknowledges Franchisee's exclusive right to select the programming and services to be offered to Subscribers. Franchisee will nonetheless monitor the needs of the community, consider the results of surveys regarding those needs, and comply with all FCC cable programming rules. During the term of this Franchise, Franchisee will offer programming services that meet at least the following broad programming categories:

- A. Regional Programming
- B. News and Information
- C. Educational Programming
- D. Weather
- E. Movies and Entertainment
- F. Children's and Family Programming
- G. Sports
- H. Comedy
- I. Music or Performing Arts

ORDINANCE NO. _____

**CABLE SERVICES REGULATORY ORDINANCE
FOR
THE CITY OF EAST GRAND FORKS, MINNESOTA**

TABLE OF CONTENTS

	<u>PAGE</u>
SECTION 1: <u>GENERAL PROVISIONS</u>	2
1.1 <i>Title</i>	2
1.2 <i>Applicability</i>	2
1.3 <i>Preservation of Police Power Authority</i>	2
1.4 <i>Public Inspection of Records</i>	2
1.5 <i>No Cause of Action for Damages Against the City</i>	3
1.6 <i>Enforcement</i>	3
1.7 <i>Relationship of the Parties</i>	3
SECTION 2: <u>DEFINITIONS</u>	3
2.1 <i>Access Channels</i>	3
2.2 <i>Affiliate</i>	3
2.3 <i>Basic Cable Service</i>	4
2.4 <i>Cable Act</i>	4
2.5 <i>Cable Service</i>	4
2.6 <i>Cable Television System, Cable System, or System</i>	4
2.7 <i>Capital Costs</i>	4
2.8 <i>City or Grantor</i>	4
2.9 <i>Channel or Cable Channel</i>	4
2.10 <i>Complaint</i>	4
2.11 <i>Converter</i>	5
2.12 <i>Drop</i>	5
2.13 <i>Facilities</i>	5
2.14 <i>FCC</i>	5
2.15 <i>Franchise</i>	5
2.16 <i>Franchise Agreement</i>	5
2.17 <i>Franchise Area</i>	5
2.18 <i>Franchise Fee</i>	5

2.19	<i>Franchisee</i>	5
2.20	<i>Gross Revenue</i>	5
2.21	<i>Installation</i>	6
2.22	<i>Normal Business Hours</i>	6
2.23	<i>Normal Operating Conditions</i>	6
2.24	<i>Open Video Services or OVS</i>	6
2.25	<i>Pay TV</i>	6
2.26	<i>Person</i>	6
2.27	<i>Public Building</i>	6
2.28	<i>Renewal</i>	6
2.29	<i>Rights-of-Way</i>	6
2.30	<i>Service Interruption</i>	7
2.31	<i>Standard Installation</i>	7
2.32	<i>Subscriber</i>	7

SECTION 3: FRANCHISE REQUIREMENTS

3.1	<i>Franchise Required</i>	7
3.2	<i>Nature of Rights Granted by Franchise</i>	7
3.3	<i>Franchise Not Exclusive</i>	7
3.4	<i>Franchise Territory</i>	8
3.5	<i>Selection of Initial Franchise</i>	8
	3.5.1 <i>Installation Plan</i>	8
	3.5.2 <i>Rate Schedule</i>	8
	3.5.3 <i>Financial Soundness and Capability</i>	8
	3.5.4 <i>Experience in Operating a Cable or OVS System</i>	8
	3.5.5 <i>Technical Capability</i>	8
	3.5.6 <i>Future Needs</i>	8
	3.5.7 <i>Additional Considerations</i>	9
3.6	<i>Application for Franchise Renewal</i>	9

SECTION 4: TERMS.....

4.1	<i>Term of Franchise</i>	9
-----	--------------------------------	---

SECTION 5:	<u>REQUIRED PROVISIONS</u>	9
5.1	<i>Franchise Provisions</i>	9
5.2	<i>Franchise Agreement</i>	10
5.3	<i>Design, Services, and Capabilities</i>	11
	5.3.1 <i>Cable System Design</i>	11
	5.3.2 <i>The Cable System</i>	11
	5.3.3 <i>Drops to Public Buildings</i>	11
	5.3.4 <i>School and Library Cable Modems</i>	12
	5.3.5 <i>Use of Franchise Facilities</i>	12
	5.3.6 <i>Upgrade of the System and New Development</i>	12
	5.3.7 <i>Emergency Alert Capability</i>	13
	5.3.8 <i>Periodic Review and Evaluation</i>	13
	5.3.9 <i>Close Captioning and Descriptive Audio Service</i>	13
	5.3.10 <i>Standby Power</i>	13
	5.3.11 <i>HDTV/ATV Conversion</i>	13
5.4	<i>Public, Educational, and Governmental Access or Peg Access</i>	13
	5.4.1 <i>Access Channels</i>	13
	5.4.2 <i>Proof of Performance Testing</i>	14
5.5	<i>Construction Standards and Requirements</i>	14
	5.5.1 <i>Permit Required</i>	14
	5.5.2 <i>Construction Standards</i>	14
	5.5.3 <i>Compliance with City Ordinances for Work in Rights-of-Way</i>	14
	5.5.4 <i>Compliance with City Ordinances for Construction & Building</i>	14
	5.5.5 <i>Removal and Relocation of Facilities</i>	15
	5.5.6 <i>Movement of Lines</i>	15
	5.5.7 <i>Tree Trimming</i>	15
	5.5.8 <i>Responsible for Restoration and Costs</i>	15
	5.5.9 <i>Failure to Complete Work</i>	15
5.6	<i>Technical Standards</i>	16
	5.6.1 <i>Compliance with OSHA</i>	16
	5.6.2 <i>Compliance with National Electrical Codes</i>	16
	5.6.3 <i>Compliance with FAA Regulations</i>	16
	5.6.4 <i>Test and Compliance Procedure</i>	16
	5.6.5 <i>Additional Tests</i>	16
5.7	<i>Repair</i>	16
5.8	<i>Removal of Facilities From Subscriber's Premises Upon Request</i>	16
5.9	<i>Transfer of Ownership</i>	17
5.10	<i>Purchase by City</i>	18
5.11	<i>Requests for Cable Services</i>	18

5.12	<i>Multiple Franchise</i>	18
	5.12.1 <i>Grant of Additional Franchise</i>	18
	5.12.2 <i>Permits for Non-Franchised Entities</i>	19
5.13	<i>Discriminatory or Preferential Practice</i>	19
	5.13.1 <i>Rates and Charges</i>	19
	5.13.2 <i>Access and Employment</i>	19
	5.13.3 <i>Build-Out</i>	20
5.14	<i>Subscriber Privacy</i>	20
5.15	<i>Permits and Authorizations</i>	20
5.16	<i>Annual Reports</i>	20
	5.16.1 <i>Contents</i>	20
	5.16.2 <i>Service Contract and Subscriber Information</i>	21
5.17	<i>Indemnification, Security Funds, Insurance</i>	22
	5.17.1 <i>Liability and Indemnification</i>	22
	5.17.2 <i>Security Funds</i>	22
	5.17.3 <i>General Provisions Relating to Insurance</i>	23
	5.17.4 <i>Liability Insurance</i>	23
	5.17.5 <i>Non-Waiver</i>	25
5.18	<i>Continuity of Service</i>	25
5.19	<i>Safety Requirements</i>	25
<u>SECTION 6: FRANCHISE FEES</u>		26
6.1	<i>Five Percent Franchise Fee</i>	26
6.2	<i>Payment and Audits</i>	26
6.3	<i>Acceptance of Payment</i>	26
6.4	<i>Failure to Pay</i>	26
6.5	<i>Penalty for Late Payment</i>	27
6.6	<i>Monthly Report of Gross Revenues</i>	27
<u>SECTION 7: CUSTOMER SERVICE STANDARDS</u>		27
<u>SECTION 8: GENERAL</u> 30		
8.1	<i>Subscriber Rates</i>	30
8.2	<i>Records Required and City's Right to Inspect</i>	30
8.3	<i>Abandonment or Removal of Franchise Property</i>	31

8.3.1	<i>Abandonment</i>	31
8.3.2	<i>Removal</i>	31
8.3.3	<i>Transfer of Abandoned Property</i>	31
8.3.4	<i>Above Ground Portion of System</i>	31
8.3.5	<i>No Material Interference</i>	32
8.4	<i>Right Reserved to City</i>	32
8.5	<i>Force Majeure</i>	32
8.6	<i>Non-Enforcement Not Estoppel</i>	32
8.7	<i>Procedure for Remedying Franchise Violation</i>	32
8.8	<i>Penalty</i> 33	
8.9	<i>Revocation or Termination of Franchise</i>	34
SECTION 9: <u>SEVERABILITY</u>		35
SECTION 10: <u>FORECLOSURE</u>		36
SECTION 11: <u>ADMINISTRATION OF FRANCHISE</u>		36
SECTION 12: <u>EFFECTIVE DATE, PUBLICATION, ACCEPTANCE & GOVERNING LAW</u>		36
12.1	<i>Publication: Effective Date</i>	36
12.2	<i>Acceptance and Governing Law</i>	36
EXHIBIT A: FRANCHISE FEE WORKSHEET		38
EXHIBIT B: PUBLIC & SCHOOL BUILDINGS		38

AN ORDINANCE FOR THE CITY OF EAST GRAND FORKS, MINNESOTA ESTABLISHING REQUIREMENTS AND PROCEDURES RELATING TO THE GRANTING OF CABLE SERVICES FRANCHISES FOR USE OF PUBLIC RIGHTS-OF-WAY WITHIN THE CITY OF EAST GRAND FORKS, INCLUDING THE DEFINITION OF TERMS, REQUIREMENTS FOR COMMUNITY SERVICE CHANNELS, REQUIREMENTS REGARDING THE CHARGING OF FEES FOR USE OF RIGHTS-OF-WAY, CUSTOMER SERVICE STANDARDS, TECHNICAL STANDARDS, AND OTHER PROVISIONS RELATING TO CABLE SERVICES FRANCHISES.

WHEREAS, Minnesota law requires a provider of cable service to operate pursuant to franchise granted by a municipality; and

WHEREAS, the City of East Grand Forks, pursuant to applicable federal and state law, is authorized to grant one or more nonexclusive Franchises to construct, operate, maintain, and reconstruct Cable Television Systems within the City limits. Unless otherwise permitted by applicable law, this Franchise will not extend to services beyond Cable Service, as defined herein, such as telephone service or other telecommunications services. A Franchisee does not waive its rights to offer telephone service or other telecommunications services subject to applicable local, state, or federal law; and

WHEREAS, the City finds that the development of Cable Television Systems has the potential of having great benefit and impact upon the Residents and businesses of the City. Because of the complex and rapidly changing technology associated with cable television, the City further finds that the public convenience, safety, and general welfare can best be served by establishing regulatory powers regarding Cable Service that are vested in the City or such Persons the City designates. It is the intent of this Ordinance and subsequent amendments to provide for and specify the means to obtain the best possible Cable Service for the public, and any Franchises issued pursuant to this Ordinance will be deemed to include this finding as an integral part thereof; and

WHEREAS, the City will not discriminate in awarding Franchises pursuant to this Ordinance. Entities which request a Franchise shall comply with the terms of this Ordinance; and

WHEREAS, in order to ensure that the City and its residents receive state of the art Cable Services and capabilities as this technology further evolves, all Cable Franchises to the extent set forth herein shall be subject to this Ordinance and should, be subject to periodic review and modifications to keep current with changing law, technology, and Services.

East Grand Forks, Minnesota Municipal Code Chapter _____ is hereby added to read as follows:

SECTION 1: GENERAL PROVISIONS

1.1 Title.

This Ordinance shall be referred to and cited as the “Cable Services Code” or herein as the “Ordinance” of the City of East Grand Forks, Minnesota.

1.2 Applicability.

The requirements of this Ordinance shall apply to the full extent of the terms herein and shall be limited in scope or application only to the extent as may be required by applicable federal or state law, including such changes in applicable law as may be hereinafter enacted. No provisions of this Ordinance shall be disregarded pursuant to this subsection except on express application to and determination by the City to such effect based on the specific factual circumstances demonstrated. The provisions of this Ordinance shall be deemed incorporated in each Cable Franchise granted. Nothing in this Ordinance or amendments thereto shall be interpreted to unilaterally deprive any Person of any rights or obligations imposed by any binding and existing valid Cable Franchise or contract during the term thereof, whether entered into before or after enactment of this Ordinance, and shall impose obligations on any such Person additional to those included in such Franchise or contract only to the extent permitted by law and to the extent not inconsistent with such Franchise or contract; provided that the failure of the City to enforce any provision herein or the failure of any Person to comply with any provision herein shall not be a waiver of the City’s right to enforce such provisions nor shall it in any way constitute evidence or agreement by the City that such Person has a valid existing Cable Franchise. The provisions of this Ordinance shall apply irrespective of whether a Franchisee is determined to be operating pursuant to a valid Cable Franchise.

1.3 Preservation of Police Power Authority

To the extent not inconsistent with Section 5.1.2, any rights granted pursuant to this Ordinance and pursuant to any Franchise authorized hereunder are subject to the authority of the City to adopt and enforce ordinances necessary to the health, safety, and welfare of the public. Franchisees shall be subject to and comply with all applicable Laws enacted by the City, to the extent not in conflict with Minnesota or federal law. Nothing in this Ordinance shall be deemed to waive a right, if any, that any party may have to seek judicial or regulatory review as to any provisions of the Ordinance or as to actions of the parties under applicable federal law, including 47 U.S.C. 555A, as well as applicable state or local law currently in effect or as may hereinafter be amended.

1.4 Public Inspection of Records.

Certain information required to be filed with the City pursuant to this Ordinance is subject to inspection and copying by the public pursuant to the provisions of Minnesota law applicable to public and non-public information. The City shall provide a Franchisee with notice of any request by a third party for information designated as proprietary. Nothing in this Ordinance or Franchise shall be construed as a waiver of the provisions of Minnesota law applicable to public and non-public information.

1.5 No Cause of Action for Damages Against the City.

The Franchisee shall have no cause of action whatsoever against the City for damages of any kind arising from any of the provisions or requirements of a Franchise, or because of the enforcement thereof by said City, or for the failure of said City to have the authority to grant, all, or any part, of the Franchise therein granted; provided that said Franchisee expressly acknowledges that it accepted the rights therein granted in reliance upon its independent and personal investigation and understanding of the power of authority of said City to enter into the Franchise authorized therein with Franchisee; provided further that the Franchisee acknowledges by its acceptance of said Franchise that it has not been induced to enter into a Franchise upon any understanding, or promise, whether given verbally or in writing by or on behalf of said City, or by any other person concerning any term or condition of a Franchise not expressed therein; provided further that the Franchisee acknowledges by the acceptance of any Franchise that it has carefully read the provisions, terms, and conditions hereof and of its Franchise and is willing to, and does accept, all of the risk attendant to said provisions, terms, and conditions. This section shall be interpreted to provide the same limitation of liability as that contained in 47 USC 555(a), as amended.

1.5 Enforcement.

The City shall be entitled to enforce this Ordinance and any Franchise through all remedies lawfully available.

1.6 Relationship of the Parties.

Under no circumstances shall any Franchise authorized by this Ordinance be construed to create any relationship of agency, partnership, joint venture, or employment between the parties.

SECTION 2: DEFINITIONS

For the purposes of this Ordinance, the following terms, phrases, words, and their derivations will have the meaning given herein. Words used in the present tense include the future, words in the plural number include the singular number, and words in the singular number include the plural number, and all words in the plural number include the singular. All capitalized terms used in the definition of any other term will have their meaning as otherwise defined in this Section 2. The words "will" and "shall" are mandatory and "may" is permissive. Words not defined will be given their common and ordinary meaning.

2.1 Access Channels means Channel capacity designated for public, educational or governmental access use, as well as the facilities and equipment required for the use of such Channel capacity.

2.2 Affiliate means each person, directly or indirectly, controlling, controlled by, or under common control with the Franchisee; provided that Affiliate shall in no event mean any limited partner or shareholder holding an interest of less than fifteen percent (15%) of

such Franchisee, or any creditor of such Franchisee solely by virtue of its status as a creditor and which is not otherwise an Affiliate by reason of owning a controlling interest in, being owned by, or being under common ownership, common management, or common control with, such Franchisee.

- 2.3 Basic Cable Service means any service tier, which includes the lawful retransmission of local television broadcast signals and Access Channels required by this Ordinance to be carried on the basic tier. This definition will be consistent with and deemed to change pursuant to any changes in applicable federal law or FCC rules.
- 2.4 Cable Act means the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984) (codified at 47 U.S.C. §§ 521-611 (1982 & Supp. V. 1987)) as amended by the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, and the Telecommunications Act of 1996, Pub. L. No. 104-104, as may, from time to time, be amended.
- 2.5 Cable Service means (a) the one-way transmission to Subscribers of (i) Video Programming or (ii) Other Programming Service; (b) Subscriber interaction, if any, which is required for the selection or use of such Video Programming or other programming service.
- 2.6 Cable Television System, Cable System, or System means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide Cable Service which includes Video Programming and which is provided to multiple Subscribers within the Franchise Area. Such term does not include (a) a facility that serves only to retransmit the television signals of one or more television broadcast stations; (b) a facility that serves Subscribers without using any public right-of-way; (c) a facility of a common carrier which is subject, in whole or in part, to the provisions of 47 U.S.C. §§ 201 et seq., except that such facility will be considered a Cable System (other than for purposes of 47 U.S.C. § 541(C)) to the extent such facility is used in the transmission of Video Programming directly to Subscribers, unless the extent of such use is solely to provide on-demand services; or (d) any facilities of any electric utility used solely for operating its electric utility system.
- 2.7 Capital Costs means costs associated with the purchase of assets, products or other resources that will provide service for more than one year, but shall not have any meaning inconsistent with generally accepted accounting principles.
- 2.8 City or Grantor means the City of East Grand Forks, Minnesota, and all territory within its existing and future territorial corporate limits, or jurisdiction for purposes of this Ordinance.
- 2.9 Channel or Cable Channel means a portion of the electromagnetic frequency spectrum which is used in a Cable or OVS System and which is capable of delivering a television Channel as defined by the FCC.

- 2.10 Complaint means any verbal or written or electronic allegation, or assertion made by a Person regarding Cable Service and which is subject to City regulation, requiring subsequent corrective action to the System or any portion thereof.
- 2.11 Converter means an electronic device that converts signals to a frequency not susceptible to interference within the television receiver of a Subscriber and, through the use of an appropriate Channel selector, permits a Cable Subscriber to view all authorized Cable Subscriber signals delivered at designated converter dial locations.
- 2.12 Drop means the cable or cables that connect the ground block on the Cable Subscriber's property to the nearest feasible point on the Cable or OVS System in order to receive Cable Service.
- 2.13 Facilities means any portion of a Cable or OVS System located in, along, over, upon, under, or through the Rights-of-Way.
- 2.14 FCC means the Federal Communications Commission, its designee, or any successor thereof.
- 2.15 Franchise means an initial authorization or renewal thereof issued by the City, whether such authorization is designated as a Franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, which authorizes the construction or operation of the Cable or OVS System or the provision of OVS Service.
- 2.16 Franchise Agreement means the separate agreement or granting Ordinance by which the Franchise is granted to the Franchisee, as required by this Ordinance.
- 2.17 Franchise Area means the entire geographic area within the City as it is now constituted or may in the future be constituted.
- 2.18 Franchise Fee means any tax, fee, or assessment of any kind imposed by the City or other governmental entity on a Franchisee or its Cable Subscribers, or both, solely because of their status as such, pursuant to this Ordinance. The term "Franchise Fee" does not include: (i) any tax, fee, or assessment of general applicability (including any such tax, fee, or assessment imposed on both utilities and Cable Operators or their Cable Services but not including a tax, fee, or assessment that is unduly discriminatory against Franchisees or Cable Subscribers); (ii) Capital Costs that are required by a Franchise to be incurred by a Franchisee for public, educational or governmental ("PEG") Access facilities; (iii) requirements or charges incidental to the award or enforcement of a Franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages; or (iv) any fee imposed under Title 17 of the United States Code.
- 2.19 Franchisee means and includes all Persons having any rights, powers, privileges, duties, liabilities, or obligations under this Ordinance and the Franchise Agreement and any lawful agent, employee, successor, transferee, or assignee of the original Franchisee.

- 2.20 Gross Revenues means all revenues received by the Franchisee from Cable Services in the City and consistent with local, state, and federal law, including, but not limited to, Subscriber revenues (including Pay TV), home shopping programs, rentals of equipment, advertising revenue and any and all other revenues received by the Franchisee from the provision of Cable Service in the City. Gross Revenues do not include revenues recorded as received but which are "bad debt," but includes any recoveries of bad debt. Gross Revenues also do not include any sales, excise, or other taxes collected by Franchisee on behalf of federal, state, county, city, or other governmental unit. Subject to a determination by applicable law, internet modem and related services may be a Cable Service and revenues derived from such service part of Gross Revenue.
- 2.21 Installation means the act of connecting the System from the feeder cable to the Subscriber terminal so that Cable Service may be received by the Subscriber.
- 2.22 Normal Business Hours means those hours during which most similar businesses in the community are open to serve customers. In all cases, Normal Business Hours will include some evening hours at least one night per week and/or some weekend hours.
- 2.23 Normal Operating Conditions means those service conditions which are within the control of the Franchisee. Those conditions which are not within the control of the Franchisee include, but are not limited to, natural disasters, civil disturbances, power outages, telephone network outages, and severe or unusual weather conditions. Those conditions which are ordinarily within the control of the Franchisee include, but are not limited to, special promotions, pay-per-view events, rate increases, regular peak or seasonal demand periods, and maintenance or upgrade of the System.
- 2.24 Open Video Services or OVS means any video programming Services provided to any person by a Franchisee certified by the FCC to operate an Open Video System pursuant to Section 47 U.S.C. 573, as may be amended, regardless of the Facilities used.
- 2.25 Pay TV means the delivery over the System of per-Channel or per-program programming to Subscribers for a separate fee or charge from Basic Cable Service.
- 2.26 Person means any natural person or any association, firm, individual, partnership, joint stock company, joint venture, corporation, or other legally recognized entity, public or private, whether for profit or not for profit.
- 2.27 Public Building means any building identified in the Franchise, which is owned or for the greater part occupied by the City or on behalf of the City by other governmental units performing traditional municipal governmental functions.
- 2.28 Renewal means a new Cable Franchise granted to an existing Franchisee.
- 2.29 Rights-of-Way means the surface and space on, above and below every municipal street, alley, road, highway, lane or City right-of-way dedicated or commonly used now or hereafter for utility purposes and facilities thereon, including, but not limited to, overhead lighting facilities. This term shall not include any county, state, or federal rights-of-way except where controlled or maintained by the City, or as other provided by applicable Laws or pursuant to an agreement between the City and any such Person or Agency.

"Rights-of-Way" shall not include public property owned or leased by the City and not intended for right-of-way use, including, but not limited to, municipal office building property or public works facilities.

- 2.30 Service Interruption means the loss of picture or sound on one or more Cable Channels for single or multiple Subscribers.
- 2.31 Standard Installation means any Service installation that can be completed using a Drop of one hundred twenty-five (125) feet or less.
- 2.32 Subscriber means any Person who lawfully receives Cable Service provided by a Franchisee.

SECTION 3: FRANCHISE REQUIREMENTS

3.1 Franchise Required.

It shall be unlawful for any Person to construct, operate, or maintain a Cable or OVS System or to provide Cable Service or other competing multichannel video services, including OVS, in the City without a Franchise in the form of a Franchise Agreement authorizing the same, unless applicable federal or State law prohibits the City's enforcement of such a requirement. Such Franchise Agreement shall comply with all of the specifications of this Ordinance.

3.2 Nature of Rights Granted by Franchise.

Cable Franchises shall not convey title, equitable or legal, in the Rights-of-Way, and shall give only the right to occupy Rights-of-Way, for the purposes of providing Cable Services and as may be further limited by the Franchise. No Franchise shall grant the right to use Facilities owned or controlled by the City or a third-party, without the consent of such party, nor shall a Franchise excuse Franchisee from obtaining appropriate access or attachment agreements before locating its Facilities on the Facilities owned or controlled by the City or a third-party. All Franchises shall be deemed to incorporate and be limited by the provisions of this Ordinance and shall create rights for the sole and exclusive use of Franchisee. Any Franchise or other authorization for Cable Services, in whatever form granted, shall not grant or include: (i) any other permit or authorization required for the privilege of transacting and carrying on a business within the City required by the ordinances and laws of the City, including the provision of communications services; (ii) any permit, agreement, or authorization required in connection with operations in the Rights-of-Way including, without limitation, permits and agreements for placing devices on or in poles, conduits, or other structures, whether owned by the City or a private entity, or for excavating or performing other work in or along the Rights-of-Way.

3.3 Franchise Not Exclusive.

Any Cable Franchise granted by the City shall be nonexclusive. The Grantor specifically reserves the right to grant, at any time, such additional Franchises for a Cable or OVS

System or any component thereof, to any other Person including itself, as it deems appropriate, subject to this Ordinance and applicable State and federal law.

3.4 Franchise Territory.

Every Cable Franchise shall apply to the entire territorial area of the City, as it exists now or may later be configured.

3.5 Selection of Franchisee.

In selecting a Franchisee pursuant to this Ordinance, the City will prepare a request for proposals to seek bids for a Cable or OVS System to be established under a Franchise by the City. This request for proposals will contain information and instructions relating to the preparation and filing of proposals; conditions regarding the Installation, operation, and maintenance of a Cable or OVS System; and the criteria to be used in evaluating applicant proposals. Any Person desiring an initial Franchise for a Cable or OVS System shall file an application with the City. A nonrefundable Application Fee as may be hereinafter be established by the City shall accompany the application, which shall not be considered or credited against the collection of applicable Franchise Fees. The provisions of this Section will not be applicable to the renewal of any Franchise.

Applicants may be evaluated according to the following criteria:

3.5.1 Installation Plan. Consideration may be given to an Installation plan that would provide the flexibility needed to adjust to new developments, maintenance practices, and services that would be available to the Subscriber and the community immediately and in the future.

3.5.2 Rate Schedule. Consideration may be given to applicants with the most reasonable Installation and Subscriber rate schedule.

3.5.3 Financial Soundness and Capability. The evidence of financial ability required in the applicant's proposal will be such as to assure the ability to complete the entire System within a maximum of three years from the date the Franchise is granted. The City will also consider the applicant's ability to operate the System and provide the necessary services.

3.5.4 Demonstrated Experience in Operating a Cable or OVS System. Consideration may be given to evidence of the applicant's experience in operating a Cable or OVS System, where such evidence would show or tend to show or confirm the ability of the applicant to furnish sufficient and dependable service to the potential public and private users.

3.5.5 Technical Capability. The City may consider the quality of service offered, including signal quality, response to Subscriber complaints, and billing practices.

3.5.6 Future Needs. Consideration may be given to the Franchisee's ability to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests.

3.5.7 Additional Considerations. The City may consider any additional information that it deems applicable.

3.6 Application for Franchise Renewal.

Franchise renewals will be according to applicable law including, but not necessarily limited to, the Cable Act, as amended. The City and Franchisee, by mutual consent, may enter into renewal negotiations at any time during the term of the Franchise Agreement.

SECTION 4: TERM

4.1 Term of Franchise.

The term of the Franchise will be stated in the Franchise Agreement.

SECTION 5: REQUIRED PROVISIONS

5.1 Franchise Provisions.

5.1.1 All Franchises granted pursuant to this Ordinance will be subject to the following provisions:

5.1.1(1) The continuing authority of City to impose such other regulations of general applicability through lawful exercises of its police powers as may be determined by the City Council to be conducive to the health, safety, and welfare of the public.

5.1.1(2) The continuing authority of City to control and regulate the use of its streets.

5.1.1(3) The authority of City to inspect all construction or installation work performed subject to the provisions of the Franchise and this Ordinance, and make such inspections as it will find necessary to insure compliance with the terms of the Franchise, this Ordinance, and other pertinent provisions of law.

5.1.1(4) The authority of City to inspect the books, records, maps, plans, income tax returns, and other like materials of the Franchisee upon reasonable notice to insure compliance with the terms of the Franchise, this Ordinance, and other pertinent provisions of law, including Franchisee's need for confidentiality of certain information.

5.1.1(5) At the expiration of the term for which this Franchise is granted or upon the termination and cancellation as provided herein, the authority of the City to require the Franchisee to remove at its own expense any and all portions of the Cable or OVS System from the Rights-of-Way within the City; provided,

however, that this paragraph shall not be applicable if Franchisee is authorized to provide telecommunications service in City.

5.1.2 Federal, State, and City Jurisdiction.

5.1.2(1) This Ordinance and any Franchise Agreement will be construed in a manner consistent with all applicable federal and state laws.

5.1.2(2) In the event that the state or federal government will discontinue preemption in any area of cable television over which it currently exercises jurisdiction in such a manner as to expand rather than limit municipal regulatory authority, the City may, if it so elects, adopt rules and regulations in these areas to the extent permitted by law.

5.1.2(3) This Ordinance will apply to all Franchises granted or renewed from and after the effective date of this Ordinance.

5.1.2(4) Franchisee will not be relieved of its obligation to comply with any of the provisions of this Ordinance or any Franchise Agreement granted pursuant to this Ordinance by reason of any failure of the City to enforce prompt compliance.

5.1.2(5) In the event of a change in state or federal law which by its terms would require the City to amend this Ordinance, the parties shall modify the existing Cable Franchise in a mutually agreed upon manner.

5.2 Franchise Agreement.

5.2.1 The applicant awarded a Franchise by the City will execute a Franchise Agreement, agreeing to the terms and provisions of the Franchise and specifications of the Franchise as may be incorporated into the Franchise Agreement in writing. All Franchises granted by the City shall contain substantially similar terms and conditions and shall specifically require that the Franchisee serve the entire Franchise Area

5.2.2 In addition to those matters required elsewhere in this Ordinance to be included in the Franchise Agreement, it must contain the following express representations by the Franchisee that:

5.2.2(1) It accepts and agrees to all of the provisions of this Ordinance, and any supplementary specification, as to construction, operation, or maintenance of the System, which the City may include in the Franchise Agreement subject to applicable state and federal law.

5.2.2(2) It has examined all of the provisions of this Ordinance and agrees that the provisions thereof are valid, binding at this time, and enforceable as of the effective date of the Franchise.

5.2.2(3) It recognizes the right of the City to adopt such additional regulations of general applicability as it will find necessary in the exercise of its police power.

5.2.3 No Franchise will be exclusive.

5.2.4 Every Franchise will specifically require that the Franchisee serve the entire Franchise Area when residences number seven (7) per 1320 feet.- Each connection within one hundred fifty feet (150) of the existing system shall be connected at no cost to the customer.

5.2.5 The Franchise Agreement will contain such further conditions or provisions as may be included in the request for proposal and negotiated between the City and the Franchisee, except that no such conditions or provisions will be such as to conflict with any provisions of this Ordinance or other law. In case of such conflict or ambiguity between any terms or provisions of the Franchise Agreement and this Ordinance, the Franchise Agreement will control.

5.3 Design, Services, and Capabilities.

5.3.1 Cable or OVS System Design. Every Franchisee shall offer Cable Service that meets the cable-related needs of the City. Such Cable Service shall, at a minimum, be comparable to Cable Services offered by that Franchisee or its Affiliates operating any headend serving the City and surrounding municipalities. The Cable Franchise shall incorporate a description of the Franchisee's Cable or OVS System including the general design and capabilities of the Cable or OVS System to identify how the Cable or OVS System will meet the current and future Cable needs of the City.

5.3.2 The Cable or OVS System. Every Cable or OVS System shall pass by every single-family dwelling unit within the Franchise Area in accordance with line extension policies set forth in this Ordinance. Service shall be provided to Subscribers in accordance with the schedules and line extension policies specified in this Ordinance.

5.3.3 Drops to Public Buildings.

5.3.3(1) Every Franchisee shall provide installation of at least one (1) Cable Drop and one (1) outlet, provide monthly Basic Cable Service, and maintenance of the same, without charge, to public buildings specified by the City in Exhibit B herein. All accredited K-12 schools, secondary private schools with students receiving funding under Title I of the Education and Secondary School Act of 1965, public libraries, and each police and fire station shall receive one (1) Cable Drop, one (1) drop, Basic Cable Service, and maintenance of the same at no charge, subject to the 150 foot limit. The location of such Cable drops and outlets shall be determined in cooperation with the management of the public building to which the connection is to be made. Following the City's designation of additional public buildings to receive Cable Service, a Franchisee shall complete construction of the Drop and the outlet within 180 days of the request, weather permitting and subject to payment of the commercially reasonable cost of

installation in excess of 150 feet. Drops and outlets that are in addition to the one free Drop and outlet required by this section shall be provided by a Franchisee at commercially reasonable cost. Alternatively, at an institution's request, the institution may add outlets at its own expense, as long as such installation meets the Franchisee's standards, which shall be made readily available to any public entity upon request. Additional outlets and Services to Public Buildings are subject to the applicable commercial rate.

5.3.3(2) All Cable Outlets provided for in this subsection shall not be utilized for commercial purposes. The City shall take reasonable precautions to prevent any use of a Franchisee's Cable or OVS System in any inappropriate manner or that may result in loss or damage to the Cable or OVS System. Users of such outlets shall hold the Franchisee harmless from any and all liability or claims arising out of their use of such outlets, other than those claims arising out of improper installation or faulty equipment.

5.3.3(3) In instances where the Drop line from the feeder cable to the public building, school, or library exceeds 150 feet, the Franchisee may charge for its commercially reasonable costs that are incurred in exceeding this length. A Franchisee may require advance payment of this cost.

~~5.3.4 School and Library Cable Modems. Unless specified in the applicable Franchise, upon activation and commercial offering of two-way cable modem service by the Franchisee within the Franchise Area, such Franchisee shall provide upon written request one courtesy cable modem with Cable Internet Service without charge to every State accredited K-12 public school, secondary private schools with students receiving funding under Title I of the Education and Secondary School Act of 1965, and public library in the Franchise Area, where the drop does not exceed 150 feet.~~

5.3.5 Use of Franchisee's Facilities. Subject to any applicable state or federal regulations, the City shall have the right to install and maintain, upon the poles and within the underground pipes and conduits of a Franchisee, any wires and fixtures desired by the City for public purposes. . Provided, however, that (a) such use by Grantor shall not interfere with the current or future use by Franchisee or any pre-existing user or lessor of Franchisee's facilities; (b) such use by Grantor is restricted to non-commercial public purposes; (c) Grantor takes reasonable precautions to prevent and use of Franchisee's facilities in any manner that results in an inappropriate use thereof, or any loss or damage to the Cable or OVS System. For the purposes this subsection, "public purposes" includes, but is not limited to, the use of the structures and installations for City fire, police, traffic, utility, and/or signal systems, but not for commercial Cable or OVS System purposes in competition with the Franchisee; (d) to the extent provided by state law, the City holds Franchisee harmless against and from all claims, demands, costs, or liabilities of every kind and nature whatsoever arising out of such use of said poles or conduits; and (e) at the Franchisee's sole discretion, the City may be required either to pay a reasonable rental fee or otherwise reasonably compensate the Franchisee for the use of such conduit or other equipment.

5.3.6 Upgrade of the System and New Developments. Every Franchisee shall upgrade its Cable or OVS System (herein referred to as "System Upgrade"), if required, as set forth in its respective Franchise. Furthermore, the City may amend this Ordinance whenever necessary to enable the Franchisee to take advantage of any developments in the field of transmission of communication signals and upgrade the System which will afford it an opportunity to more effectively, efficiently, or economically serve its customers; provided that this Section will not be construed to require the City to make any such amendment and further provided that the City may not impose any capital or operating expenditures on any Franchisee pursuant to this Section without the Franchisee's consent.

5.3.7 Emergency Alert Capability. Every Franchisee shall at all times provide the System capabilities to comply with the FCC's Emergency Alert System rules and regulations. Provided, that if the FCC at some future date eliminates the current regulations, the City and Franchisee shall mutually agree upon the applicable standard on a going forward basis.

5.3.8 Periodic Review and Evaluation. The City has determined that cable television technology, programs, and services are subject to continuing change. This includes change in law and regulations, as well as technological and service advancements. For this reason, it is essential that any Franchise which is granted pursuant to this Ordinance must include provisions for periodic review evaluation and modification and procedures and requirements relating to evaluation of the State of the Art technology and services permitting the City and Franchisee to agree to changes based upon review and in accordance with the procedures outlined in the Franchise Agreement.

5.3.9 Close Captioning and Descriptive Audio Service. Every Franchisee will make audio descriptive services and closed captioning capabilities available to the extent required by state and federal law.

~~5.3.10 Standby Power. Within twelve (12) months of activation of the System, the Franchisee shall provide standby power generating capacity capable of providing at least twelve (12) hours of emergency supply at the Cable or OVS System headend. For nodes, two hours with emergency power supply. Every Franchisee shall maintain standby power System supplies throughout the major trunk cable networks capable of providing emergency power within the standard limits of commercially available power supply units.~~

5.3.11 HDTV/ATV Conversion. Conversion to High Definition Television/Advances Television (HDTV/ATV) formats shall occur in accordance with applicable law.

5.4 Public, Educational, and Governmental Access or PEG Access.

5.4.1 Access Channels.

5.4.1(1) Every Franchisee shall, to the extent required in its Franchise and subject to applicable law, provide or fund PEG Access Facilities in an amount equal to that provided by other Franchisee(s). Such requirements shall, at a minimum, satisfy the community need for such facilities and/or service as determined by the City or governing body for the period of the applicable Franchise and shall be established in the Franchise Agreement.

5.4.1(2) Every Franchisee shall also provide channel capacity, and support for Public, Educational, and Government Access Channels, as specified in their Franchise. All such PEG Access Channels shall be available to all Subscribers as part of their Basic Cable Service. Given the on-going changes in the state of technology as of the Effective Date of this Ordinance, absent express written consent of the City, Franchisee shall transmit PEG Access Channels in the format or technology utilized to transmit all of the Channels on the Basic Cable Service tier. Oversight and administration of the PEG Access Channels shall be set forth in the Franchise Agreement.

5.4.2 Proof of Performance Testing. To ensure high quality of service on the Access Channels, results of proof of performance testing as required by applicable federal law throughout the System and on all required Channels will be made available to the City upon request to the extent required by the Franchise. Every Franchisee will monitor the Cable or OVS System to determine and ensure that the level of technical quality of the System's transmission of Access Channels is in conformance with the FCC Rules and is the same as on other Channels transmitted on the Cable or OVS System.

5.5 Construction Standards and Requirements.

5.5.1 Permit Required. Franchisee will not construct any Cable or OVS System facilities until Franchisee has secured the necessary permits from the City or other cognizant public agencies.

5.5.2 Construction Standards. All of the Franchisee's plant and equipment including, but not limited to, the antenna site, headend, and distribution System, towers, house connections, structures, poles, wire, cable, coaxial cable, fixtures, and appurtenances will be installed, located, erected, constructed, reconstructed, replaced, removed, repaired, maintained, and operated in accordance with good engineering practices, performed by experienced pole line construction crews and so as not to endanger or interfere with the safety of any Person or property, or to interfere with improvements the City may deem proper to make, or to interfere in any manner with the right of any property owner, or to unnecessarily hinder or obstruct pedestrian or vehicular traffic on City properties.

5.5.3 Compliance with City Ordinances for Work in Rights-of-Way. Any opening or obstruction in or disturbance of the Rights-of-Way or other municipal properties made by the Franchisee in the exercise of its rights under a Franchise Agreement will be done in compliance with City ordinances which regulate work in the public ways of the City, except that any bond requirements therein shall be waived in cognizance of the bond requirements of this Ordinance.

5.5.4 Compliance with City Ordinances for Construction and Building Standards. The Franchisee will comply with the minimum standards provided for by the applicable ordinances of the City adopted from time to time containing construction or building standards of general applicability; provided, however, that Franchisee shall not be required to modify or alter its Cable or OVS System unless such modification or alteration is necessary for the protection of public health, safety and welfare.

5.5.5 Removal and Relocation of Facilities. The Franchisee will, at its expense, protect, support, temporarily disconnect, relocate in the same Rights-of-Way, or other Right-of-Way, or remove from the Right-of-Way, any property of Franchisee when required by the City or its designee by reason of traffic conditions, public safety, street excavation, freeway, and street construction, change or establishment of street grade, installation of sewers, drains, water pipes, power lines, signal lines, and tracks, or any other type of structures or improvements by public agencies. If the City compensates any utility for such work, the City must similarly compensate the Franchisee for such work.

5.5.6 Movement of Lines. The Franchisee will, on the request of any private party holding an appropriate permit issued by the City and upon five (5) days prior written notice, temporarily raise or lower its lines to permit the moving of any building or other structure, and the actual expense of the same will be paid in advance by the party requesting the same.

5.5.7 Tree Trimming. The Franchisee will have the right, with the prior approval of the City, except in emergency circumstances, to remove, trim, cut, and keep clear of its poles, wires, or cables, the trees in and along the streets of the City, but in the exercise of such right, the Franchisee will not cut or otherwise injure said trees to any greater extent than is reasonably necessary for the continued integrity of its poles, wires, or cables.

5.5.8 Responsible for Restoration and Costs. The Franchisee, in exercise of any right granted to it by the Franchise, will reconstruct, replace, restore, or repair any street, and any sewer, gas, or water main, pipe, electric, fire alarm, or police communications, off or on City property, or Right-of-Way or traffic control facility of the City which may be damaged or destroyed by the exercise of any such right, to a condition as good as that prevailing before said work to the reasonable satisfaction of the City. The City reserves the right to determine whether the Franchisee has properly complied with the provisions of this paragraph and in the event it is determined that the Franchisee has failed to do so, the City will have the right to, following notice to the Franchisee and reasonable opportunity for the Franchisee to cure, enforce such provisions, and the Franchisee will reimburse the City in full for all expenses incurred by the City in carrying out all or part of such provisions.

5.5.9 Failure to Complete Work. Upon failure of the Franchisee to commence, pursue, or complete any work required by law or by the provisions of this Ordinance to be done in any Rights-of-Way, within the time prescribed, and to the reasonable satisfaction of the City or its designee, the City or its designee may, following notice to the Franchisee and reasonable opportunity for the Franchisee to cure, at its option, cause such work to be

done. The Franchisee will pay to the City the cost thereof in the itemized amounts reported by the City or its designee to Franchisee within 30 days after receipt of such itemized report.

5.6 Technical Standards.

5.6.1 Compliance with OSHA. All construction practices will be in accordance with all applicable sections of the Occupational Safety and Health Act of 1970, as amended, as well as all other applicable local, state, and federal laws and regulations.

5.6.2 Compliance with National Electrical Codes. All Installation of electronic equipment will be installed in accordance with the provisions of the National Electrical and Safety Code and National Electrical Code as amended.

5.6.3 Compliance with FAA Regulations. Antennae and their supporting structures (towers) will be painted, lighted, erected, and maintained in accordance with all applicable rules and regulations of the Federal Aviation Administration and all other local, state, and federal laws and regulations.

5.6.4 Test and Compliance Procedure. Tests for the Cable or OVS System shall be performed periodically in a manner so as to conform with FCC specifications. The tests may be witnessed by representatives of the City and written test results shall be made available to the City within 30 days of a request.

5.6.5 Additional Tests. At any time after commencement of Service to Subscribers, the City may require the Franchisee to perform additional tests, full or partial repeat tests, or tests involving a specific Subscriber's Drop. Such additional tests may be made on the basis of Complaints received or other evidence indicating an unresolved controversy or significant noncompliance, and such tests will be limited to the particular matter in controversy. The City will be able to designate a representative to be present during the testing. If a test indicates that the Franchisee is in compliance with FCC standards and requirements, the City will bear the expense of such test. If a test indicates that the Franchisee is not in compliance with FCC standards and requirements, the Franchisee will bear the expense of such test. The City will endeavor to so arrange its requests for such special tests so as to minimize hardship or inconvenience to Franchisee or to the Subscriber.

5.7 Repair.

Any damage caused to the property of building owners or users or any other Person by the Franchisee's negligence will be repaired fully to a condition as good as that prevailing before said work by the Franchisee.

5.8 Removal of Facilities From Subscriber's Premises Upon Request.

Upon termination of service to any Subscriber, the Franchisee will promptly remove all its facilities and equipment from the premises of such Subscriber upon his or her request.

5.9 Transfer of Ownership.

5.9.1 Franchisee will not sell, transfer, lease, assign, sublet, or dispose of any Franchise awarded under this Ordinance or any of the rights or privileges granted by the Franchise to any Person other than an Affiliate of Franchisee, without the prior consent of the City, which consent will not be unreasonably withheld and may be denied only upon a good faith finding by the City that the proposed transferee lacks the legal, technical, or financial qualifications to consummate the transaction and operate the Cable or OVS System so as to perform its obligations under the Cable Franchise. This section shall not apply to sales or property or equipment in the normal course of business.

Further, any sale or transfer and the consent thereto, will comply with applicable legal requirements. Any attempt to sell, transfer, lease, assign, or otherwise dispose of the Franchise and/or the Cable or OVS System without the consent of the City except as otherwise provided herein will be null and void. The granting of a security interest in any of Franchisee's assets, or any mortgages or other hypothecation, will not be considered a transfer for the purposes of this Section.

5.9.2 Any change of control of Franchisee will be deemed to be a "sale" or "transfer" of the Franchise. A "change of control" will include any stock sale by Franchisee to, or any merger or consolidation with, any Person (or group of Persons acting in concert) that is not an Affiliate of Franchisee before such transaction but shall not include the transfer of ownership or control of a Franchisee's limited or non-managing general partner. The sale, assignment, or other transfer of all or a majority of a Franchisee's assets in the City shall also constitute a sale or transfer.

5.9.3 The Franchisee must comply with provisions of the Cable Act regarding transfers of ownership and any other state, federal, or local laws which are applicable.

5.9.4 The Franchisee will notify the City in writing of any foreclosure or any other judicial sale of all or a substantial part of the property of the Franchisee or upon the termination of any lease or interest covering all or a substantial part of said franchised property. Such notification will be considered by the City as notice that a change in control or ownership of the Franchise has taken place and the provisions under this Section governing the consent of the City to such change in control or ownership will apply.

5.9.5 For the purpose of determining whether it will consent to such a change, transfer, or acquisition of control, the City may inquire into the qualifications of the prospective transferee or controlling party, and the Franchisee will assist the City in any such inquiry. The transferee will be required to establish that it possesses the legal, technical, and financial qualifications to operate and maintain the System and comply with all Franchise requirements for the remainder of the term of the Franchise. After considering the legal, financial, and technical qualifications of the transferee and determining that they are satisfactory, the City may approve the transfer of rights and obligations of said Franchise.

5.9.6 As a condition of transfer of ownership or control any proposed transferee shall execute an agreement, in such form as acceptable to the City Attorney, that it will assume and be bound by all of the provisions, terms and conditions of this Ordinance and any Franchise granted pursuant to it.

5.9.7 Any financial institution having a pledge of the Franchisee or its assets for the advancement of money for the construction and/or operation of the Franchise will have the right to notify the City that it or its designee satisfactory to the City will take control of and operate the Cable Television System, in the event of a Franchisee default in its financial obligations. Said financial institution will also submit a plan for such operation within 30 days of assuming such control that will assure continued service and compliance with all Franchise requirements during the term the financial institution exercises control over the System. The financial institution will not exercise control over the System for a period exceeding one year unless extended by the City in its discretion and during said period of time it will have the right to petition the to transfer the Franchise to another Franchisee.

5.9.8 Notwithstanding anything to the contrary contained herein, no such prior consent will be required for any transfer or assignment to any Person controlling, controlled by, or under the same common control as the Franchisee.

~~5.9.9 The City reserves any legal right it has under applicable law to require a Franchisee to pay all costs and expenses incurred by the City in connection with the sale, assignment, or transfer of a Cable Franchise, including, but not limited to, the City's costs of reviewing the qualifications of any proposed transferees.~~

5.10 Purchase by City.

Subject to the Cable Act, if a Franchise is revoked for cause, the City may, to the extent permitted by federal law, acquire that portion of the Cable or OVS System serving the City upon payment of an equitable price or effect a transfer of ownership of the same to another Person.

5.11 Requests for Cable Service.

A Franchisee will provide Cable Service to any requesting Subscriber within the City within 30 days from the date of request, weather permitting.

5.12 Multiple Franchises.

5.12.1 Grant of Additional Franchise. The City may grant one or more Franchises for the City. Each Franchise Agreement granted shall contain substantially similar terms and conditions including the service area. The City may, in its sole discretion, limit the number of Franchises granted based upon, but not necessarily limited to, the requirements of applicable laws and specific local considerations, such as:

5.12.1(1) The capacity of the public Rights-of-Way to accommodate multiple coaxial cables in addition to the cables, conduits, and pipes of the utility systems, such as

electrical, power, telephone, gas, and sewerage and the potential disruption of those Rights-of-Way and private property that may occur if one or more additional Franchises are granted.

5.12.1(2) The impact on the community of having multiple Franchises.

~~5.12.1(3) The disadvantages that may result from Cable or OVS System competition, such as the requirement for multiple pedestals on residents' property, and a disruption arising from numerous excavations of the Rights-of-Way.~~

~~5.12.1(4) The legal, technical, and financial capabilities of the applicant and its guaranteed commitment to make the necessary investment to erect, maintain, and operate the proposed System for the duration of the Franchise term.~~

5.12.1(5) The amount of time it will take the applicant to complete construction of the proposed Cable or OVS System and activate Cable Service in the entire Franchise Area; and, whether the applicant can complete construction and activation of its Cable or OVS System in a timely manner.

Field

5.12.1(6) The disruption on the availability of Cable Service within the City.

5.12.1(7) Such other information as the City may deem appropriate to be considered prior to granting any competing or overlapping Franchise.

5.12.2 Permits for Non-Franchised Entities. The City may issue a license to a Person other than the Franchisee to permit that Person to traverse any portion of a Franchisee's Franchise Area within the City in order to provide Cable Service outside, but not within the City. Such a license or easement, absent a grant of a Franchise in accordance with this Ordinance, shall not authorize nor permit said Person to provide Cable Service of any type to any home or place of business within the City.

5.13 Discriminatory or Preferential Practice.

5.13.1 Rates and Charges. The Franchisee will not, in its rates or charges, or in making available the services or facilities of its System, or in its rules or regulations, or in any other respect, make or grant preferences or advantages to any Subscriber or potential Subscriber to the System, or to any user or potential user of the System; and will not subject any such Persons to any prejudice or disadvantage. The foregoing will not be deemed to prohibit or preclude promotional rates or charges.

5.13.2 Access and Employment. The Franchisee will not deny service, deny access, or otherwise discriminate against Subscribers on the basis of race, creed, color, religion, national origin, or sex. The Franchisee will comply at all times with applicable equal employment opportunity requirements and all other applicable federal, state, and local laws and regulations, and all executive and administrative orders relating to nondiscrimination which are hereby incorporated and made part of this Ordinance by reference.

5.13.3 Build-Out. A Franchisee may not discriminate in the build-out of its Cable or OVS System to a particular area of the City or provision of Cable Service to individual groups of residents on the basis of race, creed, color, religion, national origin, sex, or economic condition.

5.14 Subscriber Privacy.

The Franchise will comply with the Subscriber privacy standards located in 47 U.S.C. § 551. If the standards in 47 U.S.C. § 551 cease to exist, the City will have the right to implement the following:

No signal will be transmitted from a Subscriber terminal for purposes of monitoring individual viewing patterns or practices without the express written permission of the Subscriber. The request for such permission will be contained in a separate document with a prominent statement that the Subscriber is authorizing the monitoring and acknowledging the provisions. The authorization will be revocable at any time by the Subscriber without penalty of any kind whatsoever; provided, however, that the Franchisee will be entitled, without permission, to conduct System-wide or individually addressed "sweeps" for the purpose of verifying System integrity, controlling return transmission, or billing for services.

5.15 Permits and Authorizations.

The Franchisee or applicant for Franchise will diligently apply for all necessary permits and authorizations required in the conduct of its business, and will diligently pursue the acquisition thereof, including necessary pole attachment contracts, and necessary authorizations from the Federal Aviation Administration to construct such receiving antenna towers as may be required, and any necessary authorizations or waivers from the FCC. After the Franchisee has diligently pursued the acquisition of necessary pole attachment contracts, or other necessary easements, and where such necessary contracts have not been entered or easements obtained after a reasonable period of time, the Franchisee may submit the matter to the City and the City may thereupon provide assistance that may be necessary to arrive at a solution so that scheduled construction of the System will not be impaired.

5.16 Annual Reports.

5.16.1 Contents. Upon request of the City, each Franchisee will file an Annual Report. Such Report will include:

5.16.1(1) An ownership report, identifying all Persons who at any time during the preceding year controlled or benefited from an interest in the Franchisee of five percent or more.

5.16.1(2) Copies of all rules, regulations, terms, and conditions the Franchisee has adopted for the conduct of its business.

5.16.1(3) A summary of any customer surveys conducted that year.

5.16.1(4) A summary of the previous year's (or in the case of the initial reporting year, the initial year's) activities in development of the Cable or OVS System, including but not limited to, services begun or discontinued during the reporting year.

5.16.1(5) A list of Franchisee's officers, board members, and other principals and a current list of the addresses of each officer and director and other management personnel of the Franchisee.

5.16.1(6) A revenue statement certified by a representative of the Franchisee showing the Gross Revenues of the Franchisee for the proceeding fiscal year.

5.16.1(7) A statement of the Franchisee's current billing practices and charges.

5.16.1(8) As part of the Annual Report, Franchisee will provide to the City the following statistical information:

(i) Statistics compiled on a quarterly basis recording service calls in which a technician or repairman is dispatched to a residence to correct a reception problem. Such records should be kept pursuant to Section 7.6.

(ii) Franchisee's leakage log.

(iii) Records of Complaints called or written into the System and kept in the ordinary course of business. Such records should be kept pursuant to the requirements of Section 7.6.

Upon request, Franchisee will allow the City Administrator or his or her designee to review a detailed plan (map) of the System at its offices.

5.16.2 Service Contract and Subscriber Information.

5.16.2(1) A Franchisee shall have authority to promulgate such rules, regulations, terms, and conditions governing the conduct of its business as shall be reasonably necessary to enable the Franchisee to exercise its rights and perform its obligations under this Ordinance and a Franchise Agreement and to assure uninterrupted Cable Service to all of its Subscribers; provided such rules, regulations, terms, and conditions shall not be in conflict with the provisions of this Ordinance, federal, state, and or local law, or any applicable rules and regulations.

5.16.2(2) Upon request, a Franchisee shall submit to City any standard residential Subscriber contract form that it utilizes. If no written form exists, upon request, a Franchisee shall file with the City a document completely and concisely stating the terms of the standard residential Subscriber contract offered.

5.17 Indemnification, Security Funds, Insurance.

5.17.1 Liability and Indemnification. The Franchisee will indemnify, hold harmless, release, and defend the City, its officers, agents, and employees from and against any and all lawsuits, claims, causes of action, actions, liability, demands, damages, disability losses, expenses including reasonable attorneys' fees, and costs or liabilities of any nature that may be asserted by any Person or entity from any cause whatsoever including another's concurring negligence arising from injury to Persons or damages to property to the extent caused by any conduct undertaken by the Franchisee, its officers, agents, or employees, by reason of its construction, operation, or maintenance of its System. Such damages and penalties will include, but not be limited to, damages arising out of copyright infringements, and all other damages arising out of the installation, operation, or maintenance of the Cable or OVS System authorized herein, whether or not any act or omission complained of is authorized, allowed, or prohibited by the Franchise, except that a Franchisee will not be liable for payment of damages and penalties arising from any acts or omissions by the City, its agents, or employees. If a lawsuit is filed against the City, either independently or jointly with the Franchisee to recover for any claim or damages, the Franchisee, upon notice to it by the City, will, at its sole cost and expense, defend and fully control the defense of the City against the action and, in the event of a final judgment being obtained against the City, either independently or jointly with the Franchisee solely by reason of the acts of the Franchisee, the Franchisee will pay said judgment and all costs and hold the City harmless therefrom. However, the Franchisee may not enter into any compromise, settlement, resolution, or disposition of a claim or proceeding that may create or impose liability for the City without obtaining the City's written consent thereto which shall not be unreasonably withheld. In order for the City to assert its rights to be indemnified and held harmless, the City must:

5.17.1(1) Notify Franchisee of any claim or legal proceeding which gives rise to such right;

5.17.1(2) Afford Franchisee the opportunity to participate in and fully control any compromise, settlement, resolution, or disposition of such claim or proceeding; and

5.17.1(3) Fully cooperate in the defense of such claim and make available to Franchisee all such information which it may lawfully furnish to Franchisee and relating to the claim.

5.17.2 Security Funds. The City may require the Franchisee to file with the City Administrator/Clerk-Treasurer, concurrently with its acceptance of the Franchise and at Franchisee's sole expense a corporate surety bond, construction bond, performance bond, and/or security fund. Such bond and/or security fund will be in an amount specified in the Franchise Agreement, issued by a responsible company licensed to do business in Minnesota and conditioned upon the faithful performance of the Franchisee to meet its

Field

Field

obligations under this Ordinance and the Franchise. The Franchisee shall be required to replenish any such bond within thirty (30) days after the City draws down upon it.

5.17.3 General Provisions Relating to Insurance.

5.17.3(1) During the course of a Franchise Agreement, the Franchisee will be required to maintain liability insurance, to protect the City and the Franchisee from and against any and all claims, injury, or damage to Persons or property, both real and personal, caused by the construction, erection, operation, or maintenance of any aspect of the System. The amount of insurance will be specified in the Franchise Agreement.

5.17.3(2) The Franchisee will provide workers' compensation insurance as required by state law.

5.17.3(3) All such insurance coverage will provide a thirty (30) day notice to the City Administrator in the event of material alteration or cancellation of any coverage afforded in said policies prior to the date said material alteration or cancellation will become effective.

5.17.3(4) Copies of all certificates evidencing insurance will be furnished to and filed with the City Administrator prior to the commencement of operations or the expiration of prior policies, as the case may be.

5.17.3(5) It will be the obligation of Franchisee to promptly notify the City of any pending or threatened litigation that would be likely to affect the Franchisee's insurance coverage.

5.17.4 Liability Insurance.

A. As of the effective date of this Franchise Agreement, the Franchisee will, at its sole expense, maintain during the entire term of this Franchise public liability insurance with a company licensed to do business in the State of Minnesota with a rating by Best of not less than "B" that will protect the Franchisee, the City, and the City's officials, officers, employees, and agents from claims which may arise from operations under this Franchise except claims brought by City employees which are covered by Worker's Compensation, whether such operations are by the Franchisee, its officials, officers, directors, employees, or agents, or any subcontractors of Franchisee. This liability insurance will include, but will not be limited to, protection against claims arising from bodily and personal injury, and damage to property resulting from the Franchisee's automobiles, products, and completed operations. The amount of such insurance will be not less than the following:

1. General liability insurance:

Bodily injury per Person	\$1,000,000
Bodily injury per occurrence	\$1,000,000
Property damage per occurrence	\$1,000,000

	Property damage and bodily injury, aggregate	\$5,000,000
2.	Automobile insurance:	
	Bodily injury per Person	\$1,000,000
	Bodily injury per occurrence	\$1,000,000
	Property damage per occurrence	\$1,000,000
3.	Umbrella coverage:	\$1,000,000

B. The liability policy will provide for the following, by endorsement or otherwise:

1. The policy will cover personal injury as well as bodily injury.
2. The policy will cover blanket contractual liability subject to the standard universal exclusions of contractual liability included in the carrier's standard endorsement as to bodily injuries, personal injuries, and property damage.
3. Broad form property damage liability will be afforded.
4. The City will be included as an additional insured on the policy.
5. The coverage is primary insurance and no other insurance or fund of the City will be called upon to contribute to a loss under this coverage.
6. Standard form of cross-liability will be afforded.
7. The policy will not be canceled without thirty (30) days prior written notice of such cancellation to the City.

C. The automobile insurance policy will provide for the following, by endorsement or otherwise:

1. The City will be included as an additional insured on the policy.
2. The policy will not be canceled without thirty (30) days prior written notice of such cancellation to the City.

D. Upon ninety (90) days prior written notice to Franchisee, the City reserves the right to adjust the limit coverage requirements no more than every five (5) years. Any such adjustment by the City will be no greater than the increase in the State of Minnesota Consumer Price Index for such five-year period.

E. Franchisee will submit to the City documentation of the required insurance including a certificate of insurance signed by the insurance agent and companies named, as well as all properly executed endorsements required by this Section 2.2. The certificate of insurance should confirm that the required endorsements are in effect.

- F. Any deductible or self-insured retention must be declared to the City.
- G. Franchisee will have insurance coverage sufficient to cover any claim in the event that Franchisee sells or transfers the system, or in the event of termination or revocation of this Franchise.
- H. It will be the obligation of the Franchisee to notify the City promptly of any pending or threatened litigation likely to negatively impact its ability to provide the insurance coverage required herein.

5.17.5 Non-Waiver. Neither the provisions of this Section, nor any bonds accepted by the City pursuant thereto, nor any damages recovered by the City thereunder will be construed to excuse unfaithful performance by the Franchisee or limit the liability of the Franchisee under this Ordinance or the Franchise for damages, either to the full amount of the bond or otherwise.

5.18 Continuity of Service.

Field

5.18.1 It will be the right of all Subscribers to continue receiving Cable Services insofar as their financial and other obligations to the Franchisee are honored. In the event that the Franchisee elects to rebuild, modify, or sell the System, or the City gives notice of intent to terminate or fails to renew the Franchise, the Franchisee will act so as to insure that all Subscribers receive continuous, uninterrupted service, subject to compliance with federal and state laws.

5.18.2 In the event of a change of the Franchisee, or in the event a new operator acquires the System, the Franchisee will cooperate with the City's new Franchisee or operator in maintaining continuity of Cable Service to all Subscribers. During such period, Franchisee will be entitled to the revenues for any period during which it operates the System and will be entitled to reasonable cost for its services when it no longer operates the System.

5.19 Safety Requirements.

5.19.1 The Franchisee will at all times employ ordinary care and will install, maintain, and use commonly accepted methods and devices for preventing failures and accidents which are likely to cause damage, injuries, or nuisances to the public.

5.19.2 The Franchisee will install and maintain its wires, cables, fixtures, and other equipment in accordance with the requirements of the National Electrical Safety Code of the Institute of Electrical and Electronic Engineers; the National Electrical Code of the National Fire Protection Association; the Bell System Code of Pole Line Construction; and applicable federal, state, and local regulations.

5.19.3 All structures and all lines, equipment, and connections in, over, under, and upon the Rights-of-Way of the City, wherever situated or located, will at all times be kept and maintained in a safe, suitable, substantial condition and in good order and repair.

SECTION 6: FRANCHISE FEES

6.1 Five Percent Franchise Fee.

During the term of any Franchise granted pursuant to this Ordinance, the Franchisee will pay to the City for the use of its Rights-of-Way an annual franchise fee in an amount of five percent of the annual Gross Revenues as compensation for the grant of a Franchise and in consideration of permission to use the Rights-of-Way of the City for the construction, operation, maintenance, and reconstruction of a Cable or OVS System, and to defray the costs of Franchise obligations. This payment will be in addition to any other tax or payment owed to the City by the Franchisee and does not include rental of poles or underground conduits. Further, every Franchisee that offers any “bundled” services shall fairly reflect as part of its calculation of applicable Franchise Fees an appropriate and reasonable division of services among the various services offered. The specific cost accounting for such revenue attribution shall be set out in the individual Franchise or other agreement.

6.2 Payment and Audits.

Sales tax or other taxes levied directly on a per subscription basis and collected by Franchisee will be deducted from Gross Revenues before computation of sums due the City is made. Payments due the City under the terms of this Ordinance will be computed and paid monthly.. The City will be furnished a statement with each payment, certified as correct by the Franchisee, reflecting the total amount of Gross Revenues and the above charges, deductions, and computations for the one-month payment period covered by the payment. Upon 10 days prior written notice, the City will have the right to conduct an independent audit of Franchisee's records, in accordance with generally accepted accounting principles and if such audit indicates a franchise fee underpayment of five percent or more, the Franchisee will assume all reasonable costs of the audit. Any additional amount due the City as a result of such audit will be paid within 30 days following written notice by the City to the Franchisee, which notice will include a copy of the audit report.

6.3 Acceptance of Payment.

No acceptance of any payment will be construed as a release or accord and satisfaction of any claim the City may have for further or additional sums payable as a franchise fee under this Ordinance or the Franchise Agreement or for the performance of any other obligation hereunder.

6.4 Failure to Pay.

Failure to pay any fees required by this Section within 10 days of receipt of written notice of such failure from the City will be grounds for termination of the Franchise and reinstatement thereof may be had only upon resolution by the City Council.

6.5 Penalty for Late Payment.

In the event that any franchise fee payment or recomputed amount is not made on or before the dates specified above, Franchisee will pay as additional compensation an interest charge, computed from such due date, at an annual rate equal to the prime lending rate plus one and one-half percent during the period for which payment was due and unpaid.

6.6 Monthly Report of Gross Revenues.

Each Franchisee will file with the City monthly reports in the form provided as Exhibit A hereto, of Gross Revenues certified as correct by the Franchisee.

SECTION 7: CUSTOMER SERVICE STANDARDS

7.1 Compliance.

Franchisee shall comply with the customer service standards of the FCC, as outlined in this Section.

7.2 Cable or OVS System Office Hours and Telephone Availability.

7.2.1 Franchisee will maintain a local, toll-free, or collect call telephone access line which will be available to its Subscribers twenty-four (24) hours per day, seven days per week.

7.2.1(1) Trained Franchisee representatives will be available to respond to customer telephone inquiries during Normal Business Hours.

7.2.1(2) After Normal Business Hours, the access line may be answered by a service or an automated response system, including an answering machine. Inquiries received after Normal Business Hours must be responded to by a trained Franchisee representative on the next business day.

7.2.2 Under Normal Operating Conditions, telephone answer time by a customer representative, including wait time, will not exceed thirty (30) seconds when the connection is made. If the call needs to be transferred, transfer time will not exceed thirty (30) seconds. These standards will be met no less than ninety percent (90%) of the time under Normal Operating Conditions, measured on a quarterly basis.

7.2.3 The Franchisee will not be required to acquire equipment or perform surveys to measure compliance with the telephone answering standards above unless a historical record of Complaints indicates a clear failure to comply.

7.2.4 Under Normal Operating Conditions, the customer will receive a busy signal less than three percent (3%) of the time.

7.2.5 Customer service center and bill payment locations shall be open at least during Normal Business Hours and will be conveniently located.

7.3 Installations, Outages, and Service Calls.

Under Normal Operating Conditions, each of the following four standards will be met no less than ninety percent (90%) of the time measured on a quarterly basis:

7.3.1 Standard Installations will be performed within seven business days after an order has been placed. "Standard" Installations are those that are located up to one hundred fifty (150) feet from the existing distribution System.

7.3.2 Excluding conditions beyond the control of Franchisee, Franchisee's representatives will be available to begin working on Service Interruptions within twenty-four (24) hours after the interruption becomes known. Franchisee must begin actions to correct other service problems the next business day after notification of the service problem.

7.3.3 The "appointment window" for Installations, service calls, and other Installation activities will be either at a specific time or, at a maximum, within a four (4) hour time block during Normal Business Hours. (The Franchisee may schedule service calls and other Installation activities outside of Normal Business Hours for the express convenience of the customer.)

7.3.4 Franchisee may not cancel an appointment with a customer after the close of business on the business day prior to the scheduled appointment.

7.3.5 If Franchisee's representative is running late for an appointment with a customer and will not be able to keep the appointment as scheduled, the customer will be contacted. The appointment will be rescheduled, as necessary, at a time which is convenient for the customer.

7.4 Communications Between Franchisee and Subscribers.

7.4.1 Notifications to Subscribers.

7.4.1(1) The Franchisee will provide written information on each of the following areas at the time of Installation of service, at least annually to all Subscribers, and at any time upon request:

- (i) Products and services offered;
- (ii) Prices and options for programming services and conditions of subscription to programming and other services;
- (iii) Installation and service maintenance policies;

- (iv) Instructions on how to use the Cable Service;
- (v) Channel positions programming carried on the System; and
- (vi) Billing and Complaint procedures, including the address and telephone number of the City official who handles cable issues.

7.4.1(2) Subscribers will be notified of any changes in rates, programming services, or Channel positions as soon as possible in writing. Notice must be given to Subscribers a minimum of thirty (30) days in advance of such changes if the change is within the control of the Franchisee. In addition, the Franchisee will notify Subscribers 30 days in advance of any significant changes in the other information required by the preceding subparagraph. Notwithstanding any other provision, Franchisee shall not be required to provide prior notice of any rate change that is the result of a regulatory fee, franchise fee or any other fee, tax, assessment or charge of any kind imposed by any federal agency, state or franchise authority on the transaction between Franchisee and the Subscriber.

7.4.2. Billing.

7.4.2(1) Bills will be clear, concise, and understandable. Bills must be fully itemized, with itemizations including, but not limited to, basic and premium service charges and equipment charges. Bills will also clearly delineate all activity during the billing period, including optional charges, rebates, and credits.

7.4.2(2) In case of a billing dispute, the Franchisee must respond to a written Complaint from a Subscriber within thirty (30) days.

7.4.3 Refunds. Refund checks will be issued promptly, but no later than either:

7.4.3(1) The customer's next billing cycle following resolution of the request or thirty (30) days, whichever is earlier, or

7.4.3(2) The return of the equipment supplied by the Franchisee if service is terminated.

7.4.4 Credits. Credits for service will be issued no later than the customer's next billing cycle following the determination that a credit is warranted.

7.5 Parental Control.

Every Franchisee shall make available to any Subscriber upon request a "lockout" device, which may be included within the converter, for blocking both video and audio portions of any channel(s) of programming entering the Subscriber's premises. Such device shall be provided at

a reasonable charge, except to the extent that federal law specifically provides otherwise. A Franchisee may, however, require a reasonable security deposit for the use of such device.

7.6 Complaint Log.

Subject to the privacy provisions of 47 U.S.C. § 521 et. seq., every Franchisee shall prepare as necessary and maintain written records of Complaints made to them and the resolution of such Complaints, including the date of such resolution. Such Complaint logs shall be on file for three (3) years, and available for inspection by the City with reasonable prior notice.

SECTION 8: GENERAL

8.1 Subscriber Rates.

8.1.1 City may regulate rates as permitted by applicable law.

8.2 Records Required and City's Right to Inspect.

8.2.1 Franchisee will at all times maintain:

8.2.1(1) A full and complete set of plans, records, and "as-built" maps showing the location of the Cable Television System installed or in use in the City, exclusive of Subscriber Service Drops and equipment provided in Subscribers' homes.

8.2.1(2) If requested by City, a summary of service calls, identifying the number, general nature, and disposition of such calls, on a monthly basis to the extent kept in the regular course of business.

8.2.2 The Franchisee agrees that the Franchisor, upon thirty (30) days written notice to the Franchisee, may review such of its books and records at the Franchisee's business office, during normal business hours and on a nondisruptive basis, as is reasonably necessary to ensure compliance with the terms of this Franchise. Such notice shall specifically reference the Section of the Franchise which is under review, so that the Franchisee may organize the necessary books and records for easy access by the Franchisor. The Franchisee shall not be required to maintain any books and records for Franchise compliance purposes longer than three (3) years. Notwithstanding anything to the contrary set forth herein, the Franchisee shall not be required to disclose information which it reasonably deems to be proprietary or confidential in nature, nor disclose books and records of any affiliate which is not providing Cable Service in the Service Area.

8.2.3 The Franchisor agrees to treat any information disclosed by the Franchisee as confidential and only to disclose it to employees, representatives, and agents thereof that have a need to know, or in order to enforce the provisions hereof. Information required to be filed with the City pursuant to this Ordinance is subject to public inspection and copying pursuant to Minnesota law concerning public and nonpublic information. The City shall provide the Franchisee with notice of any request for information designated by the Franchisee as proprietary. Nothing in this Ordinance or Franchise shall be construed as a waiver of the provisions of Minnesota law applicable to public and

nonpublic information. The City shall not make information designated as proprietary open for public inspection or copying except as may be required by law. The Franchisee shall not be required to provide Subscriber information in violation of Section 631 of the Cable Act.

8.2.4 The City will have the right to request copies of any petitions, applications, communications, and reports submitted by Franchisee or on its behalf to the FCC, Securities and Exchange Commission, or any other federal or state regulatory commission or agency having jurisdiction with respect to any matters affecting the Cable or OVS System authorized pursuant to this Ordinance and any Franchise, as such documents relate to Franchisee's operation of its System under the Franchise. Copies of responses from the regulatory agencies to Franchisee will likewise be furnished to the City upon request. If the City is specifically named in any such pleading or response, the City shall automatically be furnished a copy.

8.3 Abandonment or Removal of Franchise Property.

8.3.1 Abandonment. In the event that the use of any property of Franchisee within the Franchise Area or a portion thereof is discontinued for a continuous period of 12 months, Franchisee will be deemed to have abandoned that Franchise property.

8.3.2 Removal. The City, upon such terms as City may impose, may give Franchisee permission to abandon, without removing, any System facility or equipment laid, directly constructed, operated, or maintained under the Franchise. Unless such permission is granted or unless otherwise provided in this Ordinance, the Franchisee will remove all abandoned above-ground facilities and equipment upon receipt of written notice from City and will restore any affected street, alley, or public property to its former state at the time such facilities and equipment were installed, so as not to impair its usefulness. In removing its plant, structures, and equipment, Franchisee will refill, at its own expense, any excavation that will be made by it and will leave all Rights-of-Way in as good condition as that prevailing prior to such removal without materially interfering with any electrical or telephone cable or other utility wires, poles, or attachments. The City will have the right to inspect and approve the condition of the Rights-of-Way, cables, wires, attachments, and poles prior to and after removal. The liability, indemnity, and insurance provisions of this Ordinance and the security fund as provided herein will continue in full force and effect during the period of removal and until full compliance by Franchisee with the terms and conditions of this Section.

8.3.3 Transfer of Abandoned Property. Upon abandonment of any Franchise property in place, the Franchisee, if required by the City, will submit to the City an instrument, satisfactory in form to the City, transferring to the City the ownership of the Franchise property abandoned.

8.3.4 Above Ground Portion of System. At the expiration of the term for which the Franchise is granted and a denial of any renewal, or upon its revocation or earlier expiration, as provided for herein, in any such case without renewal, extension, or transfer, the City will have the right to require Franchisee to remove, at its own expense,

all above-ground portions of the Cable Television System from all Rights-of-Way within the City within a reasonable period of time, but will not be less than 180 days.

8.3.5 No Material Interference. Notwithstanding anything to the contrary set forth in this Ordinance, the Franchisee may abandon any underground Franchise property in place so long as it does not materially interfere with the use of the Rights-of-Way in which such property is located or with the use thereof by any public utility or other cable Franchisee.

8.4 Rights Reserved to City.

8.4.1 In addition to any rights specifically reserved to the City by this Ordinance, the City reserves to itself every right and power which is required to be reserved by a provision of any ordinance or under the Franchise Agreement.

8.5 Force Majeure.

Franchisee's Inability to Perform. In the event Franchisee's performance of any of the terms, conditions, or obligations required by this Ordinance or a Franchise granted hereunder is prevented by a cause or event not within Normal Operating Conditions or otherwise not within the Franchisee's control, such inability to perform will be deemed excused and no penalties or sanctions will be imposed as a result thereof.

For the purpose of this Section, causes or events not within the control of Franchisee include but are not limited to: acts of God, strikes, sabotage, riots or civil disturbances, restraints imposed by order of a governmental agency or court, failure or loss of utilities, explosions, acts of public enemies, and natural disasters such as floods, earthquakes, landslides, weather, inability to obtain equipment, and fires.

8.6 Non-Enforcement Not Estoppel.

The Franchisee will not be relieved of its obligation to comply promptly with any of the provisions of the Franchise by any failure of the City to enforce prompt compliance.

8.7 Procedure for Remediating Franchise Violations.

If Franchisee fails to perform in a timely manner any material obligation required by Ordinance or a Franchise Agreement, following notice from the City and an opportunity to cure such non-performance, the City may remedy such violation in accordance with the following procedures:

8.7.1 The City will first notify a Franchisee of the violation in writing by delivery of registered or certified mail, and demand correction within a reasonable time, which will not be less than twenty-five (25) days in the case of the failure of a Franchisee to pay any sum or other amount due the City under this Ordinance or a franchise, and not less than forty-five (45) days in all other cases. If a Franchisee fails to correct the violation within the time prescribed or if Franchisee fails to commence corrective action within the time prescribed and diligently remedy such violation thereafter, a Franchisee

will then be given a written notice of not less than thirty (30) days of a public hearing to be held before the City Council. Said notice will specify the violations alleged to have occurred.

8.7.2 At the public hearing, the City Council will hear and consider all relevant evidence, and thereafter render findings at its decision.

8.7.3 In the event the City Council finds that a Franchisee has corrected the violation or has diligently commenced correction of such violation after notice thereof from the City and is diligently proceeding to fully remedy such violation, or that no material violation has occurred, the proceedings will terminate and no penalty or other sanction will be imposed.

8.7.4 In the event the City Council finds that a material violation exists and that Franchisee has not corrected the same in a satisfactory manner or has not diligently commenced correction of such violation, the City Council may establish a date of not less than thirty (30) days, by which a Franchisee must comply with the obligation or the City may thereafter impose liquidated damages, payable from the security fund, in the amounts stated in this Ordinance. The City Council may also commence the Franchise termination procedures outlined in this Ordinance.

8.7.5 In determining whether a violation is material, the City will take into consideration the reliability of the evidence of the violation, the nature of the violation, and the damage, if any, caused to the City or the City's residents thereby, whether the violation was chronic, and any justifying or mitigating circumstances, and such other matters the City may deem appropriate.

8.7.6 If the violation as proposed depends on a finding of fact, such finding of fact will be made by the City only after an administrative hearing providing a Franchisee with a full and fair opportunity to be heard. A Franchisee will have the right to appeal any such decision to a state court or a federal district court or a federal court as a Franchisee may choose and the revocation or penalty will not become effective until any such appeal has become final or the time for taking such appeal will have expired.

8.8 Penalty.

In the event, after complying with the due process procedures provided herein, the City finds that a material violation exists and that Franchisee has not corrected the same in a satisfactory manner or has not diligently commenced correction of such violation, the City may establish a date, no earlier than thirty (30) days, by which Franchisee must comply with the obligation or the City may thereafter impose liquidated damages, payable from the security fund, in the following amounts:

8.8.1 For failure to complete any upgrade, modifications, or construction in accordance with a Franchise Agreement unless the City approves the delay, the penalty will be one hundred dollars (\$100) per day for each day, or part thereof, such failure occurs or continues.

8.8.2 For failure to provide data, documents, reports, or information, or to cooperate or participate with the City during a renewal process or the System review, the penalty will be fifty dollars (\$50) per day.

8.8.3 For failure to comply with any provision of the Customer Service standards in Section 7 of this Ordinance, the penalty will be fifty dollars (\$50) per day.

8.8.4 For failure to test, analyze, and report on the performance of the System following a request by the City, the penalty will be fifty dollars (\$50) per day.

8.8.5 For failure to comply with operation or maintenance standards, the penalty will be fifty dollars (\$50) per day.

8.8.6 For failure to provide the services described in a Franchise Agreement, the penalty will be fifty dollars (\$50) per day.

8.8.7 For failure to comply with all conditions of the City permits to disturb Rights-of-Way, fix Rights-of-Way, or other terms or conditions of the City, the penalty will be fifty dollars (\$50) per day.

8.8.8 For failure to give notices required by this Ordinance or a Franchise Agreement to City or departments of the City, the penalty will be fifty dollars (\$50) per day.

8.8.9 For failure to comply with any provision of this Ordinance or a Franchise Agreement, for which a penalty is not otherwise specifically provided, the penalty will be fifty dollars (\$50) on occurrence and per day thereafter such failure continues.

8.9 Revocation or Termination of a Franchise and the Franchise Agreement.

8.9.1 Upon completion of the term of a Franchise Agreement, if a new, extended, or renewed Franchise is not granted to a Franchisee by the City, a Franchisee's right to occupy the Public Rights-of-way shall terminate, subject to applicable federal law.

8.9.2 The City shall have the right to revoke a Franchise and the Franchise Agreement for a Franchisee's failure to construct, operate or maintain a Cable or OVS System as required by a Franchise Agreement or this Ordinance; for defrauding or attempting to defraud the City or Subscribers; or for any other material breach or violation of a Franchise or of this Ordinance.

8.9.3 To invoke the provisions of this Section, the City shall give a Franchisee written notice of the default in its performance. If within ninety (90) calendar days following such written notice from the City to a Franchisee, or such other period as a Franchisee and the City shall agree, a Franchisee has not taken corrective action to the satisfaction of the City, the City may give written notice to a Franchisee of its intent to revoke a Franchise and the Franchise Agreement, stating its reasons.

8.9.4 Prior to revoking a Franchise, the City shall hold a public hearing, upon thirty (30) calendar days advance notice to the public and by certified mail to a Franchisee, at which time a Franchisee and the public shall be given an opportunity to be heard. Following the public hearing, the City may determine whether to revoke a Franchise and a Franchise Agreement based on the information presented at the hearing, and other information of record, or, where applicable, grant additional time to a Franchisee to affect any cure. If the City determines to revoke a Franchise and the Franchise Agreement, it shall issue a written decision setting forth the reasons for its decision. A copy of such decision shall be transmitted to a Franchisee.

8.9.5 If the City revokes a Franchise and the Franchise Agreement, or if for any reason a Franchisee abandons, terminates, or fails to operate or maintain service to its Subscribers, the following procedures and rights are effective.

8.9.5(1) The City may require the former Franchisee to remove its above-ground facilities and equipment at the former Franchisee's expense and restore affected sites or permit the former Franchisee to abandon such facilities in place. If the former Franchisee fails to do so within a reasonable period of time, the City may have the removal done at the former Franchisee's and/or surety's expense.

8.9.5(2) The City may require the former Franchisee to continue operating the Cable or OVS System.

8.9.5(3) If a Cable or OVS System is abandoned by a Franchisee, the ownership of all portions of the Cable or OVS System in Public Rights-of-Way shall revert to the City and the City may sell, assign, or transfer all or part of the assets of the System.

8.9.6 Notwithstanding the foregoing, a Franchisee may appeal a revocation decision by the City to a court of competent jurisdiction and such appeal shall stay the implementation of such revocation if a stay or injunction is obtained from the court.

SECTION 9: SEVERABILITY

If any provision of this Ordinance is held by any court or by any federal or state agency of competent jurisdiction to be invalid as conflicting with any federal or state law, rule, or regulation now or hereafter in effect, or is held by such court or agency to be modified in any way in order to conform to the requirements of any such law, rule, or regulation, such provision will be considered a separate, distinct, and independent part of this Ordinance, and such holding will not affect the validity and enforceability of all other provisions hereof. In the event that such law, rule, or regulation is subsequently repealed, rescinded, amended, or otherwise changed, so that the provision hereof which had been held invalid or modified is no longer in conflict with such law, rule, or regulation, said provision will thereupon return to full force and effect and will thereafter be binding on City and Franchisee, provided that City will give Franchisee 30 days

written notice of such change before requiring compliance with said provision or such longer period of time as may be reasonably required for Franchisee to comply with such provision.

SECTION 10: BANKRUPTCY, RECEIVERSHIP AND FORECLOSURE

10.1 Consistent with federal law, the filing of a bankruptcy petition alone shall not constitute a material default of this Ordinance or a Franchise Agreement provided, however, and subject to applicable federal law, in the event of a bankruptcy or other insolvency proceeding, and the City retains all existing rights and enforcement authority under this Ordinance or a Franchise Agreement and its general police powers.

10.2 Subject to applicable federal law, any trustee or receiver of a Franchisee shall be required to assume responsibility for, and remedy all existing defaults and provide adequate assurance of future performance under this Ordinance and a Franchise Agreement during the pendency of such bankruptcy or insolvency proceeding.

10.3 Subject to applicable federal law, in the event a foreclosure or other judicial sale of a Franchisee's plant, equipment, or other property comprising the System, or any material part thereof, such event shall, at the option of the City, constitute a material breach of this Ordinance and a Franchise Agreement, unless the entity acquiring the property gives adequate assurance of future performance and that it will remedy all past defaults of a Franchise Agreement.

SECTION 11: ADMINISTRATION OF FRANCHISE

The City shall be responsible for the continued administration of this Code and any Franchises granted hereunder. The City may delegate this authority from time to time in any manner consistent with applicable law, provided, however, that the City shall not delegate enforcement authority.

SECTION 12: EFFECTIVE DATE, PUBLICATION, ACCEPTANCE AND GOVERNING LAW

12.1 Publication: Effective Date.

12.1.1 A Franchise shall be signed by the Mayor and attested by the City Administrator/Clerk-Treasurer. A Franchise Agreement shall be published in accordance with the requirements of City and state law and shall take effect upon acceptance by a Franchisee, and in accordance with the requirements as provided for in Section 12.2 of this Ordinance, the Effective Date.

12.2 Acceptance and Governing Law.

12.2.1 A Franchisee shall have thirty (30) days from the date of adoption of a Franchise to accept a Franchise in a written form approved by the City Attorney which shall include Franchisee acceptance of this Ordinance and the Franchise, its authority to do business in

Minnesota, a representation of its legal, technical, and financial qualifications to fully perform the obligations of this Ordinance and a Franchise, and the representations required in Section 5.2.2 of this Ordinance. Such acceptance by Franchisee shall be deemed the grant of a Franchise for all purposes. Franchisee shall also deliver a Guarantee, if required by the City, when granting the Franchise, within the same time as delivery of the acceptance, in a form acceptable to the City Attorney. In the event acceptance does not take place within thirty (30) days or such other time as the City might allow, a Franchise shall be null and void.

12.2.2 Upon acceptance of a Franchise, Franchisee shall be bound by all the terms and conditions contained in this Ordinance and in a Franchise. Franchisee shall provide all services and offerings specifically set forth in this Ordinance and in a Franchise, to provide cable services within the City.

12.2.3 With its acceptance, Franchisee shall also deliver to the City a certified resolution evidencing a Franchisee's power and authority to accept a Franchise. Such documents shall also describe the officers authorized to accept on behalf of Franchisee.

12.2.4 With its acceptance, Franchisee shall also deliver any security deposit, insurance certificate, and performance bonds required by this Ordinance and a Franchise.

12.2.5 This Ordinance and a Franchise granted pursuant to it and every question arising thereunder shall be construed or determined according to the laws of the State of Minnesota and applicable federal law.

Adopted this ____ day of _____, 2005 and effective _____.

Attest:

City Clerk

By _____
Mayor

Approved as to Form:

City Attorney

~~Exhibit A~~
Replace with Current Pay Sheet in Use
Exhibit A

Franchise fees payable for the current month were calculated using prior month revenue numbers as follows:

	Revenue Type
	Subscribers
	Revenue
	Base Rate
	Franchise Fee
Basic	
	5.00%
Premium	
	5.00%
Other	
	5.00%

Total

Payment is attached. If you have any questions or concerns, please contact Accounts Payable at (605) 357-5739.

Thanks,

Enclosure (1)

Exhibit B

PUBLIC AND SCHOOL BUILDINGS

NOTE: The City may add other City buildings in the future that are within two hundred (200) feet of the System, without cost provided that no commercial user or uses of said City buildings shall be entitled to free service or installation of any kind.

<u>Schools</u>		<u>Public Buildings</u>	
Senior High School	C	East Grand Forks Fire Station #1	C
Central Middle School	C	East Grand Forks Fire Station #2	C
New Heights Elementary	C	Parks Maintenance	C
South Point Elementary	C	East Grand Forks City Hall	C
RR Valley High School Coop	C	East Grand Forks Police Department	C
Sacred Heart Grade School	C	Civic Center	C
Sacred Heart High School	C	VFW Arena	C
Riverside Christian School	C & M	Library	C



M = MidcoNet Only

C = Classic Cable Only

Request for Council Action

Date: September 8

To: East Grand Forks City Council Mayor Lynn Stauss, President Mark Olstad, Council Vice President Chad Grassel, Council Members: Clarence Vetter, Mike Pokrzywinski, Craig Buckalew, Henry Tweten, and Marc DeMers.

Cc: File

From: City Administrator David Murphy

RE: Discussion on Engineering Contract.

Background

The two year contract with WSN expires at the end of 2015. I have met with representatives from WSN regarding language of the contract and changes that would be beneficial for the future. WSN has provided a draft 3 year agreement for you to review

There has been discussion in the past about putting out a request for proposals to provide Engineering services. If the Council is interested in pursuing that option, now would be the optimal time to have a January 1 start date. I will be prepared to answer questions regarding both options.

Budget Impact

Unknown at this time.

Action Required

Discussion and questions to staff..

**AGREEMENT
BETWEEN OWNER AND ENGINEER
FOR PROFESSIONAL SERVICES**

THIS IS AN AGREEMENT effective as of January 1, 2016 (“Effective Date”) between
City of East Grand Forks (“Owner”) and
Widseth Smith Nolting & Associates (“Engineer”).

Engage the Engineer to render certain technical or professional services hereinafter described in connection with all City and Special Assessment projects within the City of East Grand Forks, MN for the years 2016, 2017, and 2018

Owner and Engineer further agree as follows:

ARTICLE 1 – SERVICES OF ENGINEER

1.01 *Scope*

- A. Engineer shall provide, or cause to be provided, the services set forth herein and in Exhibit A.

ARTICLE 2 – OWNER’S RESPONSIBILITIES

2.01 *General*

- A. Owner shall have the responsibilities set forth herein and in Exhibit B.
- B. Owner shall pay Engineer as set forth in Article 4 and Exhibit C.
- C. Owner shall be responsible for all requirements and instructions that it furnishes to Engineer pursuant to this Agreement, and for the accuracy and completeness of all programs, reports, data, and other information furnished by Owner to Engineer pursuant to this Agreement. Engineer may use and rely upon such requirements, programs, instructions, reports, data, and information in performing or furnishing services under this Agreement, subject to any express limitations or reservations applicable to the furnished items.
- D. Owner shall give prompt written notice to Engineer whenever Owner observes or otherwise becomes aware of:
 - 1. any development that affects the scope or time of performance of Engineer’s services;
 - 2. the presence at the Site of any Constituent of Concern; or
 - 3. any relevant, material defect or nonconformance in: (a) Engineer’s services, (b) the Work, (c) the performance of any Constructor, or (d) Owner’s performance of its responsibilities under this Agreement.

ARTICLE 3 – SCHEDULE FOR RENDERING SERVICES

3.01 *Commencement*

- A. Engineer is authorized to begin rendering services as of the Effective Date.

3.02 *Time for Completion*

- A. Engineer shall complete its obligations within a reasonable time. Specific periods of time for rendering services, or specific dates by which services are to be completed, are provided in Exhibit A, and are hereby agreed to be reasonable.
- B. If, through no fault of Engineer, such periods of time or dates are changed, or the orderly and continuous progress of Engineer's services is impaired, or Engineer's services are delayed or suspended, then the time for completion of Engineer's services, and the rates and amounts of Engineer's compensation, shall be adjusted equitably.
- C. If Owner authorizes changes in the scope, extent, or character of the Project or Engineer's services, then the time for completion of Engineer's services, and the rates and amounts of Engineer's compensation, shall be adjusted equitably.
- D. Owner shall make decisions and carry out its other responsibilities in a timely manner so as not to delay the Engineer's performance of its services.
- E. If Engineer fails, through its own fault, to complete the performance required in this Agreement within the time set forth, as duly adjusted, then Owner shall be entitled, as its sole remedy, to the recovery of direct damages, if any, resulting from such failure.

ARTICLE 4 – INVOICES AND PAYMENTS

4.01 *Invoices*

- A. *Preparation and Submittal of Invoices:* Engineer shall prepare invoices in accordance with its standard invoicing practices and the terms of Exhibit C. Invoices must include a breakdown of services provided. Engineer shall submit its invoices to Owner on a monthly basis. Invoices are due and payable within 30 days of receipt.

4.02 *Payments*

- A. *Application to Interest and Principal:* Payment will be credited first to any interest owed to Engineer and then to principal.
- B. *Failure to Pay:* If Owner fails to make any payment due Engineer for services and expenses within 30 days after receipt of Engineer's invoice, then:
 - 1. amounts due Engineer will be increased at the rate of 1.0% per month (or the maximum rate of interest permitted by law, if less) from said thirtieth day; and
 - 2. Engineer may, after giving seven days written notice to Owner, suspend services under this Agreement until Owner has paid in full all amounts due for services, expenses, and

other related charges. Owner waives any and all claims against Engineer for any such suspension.

- C. *Disputed Invoices:* If Owner disputes an invoice, either as to amount or entitlement, then Owner shall promptly advise Engineer in writing of the specific basis for doing so, may withhold only that portion so disputed, and must pay the undisputed portion subject to the terms of Paragraph 4.01.
- D. *Sales or Use Taxes:* If after the Effective Date any governmental entity takes a legislative action that imposes additional sales or use taxes on Engineer's services or compensation under this Agreement, then Engineer may invoice such additional sales or use taxes for reimbursement by Owner. Owner shall reimburse Engineer for the cost of such invoiced additional sales or use taxes; such reimbursement shall be in addition to the compensation to which Engineer is entitled under the terms of Exhibit C.

ARTICLE 5 – OPINIONS OF COST

5.01 *Opinions of Probable Construction Cost*

- A. Engineer's opinions (if any) of probable Construction Cost are to be made on the basis of Engineer's experience, qualifications, and general familiarity with the construction industry. However, because Engineer has no control over the cost of labor, materials, equipment, or services furnished by others, or over contractors' methods of determining prices, or over competitive bidding or market conditions, Engineer cannot and does not guarantee that proposals, bids, or actual Construction Cost will not vary from opinions of probable Construction Cost prepared by Engineer. If Owner requires greater assurance as to probable Construction Cost, then Owner agrees to obtain an independent cost estimate.

5.02 *Designing to Construction Cost Limit*

- A. If a Construction Cost limit is established between Owner and Engineer, such Construction Cost limit and a statement of Engineer's rights and responsibilities with respect thereto will be specifically set forth in Exhibit F to this Agreement.

5.03 *Opinions of Total Project Costs*

- A. The services, if any, of Engineer with respect to Total Project Costs shall be limited to assisting the Owner in tabulating the various categories that comprise Total Project Costs. Engineer assumes no responsibility for the accuracy of any opinions of Total Project Costs.

ARTICLE 6 – GENERAL CONSIDERATIONS

6.01 *Standards of Performance*

- A. *Standard of Care:* The standard of care for all professional engineering and related services performed or furnished by Engineer under this Agreement will be the care and skill ordinarily used by members of the subject profession practicing under similar circumstances at the same time and in the same locality. Engineer makes no warranties,

express or implied, under this Agreement or otherwise, in connection with any services performed or furnished by Engineer.

- B. *Technical Accuracy:* Owner may not be responsible for discovering deficiencies in the technical accuracy of Engineer's services. Engineer may correct deficiencies in technical accuracy without additional compensation, unless such corrective action is directly attributable to deficiencies in Owner-furnished information.
- C. *Consultants:* Engineer may retain such Consultants as Engineer deems necessary to assist in the performance or furnishing of the services, subject to reasonable, timely, and substantive objections by Owner.
- D. *Reliance on Others:* Subject to the standard of care set forth in Paragraph 6.01.A, Engineer and its Consultants may use or rely upon design elements and information ordinarily or customarily furnished by others, including, but not limited to, specialty contractors, manufacturers, suppliers, and the publishers of technical standards.
- E. *Compliance with Laws and Regulations, and Policies and Procedures:*
 - 1. Engineer and Owner shall comply with applicable Laws and Regulations.
 - 2. Engineer shall comply with any and all policies, procedures, and instructions of Owner that are applicable to Engineer's performance of services under this Agreement and that Owner provides to Engineer in writing, subject to the standard of care set forth in Paragraph 6.01.A, and to the extent compliance is not inconsistent with professional practice requirements.
 - 3. This Agreement is based on Laws and Regulations and Owner-provided written policies and procedures as of the Effective Date. The following may be the basis for modifications to Owner's responsibilities or to Engineer's scope of services, times of performance, or compensation:
 - a. changes after the Effective Date to Laws and Regulations;
 - b. the receipt by Engineer after the Effective Date of Owner-provided written policies and procedures;
 - c. changes after the Effective Date to Owner-provided written policies or procedures.
- F. Engineer shall not be required to sign any document, no matter by whom requested, that would result in the Engineer having to certify, guarantee, or warrant the existence of conditions whose existence the Engineer cannot ascertain. Owner agrees not to make resolution of any dispute with the Engineer or payment of any amount due to the Engineer in any way contingent upon the Engineer signing any such document.
- G. The general conditions for any construction contract documents prepared hereunder are to be EJCDC® C-700 "Standard General Conditions of the Construction Contract" (2013 Edition), prepared by the Engineers Joint Contract Documents Committee, unless expressly indicated otherwise in Exhibit J or elsewhere in this Agreement.

- H. Engineer shall not at any time supervise, direct, control, or have authority over any Constructor's work, nor shall Engineer have authority over or be responsible for the means, methods, techniques, sequences, or procedures of construction selected or used by any Constructor, or the safety precautions and programs incident thereto, for security or safety at the Site, nor for any failure of a Constructor to comply with Laws and Regulations applicable to that Constructor's furnishing and performing of its work. Engineer shall not be responsible for the acts or omissions of any Constructor.
- I. Engineer neither guarantees the performance of any Constructor nor assumes responsibility for any Constructor's, failure to furnish and perform the Work in accordance with the Construction Contract Documents.
- J. Engineer shall not be responsible for any decision made regarding the Construction Contract Documents, or any application, interpretation, clarification, or modification of the Construction Contract Documents, other than those made by Engineer or its Consultants.
- K. Engineer is not required to provide and does not have any responsibility for surety bonding or insurance-related advice, recommendations, counseling, or research, or enforcement of construction insurance or surety bonding requirements.
- L. Engineer's services do not include providing legal advice or representation.
- M. Engineer's services do not include (1) serving as a "municipal advisor" for purposes of the registration requirements of Section 975 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (2010) or the municipal advisor registration rules issued by the Securities and Exchange Commission, or (2) advising Owner, or any municipal entity or other person or entity, regarding municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, or other similar matters concerning such products or issuances.
- N. While at the Site, Engineer, its Consultants, and their employees and representatives shall comply with the applicable requirements of Contractor's and Owner's safety programs of which Engineer has been informed in writing.

6.02 *Design Without Construction Phase Services*

- A. Engineer shall be responsible only for those Construction Phase services expressly required of Engineer in Exhibit A, Paragraph A1.05. With the exception of such expressly required services, Engineer shall have no design, Shop Drawing review, or other obligations during construction, and Owner assumes all responsibility for the application and interpretation of the Construction Contract Documents, review and response to Contractor claims, Construction Contract administration, processing of Change Orders and submittals, revisions to the Construction Contract Documents during construction, construction observation and review, review of Contractor's payment applications, and all other necessary Construction Phase administrative, engineering, and professional services. Owner waives all claims against the Engineer that may be connected in any way to Construction Phase administrative, engineering, or professional services except for those services that are expressly required of Engineer in Exhibit A.

6.03 *Use of Documents*

- A. All Documents are instruments of service, and Engineer shall retain an ownership and property interest therein (including the copyright and the right of reuse at the discretion of the Engineer) whether or not the Project is completed.
- B. If Engineer is required to prepare or furnish Drawings or Specifications under this Agreement, Engineer shall deliver to Owner at least one original printed record version of such Drawings and Specifications, signed and sealed according to applicable Laws and Regulations.
- C. Owner may make and retain copies of Documents for information and reference in connection with the use of the Documents on the Project. Engineer grants Owner a limited license to use the Documents on the Project, extensions of the Project, and for related uses of the Owner, subject to receipt by Engineer of full payment due and owing for all services relating to preparation of the Documents, and subject to the following limitations: (1) Owner acknowledges that such Documents are not intended or represented to be suitable for use on the Project unless completed by Engineer, or for use or reuse by Owner or others on extensions of the Project, on any other project, or for any other use or purpose, without written verification or adaptation by Engineer; (2) any such use or reuse, or any modification of the Documents, without written verification, completion, or adaptation by Engineer, as appropriate for the specific purpose intended, will be at Owner's sole risk and without liability or legal exposure to Engineer or to its officers, directors, members, partners, agents, employees, and Consultants; (3) Owner shall indemnify and hold harmless Engineer and its officers, directors, members, partners, agents, employees, and Consultants from all claims, damages, losses, and expenses, including attorneys' fees, arising out of or resulting from any use, reuse, or modification of the Documents without written verification, completion, or adaptation by Engineer; and (4) such limited license to Owner shall not create any rights in third parties.
- D. If Engineer at Owner's request verifies the suitability of the Documents, completes them, or adapts them for extensions of the Project or for any other purpose, then Owner shall compensate Engineer at rates or in an amount to be agreed upon by Owner and Engineer.

6.04 *Electronic Transmittals*

- A. Owner and Engineer may transmit, and shall accept, Project-related correspondence, Documents, text, data, drawings, information, and graphics, in electronic media or digital format, either directly, or through access to a secure Project website, in accordance with a mutually agreeable protocol.
- B. If this Agreement does not establish protocols for electronic or digital transmittals, then Owner and Engineer may jointly develop such protocols.
- C. When transmitting items in electronic media or digital format, the transmitting party makes no representations as to long term compatibility, usability, or readability of the items resulting from the recipient's use of software application packages, operating systems, or computer hardware differing from those used in the drafting or transmittal of the items, or from those established in applicable transmittal protocols.

6.05 Insurance

- A. Engineer shall procure and maintain insurance as set forth in Exhibit G. Engineer shall cause Owner to be listed as an additional insured on any applicable general liability insurance policy carried by Engineer.
- B. Owner shall procure and maintain insurance as set forth in Exhibit G. Owner shall cause Engineer and its Consultants to be listed as additional insureds on any general liability policies carried by Owner, which are applicable to the Project.
- C. Owner shall require Contractor to purchase and maintain policies of insurance covering workers' compensation, general liability, motor vehicle damage and injuries, and other insurance necessary to protect Owner's and Engineer's interests in the Project. Owner shall require Contractor to cause Engineer and its Consultants to be listed as additional insureds with respect to such liability insurance purchased and maintained by Contractor for the Project.
- D. Owner and Engineer shall each deliver to the other certificates of insurance evidencing the coverages indicated in Exhibit G. Such certificates shall be furnished prior to commencement of Engineer's services and at renewals thereafter during the life of the Agreement.
- E. All policies of property insurance relating to the Project, including but not limited to any builder's risk policy, shall allow for waiver of subrogation rights and contain provisions to the effect that in the event of payment of any loss or damage the insurers will have no rights of recovery against any insured thereunder or against Engineer or its Consultants. Owner and Engineer waive all rights against each other, Contractor, the Consultants, and the respective officers, directors, members, partners, employees, agents, consultants, and subcontractors of each and any of them, for all losses and damages caused by, arising out of, or resulting from any of the perils or causes of loss covered by any builder's risk policy and any other property insurance relating to the Project. Owner and Engineer shall take appropriate measures in other Project-related contracts to secure waivers of rights consistent with those set forth in this paragraph.
- F. All policies of insurance shall contain a provision or endorsement that the coverage afforded will not be canceled or reduced in limits by endorsement, and that renewal will not be refused, until at least 10 days prior written notice has been given to the primary insured. Upon receipt of such notice, the receiving party shall promptly forward a copy of the notice to the other party to this Agreement.
- G. At any time, Owner may request that Engineer or its Consultants, at Owner's sole expense, provide additional insurance coverage, increased limits, or revised deductibles that are more protective than those specified in Exhibit G. If so requested by Owner, and if commercially available, Engineer shall obtain and shall require its Consultants to obtain such additional insurance coverage, different limits, or revised deductibles for such periods of time as requested by Owner, and Exhibit G will be supplemented to incorporate these requirements.

6.06 *Suspension and Termination*

A. *Suspension:*

1. *By Owner:* Owner may suspend the Project for up to 90 days upon seven days written notice to Engineer.
2. *By Engineer:* Engineer may, after giving seven days written notice to Owner, suspend services under this Agreement if Owner has failed to pay Engineer for invoiced services and expenses, as set forth in Paragraph 4.02.B, or in response to the presence of Constituents of Concern at the Site, as set forth in Paragraph 6.10.D.

B. *Termination:* The obligation to provide further services under this Agreement may be terminated:

1. For cause,
 - a. by either party upon 30 days written notice in the event of substantial failure by the other party to perform in accordance with the terms hereof through no fault of the terminating party.
 - b. by Engineer:
 - 1) upon seven days written notice if Owner demands that Engineer furnish or perform services contrary to Engineer's responsibilities as a licensed professional; or
 - 2) upon seven days written notice if the Engineer's services for the Project are delayed or suspended for more than 90 days for reasons beyond Engineer's control, or as the result of the presence at the Site of undisclosed Constituents of Concern, as set forth in Paragraph 6.10.D.
 - 3) Engineer shall have no liability to Owner on account of such termination.
 - c. Notwithstanding the foregoing, this Agreement will not terminate under Paragraph 6.06.B.1.a if the party receiving such notice begins, within seven days of receipt of such notice, to correct its substantial failure to perform and proceeds diligently to cure such failure within no more than 30 days of receipt thereof; provided, however, that if and to the extent such substantial failure cannot be reasonably cured within such 30 day period, and if such party has diligently attempted to cure the same and thereafter continues diligently to cure the same, then the cure period provided for herein shall extend up to, but in no case more than, 60 days after the date of receipt of the notice.
 2. For convenience, by Owner effective upon Engineer's receipt of notice from Owner.
- C. *Effective Date of Termination:* The terminating party under Paragraph 6.06.B may set the effective date of termination at a time up to 30 days later than otherwise provided to allow Engineer to demobilize personnel and equipment from the Site, to complete tasks

whose value would otherwise be lost, to prepare notes as to the status of completed and uncompleted tasks, and to assemble Project materials in orderly files.

D. *Payments Upon Termination:*

1. In the event of any termination under Paragraph 6.06, Engineer will be entitled to invoice Owner and to receive full payment for all services performed or furnished in accordance with this Agreement and all Reimbursable Expenses incurred through the effective date of termination. Upon making such payment, Owner shall have the limited right to the use of Documents, at Owner's sole risk, subject to the provisions of Paragraph 6.03.
2. In the event of termination by Owner for convenience or by Engineer for cause, Engineer shall be entitled, in addition to invoicing for those items identified in Paragraph 6.06.D.1, to invoice Owner and receive payment of a reasonable amount for services and expenses directly attributable to termination, both before and after the effective date of termination, such as reassignment of personnel, costs of terminating contracts with Engineer's Consultants, and other related close-out costs, using methods and rates for Additional Services as set forth in Exhibit C.

6.07 *Controlling Law*

- A. This Agreement is to be governed by the Laws and Regulations of the state in which the Project is located.

6.08 *Successors, Assigns, and Beneficiaries*

- A. Owner and Engineer are hereby bound and the successors, executors, administrators, and legal representatives of Owner and Engineer (and to the extent permitted by Paragraph 6.08.B the assigns of Owner and Engineer) are hereby bound to the other party to this Agreement and to the successors, executors, administrators and legal representatives (and said assigns) of such other party, in respect of all covenants, agreements, and obligations of this Agreement.
- B. Neither Owner nor Engineer may assign, sublet, or transfer any rights under or interest (including, but without limitation, money that is due or may become due) in this Agreement without the written consent of the other party, except to the extent that any assignment, subletting, or transfer is mandated by law. Unless specifically stated to the contrary in any written consent to an assignment, no assignment will release or discharge the assignor from any duty or responsibility under this Agreement.
- C. Unless expressly provided otherwise in this Agreement:
 1. Nothing in this Agreement shall be construed to create, impose, or give rise to any duty owed by Owner or Engineer to any Constructor, other third-party individual or entity, or to any surety for or employee of any of them.
 2. All duties and responsibilities undertaken pursuant to this Agreement will be for the sole and exclusive benefit of Owner and Engineer and not for the benefit of any other party.

3. Owner agrees that the substance of the provisions of this Paragraph 6.08.C shall appear in the Construction Contract Documents.

6.09 *Dispute Resolution*

- A. Owner and Engineer agree to negotiate all disputes between them in good faith for a period of 30 days from the date of notice prior to invoking the procedures of Exhibit H or other provisions of this Agreement, or exercising their rights at law.
- B. If the parties fail to resolve a dispute through negotiation under Paragraph 6.09.A, then either or both may invoke the procedures of Exhibit H. If Exhibit H is not included, or if no dispute resolution method is specified in Exhibit H, then the parties may exercise their rights at law.

6.10 *Environmental Condition of Site*

- A. Owner represents to Engineer that as of the Effective Date to the best of Owner's knowledge no Constituents of Concern, other than those disclosed in writing to Engineer, exist at or adjacent to the Site.
- B. If Engineer encounters or learns of an undisclosed Constituent of Concern at the Site, then Engineer shall notify (1) Owner and (2) appropriate governmental officials if Engineer reasonably concludes that doing so is required by applicable Laws or Regulations.
- C. It is acknowledged by both parties that Engineer's scope of services does not include any services related to unknown or undisclosed Constituents of Concern. If Engineer or any other party encounters, uncovers, or reveals an undisclosed Constituent of Concern, then Owner shall promptly determine whether to retain a qualified expert to evaluate such condition or take any necessary corrective action.
- D. If investigative or remedial action, or other professional services, are necessary with respect to undisclosed Constituents of Concern, or if investigative or remedial action beyond that reasonably contemplated is needed to address a disclosed or known Constituent of Concern, then Engineer may, at its option and without liability for consequential or any other damages, suspend performance of services on the portion of the Project affected thereby until such portion of the Project is no longer affected.
- E. If the presence at the Site of undisclosed Constituents of Concern adversely affects the performance of Engineer's services under this Agreement, then the Engineer shall have the option of (1) accepting an equitable adjustment in its compensation or in the time of completion, or both; or (2) terminating this Agreement for cause on seven days notice.
- F. Owner acknowledges that Engineer is performing professional services for Owner and that Engineer is not and shall not be required to become an "owner," "arranger," "operator," "generator," or "transporter" of hazardous substances, as defined in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended, which are or may be encountered at or near the Site in connection with Engineer's activities under this Agreement.

6.11 Indemnification and Mutual Waiver

- A. *Indemnification by Engineer:* To the fullest extent permitted by Laws and Regulations, Engineer shall indemnify and hold harmless Owner, and Owner's officers, directors, members, partners, agents, consultants, and employees, from losses, damages, and judgments (including reasonable consultants' and attorneys' fees and expenses) arising from third-party claims or actions relating to the Project, provided that any such claim, action, loss, damages, or judgment is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Work itself), including the loss of use resulting therefrom, but only to the extent caused by any negligent act or omission of Engineer or Engineer's officers, directors, members, partners, agents, employees, or Consultants. This indemnification provision is subject to and limited by the provisions, if any, agreed to by Owner and Engineer in Exhibit I, "Limitations of Liability."
- B. *Indemnification by Owner:* Owner shall indemnify and hold harmless Engineer and its officers, directors, members, partners, agents, employees, and Consultants as required by Laws and Regulations and to the extent (if any) required in Exhibit I, "Limitations of Liability."
- C. *Environmental Indemnification:* To the fullest extent permitted by Laws and Regulations, Owner shall indemnify and hold harmless Engineer and its officers, directors, members, partners, agents, employees, and Consultants from all claims, costs, losses, damages, actions, and judgments (including reasonable consultants' and attorneys fees and expenses) caused by, arising out of, relating to, or resulting from a Constituent of Concern at, on, or under the Site, provided that (1) any such claim, cost, loss, damages, action, or judgment is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Work itself), including the loss of use resulting therefrom, and (2) nothing in this paragraph shall obligate Owner to indemnify any individual or entity from and against the consequences of that individual's or entity's own negligence or willful misconduct.
- D. *No Defense Obligation:* The indemnification commitments in this Agreement do not include a defense obligation by the indemnitor unless such obligation is expressly stated.
- E. *Percentage Share of Negligence:* To the fullest extent permitted by Laws and Regulations, a party's total liability to the other party and anyone claiming by, through, or under the other party for any cost, loss, or damages caused in part by the negligence of the party and in part by the negligence of the other party or any other negligent entity or individual, shall not exceed the percentage share that the party's negligence bears to the total negligence of Owner, Engineer, and all other negligent entities and individuals.
- F. *Mutual Waiver:* To the fullest extent permitted by Laws and Regulations, Owner and Engineer waive against each other, and the other's employees, officers, directors, members, agents, insurers, partners, and consultants, any and all claims for or entitlement to special, incidental, indirect, or consequential damages arising out of, resulting from, or in any way related to this Agreement or the Project, from any cause or causes.

6.12 *Records Retention*

- A. Engineer shall maintain on file in legible form, for a period of five years following completion or termination of its services, all Documents, records (including cost records), and design calculations related to Engineer's services or pertinent to Engineer's performance under this Agreement. Upon Owner's request, Engineer shall provide a copy of any such item to Owner at cost.

6.13 *Miscellaneous Provisions*

- A. *Notices:* Any notice required under this Agreement will be in writing, addressed to the appropriate party at its address on the signature page and given personally, by registered or certified mail postage prepaid, or by a commercial courier service. All notices shall be effective upon the date of receipt.
- B. *Survival:* All express representations, waivers, indemnifications, and limitations of liability included in this Agreement will survive its completion or termination for any reason.
- C. *Severability:* Any provision or part of the Agreement held to be void or unenforceable under any Laws or Regulations shall be deemed stricken, and all remaining provisions shall continue to be valid and binding upon Owner and Engineer, which agree that the Agreement shall be reformed to replace such stricken provision or part thereof with a valid and enforceable provision that comes as close as possible to expressing the intention of the stricken provision.
- D. *Waiver:* A party's non-enforcement of any provision shall not constitute a waiver of that provision, nor shall it affect the enforceability of that provision or of the remainder of this Agreement.
- E. *Accrual of Claims:* To the fullest extent permitted by Laws and Regulations, all causes of action arising under this Agreement shall be deemed to have accrued, and all statutory periods of limitation shall commence, no later than the date of Substantial Completion.

ARTICLE 7 – DEFINITIONS

7.01 *Defined Terms*

- A. Wherever used in this Agreement (including the Exhibits hereto) terms (including the singular and plural forms) printed with initial capital letters have the meanings indicated in the text above, in the exhibits, or in the following definitions:
 - 1. *Addenda*—Written or graphic instruments issued prior to the opening of bids which clarify, correct, or change the bidding requirements or the proposed Construction Contract Documents.
 - 2. *Additional Services*—The services to be performed for or furnished to Owner by Engineer in accordance with Part 2 of Exhibit A of this Agreement.

3. *Agreement*—This written contract for professional services between Owner and Engineer, including all exhibits identified in Paragraph 8.01 and any duly executed amendments.
4. *Application for Payment*—The form acceptable to Engineer which is to be used by Contractor during the course of the Work in requesting progress or final payments and which is to be accompanied by such supporting documentation as is required by the Construction Contract.
5. *Basic Services*—The services to be performed for or furnished to Owner by Engineer in accordance with Part 1 of Exhibit A of this Agreement.
6. *Change Order*—A document which is signed by Contractor and Owner and authorizes an addition, deletion, or revision in the Work or an adjustment in the Construction Contract Price or the Construction Contract Times, or other revision to the Construction Contract, issued on or after the effective date of the Construction Contract.
7. *Change Proposal*—A written request by Contractor, duly submitted in compliance with the procedural requirements set forth in the Construction Contract, seeking an adjustment in Construction Contract Price or Construction Contract Times, or both; contesting an initial decision by Engineer concerning the requirements of the Construction Contract Documents or the acceptability of Work under the Construction Contract Documents; challenging a set-off against payments due; or seeking other relief with respect to the terms of the Construction Contract.
8. *Constituent of Concern*—Asbestos, petroleum, radioactive material, polychlorinated biphenyls (PCBs), hazardous waste, and any substance, product, waste, or other material of any nature whatsoever that is or becomes listed, regulated, or addressed pursuant to (a) the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§9601 et seq. (“CERCLA”); (b) the Hazardous Materials Transportation Act, 49 U.S.C. §§5501 et seq.; (c) the Resource Conservation and Recovery Act, 42 U.S.C. §§6901 et seq. (“RCRA”); (d) the Toxic Substances Control Act, 15 U.S.C. §§2601 et seq.; (e) the Clean Water Act, 33 U.S.C. §§1251 et seq.; (f) the Clean Air Act, 42 U.S.C. §§7401 et seq.; or (g) any other federal, State, or local statute, law, rule, regulation, ordinance, resolution, code, order, or decree regulating, relating to, or imposing liability or standards of conduct concerning, any hazardous, toxic, or dangerous waste, substance, or material.
9. *Construction Contract*—The entire and integrated written contract between the Owner and Contractor concerning the Work.
10. *Construction Contract Documents*—Those items designated as “Contract Documents” in the Construction Contract, and which together comprise the Construction Contract.
11. *Construction Contract Price*—The money that Owner has agreed to pay Contractor for completion of the Work in accordance with the Construction Contract Documents.
12. *Construction Contract Times*—The number of days or the dates by which Contractor shall: (a) achieve milestones, if any, in the Construction Contract; (b) achieve Substantial Completion; and (c) complete the Work.

13. *Construction Cost*—The cost to Owner of the construction of those portions of the entire Project designed or specified by or for Engineer under this Agreement, including construction labor, services, materials, equipment, insurance, and bonding costs, and allowances for contingencies. Construction Cost does not include costs of services of Engineer or other design professionals and consultants; cost of land or rights-of-way, or compensation for damages to property; Owner's costs for legal, accounting, insurance counseling, or auditing services; interest or financing charges incurred in connection with the Project; or the cost of other services to be provided by others to Owner. Construction Cost is one of the items comprising Total Project Costs.
14. *Constructor*—Any person or entity (not including the Engineer, its employees, agents, representatives, and Consultants), performing or supporting construction activities relating to the Project, including but not limited to Contractors, Subcontractors, Suppliers, Owner's work forces, utility companies, other contractors, construction managers, testing firms, shippers, and truckers, and the employees, agents, and representatives of any or all of them.
15. *Consultants*—Individuals or entities having a contract with Engineer to furnish services with respect to this Project as Engineer's independent professional associates and consultants; subcontractors; or vendors.
16. *Contractor*—The entity or individual with which Owner enters into a Construction Contract.
17. *Documents*—Data, reports, Drawings, Specifications, Record Drawings, building information models, civil integrated management models, and other deliverables, whether in printed or electronic format, provided or furnished in appropriate phases by Engineer to Owner pursuant to this Agreement.
18. *Drawings*—That part of the Construction Contract Documents that graphically shows the scope, extent, and character of the Work to be performed by Contractor.
19. *Effective Date*—The date indicated in this Agreement on which it becomes effective, but if no such date is indicated, the date on which this Agreement is signed and delivered by the last of the parties to sign and deliver.
20. *Engineer*—The individual or entity named as such in this Agreement.
21. *Field Order*—A written order issued by Engineer which requires minor changes in the Work but does not change the Construction Contract Price or the Construction Contract Times.
22. *Laws and Regulations; Laws or Regulations*—Any and all applicable laws, statutes, rules, regulations, ordinances, codes, and orders of any and all governmental bodies, agencies, authorities, and courts having jurisdiction.
23. *Owner*—The individual or entity named as such in this Agreement and for which Engineer's services are to be performed. Unless indicated otherwise, this is the same individual or entity that will enter into any Construction Contracts concerning the Project.

24. *Project*—The total undertaking to be accomplished for Owner by engineers, contractors, and others, including planning, study, design, construction, testing, commissioning, and start-up, and of which the services to be performed or furnished by Engineer under this Agreement are a part.
25. *Record Drawings*—Drawings depicting the completed Project, or a specific portion of the completed Project, prepared by Engineer and based on Contractor's record copy of all Drawings, Specifications, Addenda, Change Orders, Work Change Directives, Field Orders, and written interpretations and clarifications, as delivered to Engineer and annotated by Contractor to show changes made during construction.
26. *Reimbursable Expenses*—The expenses incurred directly by Engineer in connection with the performing or furnishing of Basic Services and Additional Services for the Project.
27. *Resident Project Representative*—The authorized representative of Engineer assigned to assist Engineer at the Site during the Construction Phase. As used herein, the term Resident Project Representative or "RPR" includes any assistants or field staff of Resident Project Representative. The duties and responsibilities of the Resident Project Representative, if any, are as set forth in Exhibit D.
28. *Samples*—Physical examples of materials, equipment, or workmanship that are representative of some portion of the Work and that establish the standards by which such portion of the Work will be judged.
29. *Shop Drawings*—All drawings, diagrams, illustrations, schedules, and other data or information that are specifically prepared or assembled by or for Contractor and submitted by Contractor to illustrate some portion of the Work. Shop Drawings, whether approved or not, are not Drawings and are not Construction Contract Documents.
30. *Site*—Lands or areas to be indicated in the Construction Contract Documents as being furnished by Owner upon which the Work is to be performed, including rights-of-way and easements, and such other lands furnished by Owner which are designated for the use of Contractor.
31. *Specifications*—The part of the Construction Contract Documents that consists of written requirements for materials, equipment, systems, standards, and workmanship as applied to the Work, and certain administrative requirements and procedural matters applicable to the Work.
32. *Subcontractor*—An individual or entity having a direct contract with Contractor or with any other Subcontractor for the performance of a part of the Work.
33. *Substantial Completion*—The time at which the Work (or a specified part thereof) has progressed to the point where, in the opinion of Engineer, the Work (or a specified part thereof) is sufficiently complete, in accordance with the Construction Contract Documents, so that the Work (or a specified part thereof) can be utilized for the purposes for which it is intended. The terms "substantially complete" and "substantially completed" as applied to all or part of the Work refer to Substantial Completion thereof.

34. *Supplier*—A manufacturer, fabricator, supplier, distributor, materialman, or vendor having a direct contract with Contractor or with any Subcontractor to furnish materials or equipment to be incorporated in the Work by Contractor or a Subcontractor.
 35. *Total Project Costs*—The total cost of planning, studying, designing, constructing, testing, commissioning, and start-up of the Project, including Construction Cost and all other Project labor, services, materials, equipment, insurance, and bonding costs, allowances for contingencies, and the total costs of services of Engineer or other design professionals and consultants, together with such other Project-related costs that Owner furnishes for inclusion, including but not limited to cost of land, rights-of-way, compensation for damages to properties, Owner's costs for legal, accounting, insurance counseling, and auditing services, interest and financing charges incurred in connection with the Project, and the cost of other services to be provided by others to Owner.
 36. *Work*—The entire construction or the various separately identifiable parts thereof required to be provided under the Construction Contract Documents. Work includes and is the result of performing or providing all labor, services, and documentation necessary to produce such construction; furnishing, installing, and incorporating all materials and equipment into such construction; and may include related services such as testing, start-up, and commissioning, all as required by the Construction Contract Documents.
 37. *Work Change Directive*—A written directive to Contractor issued on or after the effective date of the Construction Contract, signed by Owner and recommended by Engineer, ordering an addition, deletion, or revision in the Work.
- B. *Day*:
1. The word "day" means a calendar day of 24 hours measured from midnight to the next midnight.

ARTICLE 8 – EXHIBITS AND SPECIAL PROVISIONS

8.01 Exhibits Included:

- A. Exhibit A, Engineer's Services.
- B. Exhibit B, Owner's Responsibilities.
- C. Exhibit C, Payments to Engineer for Services and Reimbursable Expenses.
- D. Exhibit D, Duties, Responsibilities and Limitations of Authority of Resident Project Representative.
- E. Exhibit E, Notice of Acceptability of Work.
- F. Exhibit F, Construction Cost Limit.
- G. Exhibit G, Insurance.
- H. Exhibit H, Dispute Resolution.

- I. Exhibit I, Limitations of Liability.
- J. Exhibit J, Special Provisions.

8.02 *Total Agreement*

- A. This Agreement, (together with the exhibits included above) constitutes the entire agreement between Owner and Engineer and supersedes all prior written or oral understandings. This Agreement may only be amended, supplemented, modified, or canceled by a written instrument duly executed by both parties. Amendments should be based whenever possible on the format of Exhibit K to this Agreement.

8.03 *Designated Representatives*

- A. With the execution of this Agreement, Engineer and Owner shall designate specific individuals to act as Engineer's and Owner's representatives with respect to the services to be performed or furnished by Engineer and responsibilities of Owner under this Agreement. Such an individual shall have authority to transmit instructions, receive information, and render decisions relative to this Agreement on behalf of the respective party whom the individual represents.

8.04 *Engineer's Certifications*

- A. Engineer certifies that it has not engaged in corrupt, fraudulent, or coercive practices in competing for or in executing the Agreement. For the purposes of this Paragraph 8.04:
 - 1. "corrupt practice" means the offering, giving, receiving, or soliciting of any thing of value likely to influence the action of a public official in the selection process or in the Agreement execution;
 - 2. "fraudulent practice" means an intentional misrepresentation of facts made (a) to influence the selection process or the execution of the Agreement to the detriment of Owner, or (b) to deprive Owner of the benefits of free and open competition;
 - 3. "coercive practice" means harming or threatening to harm, directly or indirectly, persons or their property to influence their participation in the selection process or affect the execution of the Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, the Effective Date of which is indicated on page 1.

Owner: City of East Grand Forks

Engineer: Widdeth Smith Nolting & Associates

By: []
Print name: Lynn Stauss
Title: Mayor
Date Signed: []

By: 
Print name: Greg Boppre
Title: Office Manager
Date Signed: [] 8/20/15

Address for Owner's receipt of notices:
600 Demers Ave
East Grand Forks, MN 56721

Address for Engineer's receipt of notices:
1600 Central Ave NE
East Grand Forks, MN 56721

Designated Representative (Paragraph 8.03.A):
David Murphy
Title: City Administrator
Phone Number: 218-773-2483
E-Mail Address: dmurphy@egf.mn

Designated Representative (Paragraph 8.03.A):
Greg Boppre
Title: Office Manager
Phone Number: 218-773-5672
E-Mail Address: Greg.boppre@wsn.us.com

This is **EXHIBIT A**, consisting of 16 pages, referred to in and part of the **Agreement between Owner and Engineer for Professional Services** dated 01-01-2016.

Engineer's Services

Article 1 of the Agreement is supplemented to include the following agreement of the parties.

Engineer shall provide Basic and Additional Services as set forth below.

PART 1 – BASIC SERVICES

A1.01 Study and Report Phase

A. Engineer shall:

1. Consult with Owner to define and clarify Owner's requirements for the Project, including design objectives and constraints, space, capacity and performance requirements, flexibility, and expandability, and any budgetary limitations, and identify available data, information, reports, facilities plans, and site evaluations.
2. Identify potential solution(s) to meet Owner's Project requirements, as needed.
3. Study and evaluate the potential solution(s) to meet Owner's Project requirements.
4. Visit the Site, or potential Project sites, to review existing conditions and facilities, unless such visits are not necessary or applicable to meeting the objectives of the Study and Report Phase.
5. Advise Owner of any need for Owner to obtain, furnish, or otherwise make available to Engineer additional Project-related data and information, for Engineer's use in the study and evaluation of potential solution(s) to Owner's Project requirements, and preparation of a related report.
6. After consultation with Owner, recommend to Owner the solution(s) which in Engineer's judgment meet Owner's requirements for the Project.
7. Identify, consult with, and analyze requirements of governmental authorities having jurisdiction to approve the portions of the Project to be designed or specified by Engineer, including but not limited to mitigating measures identified in an environmental assessment for the Project.
8. Prepare a report (the "Report") which will, as appropriate, contain schematic layouts, sketches, and conceptual design criteria with appropriate exhibits to indicate the agreed-to requirements, considerations involved, and Engineer's recommended solution(s). For each recommended solution Engineer will provide the following, which will be separately itemized: opinion of probable Construction Cost; proposed allowances for contingencies; the estimated total costs of design, professional, and related services to be provided by Engineer and its Consultants; and, on the basis of

information furnished by Owner, a tabulation of other items and services included within the definition of Total Project Costs.

9. Advise Owner of any need for Owner to provide data or services of the types described in Exhibit B, for use in Project design, or in preparation for Contractor selection and construction.
 10. When mutually agreed, assist Owner in evaluating the possible use of building information modeling; civil integrated management; geotechnical baselining of subsurface site conditions; innovative design, contracting, or procurement strategies; or other strategies, technologies, or techniques for assisting in the design, construction, and operation of Owner's facilities. The subject matter of this paragraph shall be referred to in Exhibit A and B as "Project Strategies, Technologies, and Techniques."
 11. If requested to do so by Owner, assist Owner in identifying opportunities for enhancing the sustainability of the Project, and pursuant to Owner's instructions plan for the inclusion of sustainable features in the design.
 12. Develop a scope of work and survey limits for any topographic and other surveys necessary for design.
 13. Furnish 2 review copies of the Report and any other Study and Report Phase deliverables to Owner within 30 days of the Effective Date and review it with Owner. Within 30 days of receipt, Owner shall submit to Engineer any comments regarding the furnished items.
- B. Engineer's services under the Study and Report Phase will be considered complete on the date when Engineer has delivered to Owner the revised Report and any other Study and Report Phase deliverables.

A1.02 *Preliminary Design Phase*

- A. After acceptance by Owner of the Report and any other Study and Report Phase deliverables; selection by Owner of a recommended solution; issuance by Owner of any instructions of for use of Project Strategies, Technologies, and Techniques, or for inclusion of sustainable features in the design; and indication by Owner of any specific modifications or changes in the scope, extent, character, or design requirements of the Project desired by Owner, (1) Engineer and Owner shall discuss and resolve any necessary revisions to Engineer's compensation (through application of the provisions regarding Additional Services, or otherwise), or the time for completion of Engineer's services, resulting from the selected solution, related Project Strategies, Technologies, or Techniques, sustainable design instructions, or specific modifications to the Project, and (2) upon written authorization from Owner, Engineer shall:
1. Prepare Preliminary Design Phase documents consisting of final design criteria, preliminary drawings, outline specifications, and written descriptions of the Project.
 2. In preparing the Preliminary Design Phase documents, use any specific applicable Project Strategies, Technologies, and Techniques authorized by Owner during or following the Study and Report Phase, and include sustainable features, as appropriate, pursuant to Owner's instructions.

Exhibit A – Engineer's Services

3. Provide necessary field surveys and topographic and utility mapping for Engineer's design purposes. If no such scope of work and procedure for utility mapping has been selected and authorized, then at a minimum the utility mapping will include Engineer contacting utility owners and obtaining available information.
 4. Visit the Site as needed to prepare the Preliminary Design Phase documents.
 5. Advise Owner if additional reports, data, information, or services of the types described in Exhibit B are necessary and assist Owner in obtaining such reports, data, information, or services.
 6. Continue to assist Owner with Project Strategies, Technologies, and Techniques that Owner has chosen to implement.
 7. Based on the information contained in the Preliminary Design Phase documents, prepare a revised opinion of probable Construction Cost, and assist Owner in tabulating the various cost categories which comprise Total Project Costs.
 8. Obtain and review Owner's instructions regarding Owner's procurement of construction services (including instructions regarding advertisements for bids, instructions to bidders, and requests for proposals, as applicable), Owner's construction contract practices and requirements, insurance and bonding requirements, electronic transmittals during construction, and other information necessary for the finalization of Owner's bidding-related documents (or requests for proposals or other construction procurement documents), and Construction Contract Documents. Also obtain and review copies of Owner's design and construction standards, Owner's standard forms, general conditions (if other than EJCDC® C-700, Standard General Conditions of the Construction Contract, 2013 Edition), supplementary conditions, text, and related documents or content for Engineer to include in the draft bidding-related documents (or requests for proposals or other construction procurement documents), and in the draft Construction Contract Documents, when applicable.
 9. Furnish 2 review copies of the Preliminary Design Phase documents, opinion of probable Construction Cost, and any other Preliminary Design Phase deliverables to Owner within 30 days of authorization to proceed with this phase, and review them with Owner. Within 30 days of receipt, Owner shall submit to Engineer any comments regarding the furnished items.
 10. Revise the Preliminary Design Phase documents, opinion of probable Construction Cost, and any other Preliminary Design Phase deliverables in response to Owner's comments, as appropriate, and furnish to Owner 2 copies of the revised Preliminary Design Phase documents, revised opinion of probable Construction Cost, and any other deliverables within 30 days after receipt of Owner's comments.
- B. Engineer's services under the Preliminary Design Phase will be considered complete on the date when Engineer has delivered to Owner the revised Preliminary Design Phase documents, revised opinion of probable Construction Cost, and any other Preliminary Design Phase deliverables.

A1.03 *Final Design Phase*

- A. After acceptance by Owner of the Preliminary Design Phase documents, revised opinion of probable Construction Cost as determined in the Preliminary Design Phase, and any other Preliminary Design Phase deliverables, subject to any Owner-directed modifications or changes in the scope, extent, character, or design requirements of or for the Project, and upon written authorization from Owner, Engineer shall:
1. Prepare final Drawings and Specifications indicating the scope, extent, and character of the Work to be performed and furnished by Contractor.
 2. Visit the Site as needed to assist in preparing the final Drawings and Specifications.
 3. Provide technical criteria, written descriptions, and design data for Owner's use in filing applications for permits from or approvals of governmental authorities having jurisdiction to review or approve the final design; assist Owner in consultations with such authorities; and revise the Drawings and Specifications in response to directives from such authorities, as appropriate.
 4. Advise Owner of any recommended adjustments to the opinion of probable Construction Cost.
 5. After consultation with Owner, include in the Construction Contract Documents any specific protocols for the transmittal of Project-related correspondence, documents, text, data, drawings, information, and graphics, in electronic media or digital format, either directly, or through access to a secure Project website. Any such protocols shall be applicable to transmittals between and among Owner, Engineer, and Contractor during the Construction Phase and Post-Construction Phase, and unless agreed otherwise shall supersede any conflicting protocols previously established for transmittals between Owner and Engineer.
 6. Assist Owner in assembling known reports and drawings of Site conditions, and in identifying the technical data contained in such reports and drawings upon which bidders or other prospective contractors may rely.
 7. In addition to preparing the final Drawings and Specifications, assemble drafts of other Construction Contract Documents based on specific instructions and contract forms, text, or content received from Owner.
 8. Prepare or assemble draft bidding-related documents (or requests for proposals or other construction procurement documents), based on the specific bidding or procurement-related instructions and forms, text, or content received from Owner.
 9. Perform or provide the following other Final Design Phase tasks or deliverables:
 10. Furnish for review by Owner, its legal counsel, and other advisors, 2 copies of the final Drawings and Specifications, assembled drafts of other Construction Contract Documents, the draft bidding-related documents (or requests for proposals or other construction procurement documents), and any other Final Design Phase deliverables, within 30 days of authorization to proceed with the Final Design Phase, and review them

with Owner. Within 30 days of receipt, Owner shall submit to Engineer any comments regarding the furnished items, and any instructions for revisions.

11. Revise the final Drawings and Specifications, assembled drafts of other Construction Contract Documents, the draft bidding-related documents (or requests for proposals or other construction procurement documents), and any other Final Design Phase deliverables in accordance with comments and instructions from the Owner, as appropriate, and submit 2 final copies of such documents to Owner within 30 days after receipt of Owner's comments and instructions.
- B. Engineer's services under the Final Design Phase will be considered complete on the date when Engineer has delivered to Owner the final Drawings and Specifications, other assembled Construction Contract Documents, bidding-related documents (or requests for proposals or other construction procurement documents), and any other Final Design Phase deliverables and all final design phase deliverables have been accepted by Owner.
 - C. In the event that the Work designed or specified by Engineer is to be performed or furnished under more than one prime contract, or if Engineer's services are to be separately sequenced with the work of one or more prime Contractors (such as in the case of fast-tracking), Owner and Engineer shall, prior to commencement of the Final Design Phase, develop a schedule for performance of Engineer's services during the Final Design, Bidding or Negotiating, Construction, and Post-Construction Phases in order to sequence and coordinate properly such services as are applicable to the work under such separate prime contracts. This schedule is to be prepared and included in or become an amendment to Exhibit A whether or not the work under such contracts is to proceed concurrently.
 - D. The number of prime contracts for Work designed or specified by Engineer upon which the Engineer's compensation has been established under this Agreement is negotiable.

A1.04 *Bidding or Negotiating Phase*

- A. After acceptance by Owner of the final Drawings and Specifications, other Construction Contract Documents, bidding-related documents (or requests for proposals or other construction procurement documents), and the most recent opinion of probable Construction Cost as determined in the Final Design Phase, and upon written authorization by Owner to proceed, Engineer shall:
 1. Assist Owner in advertising for and obtaining bids or proposals for the Work, assist Owner in issuing assembled design, contract, and bidding-related documents (or requests for proposals or other construction procurement documents) to prospective contractors, and, where applicable, maintain a record of prospective contractors to which documents have been issued, attend pre-bid conferences, if any, and receive and process contractor deposits or charges for the issued documents.
 2. Prepare and issue Addenda as appropriate to clarify, correct, or change the issued documents.
 3. Provide information or assistance needed by Owner in the course of any review of proposals or negotiations with prospective contractors.

4. Consult with Owner as to the qualifications of prospective contractors.
 5. Consult with Owner as to the qualifications of subcontractors, suppliers, and other individuals and entities proposed by prospective contractors, for those portions of the Work as to which review of qualifications is required by the issued documents.
 6. Attend the bid opening, prepare bid tabulation sheets to meet Owner's schedule, and assist Owner in evaluating bids or proposals, assembling final contracts for the Work for execution by Owner and Contractor, and in issuing notices of award of such contracts.
 7. If Owner engages in negotiations with bidders or proposers, assist Owner with respect to technical and engineering issues that arise during the negotiations.
 8. Perform or provide the following other Bidding or Negotiating Phase tasks or deliverables: Upon award of the Construction Contract, the Engineer shall furnish to Owner three executed copies of the Contract Documents and one electronic copy of the signed documents, including Drawings and Specifications.
- B. The Bidding or Negotiating Phase will be considered complete upon commencement of the Construction Phase or upon cessation of negotiations with prospective contractors (except as may be required if Exhibit F is a part of this Agreement).

A1.05 Construction Phase

- A. Upon successful completion of the Bidding and Negotiating Phase, and upon written authorization from Owner, Engineer shall:
1. *General Administration of Construction Contract:* Consult with Owner and act as Owner's representative as provided in the Construction Contract. The extent and limitations of the duties, responsibilities, and authority of Engineer shall be as assigned in EJCDC® C-700, Standard General Conditions of the Construction Contract (2013 Edition), prepared by the Engineers Joint Contract Documents Committee, or other construction general conditions specified in this Agreement. If Owner, or Owner and Contractor, modify the duties, responsibilities, and authority of Engineer in the Construction Contract, or modify other terms of the Construction Contract having a direct bearing on Engineer, then Owner shall compensate Engineer for any related increases in the cost to provide Construction Phase services. Engineer shall not be required to furnish or perform services contrary to Engineer's responsibilities as a licensed professional. All of Owner's instructions to Contractor will be issued through Engineer, which shall have authority to act on behalf of Owner in dealings with Contractor to the extent provided in this Agreement and the Construction Contract except as otherwise provided in writing.
 2. *Resident Project Representative (RPR):* Provide the services of an RPR at the Site to assist the Engineer and to provide more extensive observation of Contractor's work. Duties, responsibilities, and authority of the RPR are as set forth in Exhibit D. The furnishing of such RPR's services will not limit, extend, or modify Engineer's responsibilities or authority except as expressly set forth in Exhibit D.
 3. *Staking:* Provide the services of a survey crew to assist the Engineer.

4. *Selection of Independent Testing Laboratory:* Assist Owner in the selection of an independent testing laboratory to perform the services identified in Exhibit B, Paragraph B2.01. Testing shall not be included in the Engineer's percentages of reimbursement.
5. *Pre-Construction Conference:* Participate in and chair a pre-construction conference prior to commencement of Work at the Site.
6. *Electronic Transmittal Protocols:* If the Construction Contract Documents do not specify protocols for the transmittal of Project-related correspondence, documents, text, data, drawings, information, and graphics, in electronic media or digital format, either directly, or through access to a secure Project website, then together with Owner and Contractor jointly develop such protocols for transmittals between and among Owner, Contractor, and Engineer during the Construction Phase and Post-Construction Phase.
7. *Original Documents:* Maintain and safeguard during the Construction Phase at least one original printed record version of the Construction Contract Documents, including Drawings and Specifications signed and sealed by Engineer and other design professionals in accordance with applicable Laws and Regulations. Throughout the Construction Phase, make such original printed record version of the Construction Contract Documents available to Contractor and Owner for review.
8. *Schedules:* Receive, review, and determine the acceptability of any and all schedules that Contractor is required to submit to Engineer, including the Progress Schedule, Schedule of Submittals, and Schedule of Values.
9. *Baselines and Benchmarks:* As appropriate, establish baselines and benchmarks for locating the Work which in Engineer's judgment are necessary to enable Contractor to proceed.
10. *Visits to Site and Observation of Construction:* In connection with observations of Contractor's Work while it is in progress:
 - a. Make visits to the Site at intervals appropriate to the various stages of construction, as Engineer deems necessary, to observe as an experienced and qualified design professional the progress of Contractor's executed Work. Such visits and observations by Engineer, and the Resident Project Representative, if any, are not intended to be exhaustive or to extend to every aspect of the Work or to involve detailed inspections of the Work beyond the responsibilities specifically assigned to Engineer in this Agreement and the Construction Contract Documents, but rather are to be limited to spot checking, selective sampling, and similar methods of general observation of the Work based on Engineer's exercise of professional judgment, as assisted by the Resident Project Representative, if any. Based on information obtained during such visits and observations, Engineer will determine in general if the Work is proceeding in accordance with the Construction Contract Documents, and Engineer shall keep Owner informed of the progress of the Work.
 - b. The purpose of Engineer's visits to the Site, and representation by the Resident Project Representative, if any, at the Site, will be to enable Engineer to better carry out the duties and responsibilities assigned to and undertaken by Engineer during the Construction Phase, and, in addition, by the exercise of Engineer's efforts as an

Exhibit A – Engineer's Services

EJDC® E-500, Agreement Between Owner and Engineer for Professional Services.

Copyright © 2014 National Society of Professional Engineers, American Council of Engineering Companies,
and American Society of Civil Engineers. All rights reserved.

experienced and qualified design professional, to provide for Owner a greater degree of confidence that the completed Work will conform in general to the Construction Contract Documents and that Contractor has implemented and maintained the integrity of the design concept of the completed Project as a functioning whole as indicated in the Construction Contract Documents. Engineer shall not, during such visits or as a result of such observations of the Work, supervise, direct, or have control over the Work, nor shall Engineer have authority over or responsibility for the means, methods, techniques, sequences, or procedures of construction selected or used by any Constructor, for security or safety at the Site, for safety precautions and programs incident to any Constructor's work in progress, for the coordination of the Constructors' work or schedules, nor for any failure of any Constructor to comply with Laws and Regulations applicable to furnishing and performing of its work. Accordingly, Engineer neither guarantees the performance of any Constructor nor assumes responsibility for any Constructor's failure to furnish or perform the Work, or any portion of the Work, in accordance with the Construction Contract Documents.

11. *Defective Work:* Reject Work if, on the basis of Engineer's observations, Engineer believes that such Work is defective under the terms and standards set forth in the Construction Contract Documents. Provide recommendations to Owner regarding whether Contractor should correct such Work or remove and replace such Work, or whether Owner should consider accepting such Work as provided in the Construction Contract Documents.
12. *Compatibility with Design Concept:* If Engineer has express knowledge that a specific part of the Work that is not defective under the terms and standards set forth in the Construction Contract Documents is nonetheless not compatible with the design concept of the completed Project as a functioning whole, then inform Owner of such incompatibility, and provide recommendations for addressing such Work.
13. *Clarifications and Interpretations:* Accept from Contractor and Owner submittal of all matters in question concerning the requirements of the Construction Contract Documents (sometimes referred to as requests for information or interpretation—RFIs), or relating to the acceptability of the Work under the Construction Contract Documents. With reasonable promptness, render a written clarification, interpretation, or decision on the issue submitted, or initiate an amendment or supplement to the Construction Contract Documents.
14. *Non-reviewable Matters:* If a submitted matter in question concerns the Engineer's performance of its duties and obligations, or terms and conditions of the Construction Contract Documents that do not involve (1) the performance or acceptability of the Work under the Construction Contract Documents, (2) the design (as set forth in the Drawings, Specifications, or otherwise), or (3) other engineering or technical matters, then Engineer will promptly give written notice to Owner and Contractor that Engineer will not provide a decision or interpretation.
15. *Field Orders:* Subject to any limitations in the Construction Contract Documents, Engineer may prepare and issue Field Orders requiring minor changes in the Work.

16. *Change Orders and Work Change Directives:* Recommend Change Orders and Work Change Directives to Owner, as appropriate, and prepare Change Orders and Work Change Directives as required.
17. *Differing Site Conditions:* Respond to any notice from Contractor of differing site conditions, including conditions relating to underground facilities such as utilities, and hazardous environmental conditions. Promptly conduct reviews and prepare findings, conclusions, and recommendations for Owner's use.
18. *Shop Drawings, Samples, and Other Submittals:* Review and approve or take other appropriate action with respect to Shop Drawings, Samples, and other required Contractor submittals, but only for conformance with the information given in the Construction Contract Documents and compatibility with the design concept of the completed Project as a functioning whole as indicated by the Construction Contract Documents. Such reviews and approvals or other action will not extend to means, methods, techniques, sequences, or procedures of construction or to safety precautions and programs incident thereto. Engineer shall meet any Contractor's submittal schedule that Engineer has accepted.
19. *Substitutes and "Or-equal":* Evaluate and determine the acceptability of substitute or "or-equal" materials and equipment proposed by Contractor, but subject to the provisions of Paragraph A2.02.A.2 of this Exhibit A.
20. *Inspections and Tests:*
 - a. Receive and review all certificates of inspections, tests, and approvals required by Laws and Regulations or the Construction Contract Documents. Engineer's review of such certificates will be for the purpose of determining that the results certified indicate compliance with the Construction Contract Documents and will not constitute an independent evaluation that the content or procedures of such inspections, tests, or approvals comply with the requirements of the Construction Contract Documents. Engineer shall be entitled to rely on the results of such inspections and tests.
 - b. As deemed reasonably necessary, request that Contractor uncover Work that is to be inspected, tested, or approved.
 - c. Pursuant to the terms of the Construction Contract, require special inspections or testing of the Work, whether or not the Work is fabricated, installed, or completed.
21. *Change Proposals and Claims:* (a) Review and respond to Change Proposals. Review each duly submitted Change Proposal from Contractor and, within 30 days after receipt of the Contractor's supporting data, either deny the Change Proposal in whole, approve it in whole, or deny it in part and approve it in part. Such actions shall be in writing, with a copy provided to Owner and Contractor. If the Change Proposal does not involve the design (as set forth in the Drawings, Specifications, or otherwise), the acceptability of the Work, or other engineering or technical matters, then Engineer will notify the parties that the Engineer will not resolve the Change Proposal. (b) Provide information or data to Owner regarding engineering or technical matters pertaining to Claims.

22. *Applications for Payment:* Based on Engineer's observations as an experienced and qualified design professional and on review of Applications for Payment and accompanying supporting documentation:
- a. Determine the amounts that Engineer recommends Contractor be paid. Recommend reductions in payment (set-offs) based on the provisions for set-offs stated in the Construction Contract. Such recommendations of payment will be in writing and will constitute Engineer's representation to Owner, based on such observations and review, that, to the best of Engineer's knowledge, information and belief, Contractor's Work has progressed to the point indicated, the Work is generally in accordance with the Construction Contract Documents (subject to an evaluation of the Work as a functioning whole prior to or upon Substantial Completion, to the results of any subsequent tests called for in the Construction Contract Documents, and to any other qualifications stated in the recommendation), and the conditions precedent to Contractor's being entitled to such payment appear to have been fulfilled in so far as it is Engineer's responsibility to observe the Work. In the case of unit price Work, Engineer's recommendations of payment will include final determinations of quantities and classifications of the Work (subject to any subsequent adjustments allowed by the Construction Contract Documents).
 - b. By recommending payment, Engineer shall not thereby be deemed to have represented that observations made by Engineer to check the quality or quantity of Contractor's Work as it is performed and furnished have been exhaustive, extended to every aspect of Contractor's Work in progress, or involved detailed inspections of the Work beyond the responsibilities specifically assigned to Engineer in this Agreement. Neither Engineer's review of Contractor's Work for the purposes of recommending payments nor Engineer's recommendation of any payment including final payment will impose on Engineer responsibility to supervise, direct, or control the Work, or for the means, methods, techniques, sequences, or procedures of construction or safety precautions or programs incident thereto, or Contractor's compliance with Laws and Regulations applicable to Contractor's furnishing and performing the Work. It will also not impose responsibility on Engineer to make any examination to ascertain how or for what purposes Contractor has used the money paid to Contractor by Owner; to determine that title to any portion of the Work, including materials or equipment, has passed to Owner free and clear of any liens, claims, security interests, or encumbrances; or that there may not be other matters at issue between Owner and Contractor that might affect the amount that should be paid.
23. *Contractor's Completion Documents:* Receive from Contractor, review, and transmit to Owner maintenance and operating instructions, schedules, guarantees, bonds, certificates or other evidence of insurance required by the Construction Contract Documents, certificates of inspection, tests and approvals, and Shop Drawings, Samples, and other data approved as provided under Paragraph A1.05.A.17.
24. *Substantial Completion:* Promptly after notice from Contractor that Contractor considers the entire Work ready for its intended use, in company with Owner and Contractor, visit the Site to review the Work and determine the status of completion. Follow the procedures in the Construction Contract regarding the preliminary certificate

of Substantial Completion, punch list of items to be completed, Owner's objections, notice to Contractor, and issuance of a final certificate of Substantial Completion. Assist Owner regarding any remaining engineering or technical matters affecting Owner's use or occupancy of the Work following Substantial Completion.

25. *Other Tasks:* Perform or provide the following other Construction Phase tasks or deliverables:

a. Such other general services, such as the following:

- 1) Meetings – TAC, Utility Meetings
- 2) Department Head Requests
- 3) Review of site plans for conformance with design guidelines (sidewalks, ROW, utilities and storm sewer)
- 4) **Engineer will provide 20 hours of any labor class, free of charge each month for General Services.**

**Council and Water & Light meetings are a service of the consulting firm and are not billable under this agreement.

26. *Final Notice of Acceptability of the Work:* Conduct a final visit to the Project to determine if the Work is complete and acceptable so that Engineer may recommend, in writing, final payment to Contractor. Accompanying the recommendation for final payment, Engineer shall also provide a notice to Owner and Contractor in the form attached hereto as Exhibit E ("Notice of Acceptability of Work") that the Work is acceptable (subject to the provisions of the Notice and Paragraph A1.05.A.21.b) to the best of Engineer's knowledge, information, and belief, and based on the extent of the services provided by Engineer under this Agreement.

27. *Standards for Certain Construction-Phase Decisions:* Engineer will render decisions regarding the requirements of the Construction Contract Documents, and judge the acceptability of the Work, pursuant to the specific procedures set forth in the Construction Contract for initial interpretations, Change Proposals, and acceptance of the Work. In rendering such decisions and judgments, Engineer will not show partiality to Owner or Contractor, and will not be liable to Owner, Contractor, or others in connection with any proceedings, interpretations, decisions, or judgments conducted or rendered in good faith.

B. *Duration of Construction Phase:* The Construction Phase will commence with the execution of the first Construction Contract for the Project or any part thereof and will terminate upon written recommendation by Engineer for final payment to Contractors. If the Project involves more than one prime contract as indicated in Paragraph A1.03.D, then Construction Phase services may be rendered at different times in respect to the separate contracts. Subject to the provisions of Article 3, Engineer shall be entitled to an equitable increase in compensation if Construction Phase services (including Resident Project Representative services, if any) are required after the original date for completion and readiness for final payment of Contractor as set forth in the Construction Contract.

A1.06 *Post-Construction Phase*

- A. Upon written authorization from Owner during the Post-Construction Phase, Engineer shall:
1. Together with Owner, visit the Project to observe any apparent defects in the Work, make recommendations as to replacement or correction of defective Work, if any, or the need to repair of any damage to the Site or adjacent areas, and assist Owner in consultations and discussions with Contractor concerning correction of any such defective Work and any needed repairs.
 2. Together with Owner, visit the Project within one month before the end of the Construction Contract's correction period to ascertain whether any portion of the Work or the repair of any damage to the Site or adjacent areas is defective and therefore subject to correction by Contractor.
 3. Perform or provide the following other Post-Construction Phase tasks or deliverables:
- B. The Post-Construction Phase services may commence during the Construction Phase and, if not otherwise modified in this Exhibit A, will terminate twelve months after the commencement of the Construction Contract's correction period.

PART 2 – ADDITIONAL SERVICES

A2.01 *Additional Services Requiring Owner's Written Authorization*

- A. If authorized in writing by Owner, Engineer shall provide Additional Services of the types listed below. These services are not included as part of Basic Services and will be paid for by Owner as indicated in Exhibit C.
1. Preparation of applications and supporting documents (in addition to those furnished under Basic Services) for private or governmental grants, loans, or advances in connection with the Project; preparation or review of environmental assessments and impact statements; review and evaluation of the effects on the design requirements for the Project of any such statements and documents prepared by others; and assistance in obtaining approvals of authorities having jurisdiction over the anticipated environmental impact of the Project.
 2. Services to make measured drawings of existing conditions or facilities, to conduct tests or investigations of existing conditions or facilities, or to verify the accuracy of drawings or other information furnished by Owner or others.
 3. Services resulting from significant changes in the scope, extent, or character of the portions of the Project designed or specified by Engineer, or the Project's design requirements, including, but not limited to, changes in size, complexity, Owner's schedule, character of construction, or method of financing; and revising previously accepted studies, reports, Drawings, Specifications, or Construction Contract Documents when such revisions are required by changes in Laws and Regulations enacted subsequent to the Effective Date or are due to any other causes beyond Engineer's control.

4. Services resulting from Owner's request to evaluate additional Study and Report Phase alternative solutions beyond those agreed to in Paragraph A1.01.A.1 and 2, but only if the Owner's request is made after completion of the Study and Report Phase.
5. Services required as a result of Owner's providing incomplete or incorrect Project information to Engineer.
6. Providing renderings or models for Owner's use, including services in support of building information modeling or civil integrated management.
7. Undertaking investigations and studies including, but not limited to:
 - a. detailed consideration of operations, maintenance, and overhead expenses;
 - b. the preparation of feasibility studies (such as those that include projections of output capacity, utility project rates, project market demand, or project revenues) and cash flow analyses, provided that such services are based on the engineering and technical aspects of the Project, and do not include rendering advice regarding municipal financial products or the issuance of municipal securities;
 - c. preparation of appraisals;
 - d. evaluating processes available for licensing, and assisting Owner in obtaining process licensing;
 - e. detailed quantity surveys of materials, equipment, and labor; and
 - f. audits or inventories required in connection with construction performed or furnished by Owner.
8. Furnishing services of Consultants for other than Basic Services, such as testing services as required.
9. Providing data or services of the types described in Exhibit B, when Owner retains Engineer to provide such data or services instead of Owner furnishing the same.
10. Providing the following services:
 - a. Services attributable to more prime construction contracts than specified in Paragraph A1.03.D.
 - b. Services to arrange for performance of construction services for Owner by contractors other than the principal prime Contractor, and administering Owner's contract for such services.
11. Services during out-of-town travel required of Engineer, other than for visits to the Site or Owner's office as required in Basic Services (Part 1 of Exhibit A).
12. Preparing for, coordinating with, participating in and responding to structured independent review processes, including, but not limited to, construction management, cost estimating, project peer review, value engineering, and constructability review

Exhibit A – Engineer's Services

EJCDC® E-500, Agreement Between Owner and Engineer for Professional Services.

Copyright © 2014 National Society of Professional Engineers, American Council of Engineering Companies,
and American Society of Civil Engineers. All rights reserved.

requested by Owner; and performing or furnishing services required to revise studies, reports, Drawings, Specifications, or other documents as a result of such review processes.

13. Preparing additional bidding-related documents (or requests for proposals or other construction procurement documents) or Construction Contract Documents for alternate bids or cost estimates requested by Owner for the Work or a portion thereof.
14. Assistance in connection with bid protests, rebidding, or renegotiating contracts for construction, materials, equipment, or services, except when such assistance is required to complete services required by Paragraph 5.02.A and Exhibit F.
15. Preparing conformed Construction Contract Documents that incorporate and integrate the content of all Addenda and any amendments negotiated by Owner and Contractor.
16. Providing Construction Phase services beyond the original date for completion and readiness for final payment of Contractor, but only if such services increase the total quantity of services to be performed in the Construction Phase, rather than merely shifting performance of such services to a later date.
17. Supplementing Record Drawings with information regarding the completed Project, Site, and immediately adjacent areas obtained from field observations, Owner, utility companies, and other reliable sources.
18. Conducting surveys, investigations, and field measurements to verify the accuracy of Record Drawing content obtained from Contractor, Owner, utility companies, and other sources; revise and supplement Record Drawings as needed.
19. Preparation of operation, maintenance, and staffing manuals.
20. Protracted or extensive assistance in refining and adjusting of Project equipment and systems (such as initial startup, testing, and balancing).
21. Assistance to Owner in training Owner's staff to operate and maintain Project equipment and systems.
22. Assistance to Owner in developing systems and procedures for (a) control of the operation and maintenance of Project equipment and systems, and (b) related recordkeeping.
23. Preparing to serve or serving as a consultant or witness for Owner in any litigation, arbitration, lien or bond claim, or other legal or administrative proceeding involving the Project.
24. Overtime work requiring higher than regular rates.
25. Providing construction surveys and staking to enable Contractor to perform its work other than as required under Paragraph A1.05.A.8; any type of property surveys or related engineering services needed for the transfer of interests in real property; and providing other special field surveys.

Exhibit A – Engineer's Services

EJCDC® E-500, Agreement Between Owner and Engineer for Professional Services.

Copyright © 2014 National Society of Professional Engineers, American Council of Engineering Companies,
and American Society of Civil Engineers. All rights reserved.

26. Providing more extensive services required to enable Engineer to issue notices or certifications requested by Owner.
27. Extensive services required during any correction period, or with respect to monitoring Contractor's compliance with warranties and guarantees called for in the Construction Contract (except as agreed to under Basic Services).
28. Other additional services performed or furnished by Engineer not otherwise provided for in this Agreement.

A2.02 Additional Services Not Requiring Owner's Written Authorization

- A. Engineer shall advise Owner that Engineer is commencing to perform or furnish the Additional Services of the types listed below. For such Additional Services, Engineer need not request or obtain specific advance written authorization from Owner. Engineer shall cease performing or furnishing such Additional Services upon receipt of written notice to cease from Owner.
 1. Services in connection with Work Change Directives and Change Orders to reflect changes requested by Owner.
 2. Services in making revisions to Drawings and Specifications occasioned by the acceptance of substitute materials or equipment other than "or equal" items; evaluation and determination of an excessive number of proposed "or equals" or substitutions, whether proposed before or after award of Construction Contract.
 3. Services resulting from significant delays, changes, or price increases occurring as a direct or indirect result of materials, equipment, or energy shortages.
 4. Additional or extended services arising from (a) the presence at the Site of any Constituent of Concern or items of historical or cultural significance, (b) emergencies or acts of God endangering the Work, (c) damage to the Work by fire or other causes during construction, (d) a significant amount of defective, neglected, or delayed Work, (e) acceleration of the progress schedule involving services beyond normal working hours, or (f) default by Contractor.
 5. Services (other than Basic Services during the Post-Construction Phase) in connection with any partial utilization of the Work by Owner prior to Substantial Completion.
 6. Evaluating unreasonable or frivolous requests for interpretation or information (RFIs), Change Proposals, or other demands from Contractor or others in connection with the Work, or an excessive number of RFIs, Change Proposals, or demands.
 7. Reviewing a Shop Drawing or other Contractor submittal more than three times, as a result of repeated inadequate submissions by Contractor.
 8. While at the Site, compliance by Engineer and its staff with those terms of Owner's or Contractor's safety program provided to Engineer subsequent to the Effective Date that exceed those normally required of engineering personnel by federal, State, or local safety authorities for similar construction sites.

Exhibit A – Engineer's Services

EJCDC® E-500, Agreement Between Owner and Engineer for Professional Services.

Copyright © 2014 National Society of Professional Engineers, American Council of Engineering Companies, and American Society of Civil Engineers. All rights reserved.

9. Engineer shall submit one (1) set of record drawings, once the project is complete.

This is **EXHIBIT B**, consisting of 3 pages, referred to in and part of the **Agreement between Owner and Engineer for Professional Services** dated 01-01-2016.

Owner's Responsibilities

Article 2 of the Agreement is supplemented to include the following agreement of the parties.

B2.01 In addition to other responsibilities of Owner as set forth in this Agreement, Owner shall at its expense:

- A. Provide Engineer with all criteria and full information as to Owner's requirements for the Project, including design objectives and constraints, space, capacity and performance requirements, flexibility, and expandability, and any budgetary limitations.
- B. Give instructions to Engineer regarding Owner's procurement of construction services (including instructions regarding advertisements for bids, instructions to bidders, and requests for proposals, as applicable), Owner's construction contract practices and requirements, insurance and bonding requirements, electronic transmittals during construction, and other information necessary for the finalization of Owner's bidding-related documents (or requests for proposals or other construction procurement documents), and Construction Contract Documents. Furnish copies (or give specific directions requesting Engineer to use copies already in Engineer's possession) of all design and construction standards, Owner's standard forms, general conditions (if other than EJDC® C-700, Standard General Conditions of the Construction Contract, 2013 Edition), supplementary conditions, text, and related documents and content for Engineer to include in the draft bidding-related documents (or requests for proposals or other construction procurement documents), and draft Construction Contract Documents, when applicable. Owner shall have responsibility for the final content of (1) such bidding-related documents (or requests for proposals or other construction procurement documents), and (2) those portions of any Construction Contract other than the design (as set forth in the Drawings, Specifications, or otherwise), and other engineering or technical matters; and Owner shall seek the advice of Owner's legal counsel, risk managers, and insurance advisors with respect to the drafting and content of such documents.
- C. Furnish to Engineer any other available information pertinent to the Project including reports and data relative to previous designs, construction, or investigation at or adjacent to the Site.
- D. Following Engineer's assessment of initially-available Project information and data and upon Engineer's request, obtain, furnish, or otherwise make available (if necessary through title searches, or retention of specialists or consultants) such additional Project-related information and data as is reasonably required to enable Engineer to complete its Basic and Additional Services. Such additional information or data would generally include the following:
 1. Property descriptions.
 2. Zoning, deed, and other land use restrictions.

3. Utility and topographic mapping and surveys.
 4. Property, boundary, easement, right-of-way, and other special surveys or data, including establishing relevant reference points.
 5. Explorations and tests of subsurface conditions at or adjacent to the Site; geotechnical reports and investigations; drawings of physical conditions relating to existing surface or subsurface structures at the Site; hydrographic surveys, laboratory tests and inspections of samples, materials, and equipment; with appropriate professional interpretation of such information or data.
 6. Environmental assessments, audits, investigations, and impact statements, and other relevant environmental, historical, or cultural studies relevant to the Project, the Site, and adjacent areas.
 7. Data or consultations as required for the Project but not otherwise identified in this Agreement.
- E. Arrange for safe access to and make all provisions for Engineer to enter upon public and private property as required for Engineer to perform services under the Agreement.
- F. Recognizing and acknowledging that Engineer's services and expertise do not include the following services, provide, as required for the Project:
1. Accounting, bond and financial advisory (including, if applicable, "municipal advisor" services as described in Section 975 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (2010) and the municipal advisor registration rules issued by the Securities and Exchange Commission), independent cost estimating, and insurance counseling services.
 2. Legal services with regard to issues pertaining to the Project as Owner requires, Contractor raises, or Engineer reasonably requests.
 3. Such auditing services as Owner requires to ascertain how or for what purpose Contractor has used the money paid.
- G. Provide the services of an independent testing laboratory to perform all inspections, tests, and approvals of samples, materials, and equipment required by the Construction Contract Documents (other than those required to be furnished or arranged by Contractor), or to evaluate the performance of materials, equipment, and facilities of Owner, prior to their incorporation into the Work with appropriate professional interpretation thereof. Provide Engineer with the findings and reports generated by testing laboratories, including findings and reports obtained from or through Contractor.
- H. Provide reviews, approvals, and permits from all governmental authorities having jurisdiction to approve all phases of the Project designed or specified by Engineer and such reviews, approvals, and consents from others as may be necessary for completion of each phase of the Project.

- I. Advise Engineer of the identity and scope of services of any independent consultants employed by Owner to perform or furnish services in regard to the Project, including, but not limited to, cost estimating, project peer review, value engineering, and constructibility review.
- J. If Owner designates a construction manager or an individual or entity other than, or in addition to, Engineer to represent Owner at the Site, define and set forth as an attachment to this Exhibit B the duties, responsibilities, and limitations of authority of such other party and the relation thereof to the duties, responsibilities, and authority of Engineer.
- K. If more than one prime contract is to be awarded for the Work designed or specified by Engineer, then designate a person or entity to have authority and responsibility for coordinating the activities among the various prime Contractors, and define and set forth the duties, responsibilities, and limitations of authority of such individual or entity and the relation thereof to the duties, responsibilities, and authority of Engineer as an attachment to this Exhibit B that is to be mutually agreed upon and made a part of this Agreement before such services begin.
- L. Inform Engineer in writing of any specific requirements of safety or security programs that are applicable to Engineer, as a visitor to the Site.
- M. Examine all alternative solutions, studies, reports, sketches, Drawings, Specifications, proposals, and other documents presented by Engineer (including obtaining advice of an attorney, risk manager, insurance counselor, financial/municipal advisor, and other advisors or consultants as Owner deems appropriate with respect to such examination) and render in writing timely decisions pertaining thereto.
- N. Inform Engineer regarding any need for assistance in evaluating the possible use of Project Strategies, Technologies, and Techniques, as defined in Exhibit A.
- O. Advise Engineer as to whether Engineer's assistance is requested in identifying opportunities for enhancing the sustainability of the Project.
- P. Place and pay for advertisement for Bids in appropriate publications.
- Q. Furnish to Engineer data as to Owner's anticipated costs for services to be provided by others (including, but not limited to, accounting, bond and financial, independent cost estimating, insurance counseling, and legal advice) for Owner so that Engineer may assist Owner in collating the various cost categories which comprise Total Project Costs.
- R. Attend and participate in the pre-bid conference, bid opening, pre-construction conferences, construction progress and other job related meetings, and Site visits to determine Substantial Completion and readiness of the completed Work for final payment.
- S. Authorize Engineer to provide Additional Services as set forth in Part 2 of Exhibit A of the Agreement, as required.

Exhibit B – Owner's Responsibilities

EJCDC® E-500, Agreement Between Owner and Engineer for Professional Services.

Copyright © 2014 National Society of Professional Engineers, American Council of Engineering Companies,
and American Society of Civil Engineers. All rights reserved.

This is **EXHIBIT C**, consisting of 2 pages, referred to in and part of the **Agreement between Owner and Engineer for Professional Services** dated 01-01-2016.

Payments to Engineer for Services and Reimbursable Expenses
COMPENSATION PACKET BC-3: Basic Services – Percentage of Construction Cost

Article 2 of the Agreement is supplemented to include the following agreement of the parties:

ARTICLE 2 – OWNER’S RESPONSIBILITIES

C2.01 *Compensation for Basic Services (other than Resident Project Representative, Staking and Construction Administrative) – Percentage of Construction Cost Method of Payment.*

A. Owner shall pay Engineer for Basic Services set forth in Exhibit A, except for services of Engineer’s Resident Project Representative, Staking and Construction Administrative if any, as follows:

1. *General:* An amount equal to a percentage of the Construction Cost.

<u>COST OF CONSTRUCTION</u>	<u>BASIC FEE</u>
A. \$ to \$50,000	10% or negotiated
B. \$50,000 to \$150,000	10%
C. \$150,000 to \$500,000	9%
E. \$500,000 to \$5,000,000	8%
F. \$5,000,000 to 10,000,000	7%
G. \$10,000,000 and Greater	Negotiable

- a. For Work designed or specified and incorporated in the completed Project, the actual final price of the Construction Contract(s), as duly adjusted by Change Orders.
- b. For Work designed or specified but not constructed, the lowest bona fide Bid received from a qualified bidder for such Work; or, if the Work is not bid, the lowest bona fide negotiated proposal for such Work.
- c. For Work designed or specified but not constructed upon which no such Bid or proposal is received, Engineer’s most recent opinion of probable Construction Cost.
- d. Labor furnished by Owner for the Project will be included in the Construction Cost at current market rates including a reasonable allowance for overhead and profit. Materials and equipment furnished by Owner will be included at current market prices.
- e. For purposes of determining Construction Cost under this provision, no deduction is to be made from Construction Contract pricing on account of any penalty, liquidated damages, or other amounts withheld from payments to Contractor(s).

2. *Reimbursable Expenses:* In addition to the Percentage of Construction Cost, Engineer is also entitled to reimbursement from Owner for the following Reimbursable Expenses (see Appendix 1 for reimbursable expenses):

3. *Progress Payments:*

a. The portion of the amounts billed for Engineer's services that is on account of the Percentage of Construction Cost will be based upon Engineer's estimate of the percentage of the total services actually completed during the billing period. If any Reimbursable Expenses are expressly allowed, Engineer may also bill for any such Reimbursable Expenses incurred during the billing period.

b. Upon conclusion of each phase of Basic Services, Owner shall pay such additional amount, if any, as may be necessary to bring total compensation paid during such phase on account of the percentage of Construction Cost to the following estimated percentages of total compensation payable on account of the percentage of Construction Cost for all phases of Basic Services:

Study and Report Phase	0%
Preliminary Design Phase	25%
Final Design Phase	25%
Bidding or Negotiating Phase	45%
Post-Construction Phase	<u>5%</u>
	100%

c. Engineer may alter the distribution of compensation between individual phases of the work noted herein to be consistent with services actually rendered, but shall not exceed the total estimated compensation amount unless approved in writing by Owner.

4. Resident Project Representative (**RPR**), Construction Staking (**S**) and Construction Administration (**CA**) and Construction.

It is understood that these services provided compensation for inspection, staking, and Construction Administration shall not exceed 6% (six percent) of the construction cost, unless otherwise negotiated between Owner and Engineer. **The Engineer shall notify the owner when the RPR, S and CA reaches 75% of the 6% maximum of the construction cost.** Compensation for inspection, staking and construction administration for state aid and federal projects is limited to 22% (twenty-two percent) of the construction cost.

Plans and Specifications	12%
Staking/Inspection/Contract Administration	<u>10%</u>
	22%

Also, for State Aid and Federal projects, Engineer must perform labor compliance in accordance with State and Federal guidelines. This work shall be completed by the hour and not included in the above percentages.

5. Special Assessment Projects

The Owner shall compensate the Engineer one percent (1%) of the Actual Construction Cost, for preparation of the Special Assessment.

Also, see Exhibit J for additional responsibilities

This is **Appendix 1 to EXHIBIT C**, consisting of 1 pages, referred to in and part of the **Agreement between OWNER and ENGINEER for Professional Services** dated 01-01-2016.

Initial:

OWNER
ENGINEER

YLB

STANDARD HOURLY RATES SCHEDULE

Current agreements for engineering services stipulate that the standard hourly rates are subject to review and adjustment per Exhibit C. Hourly rates for services performed on the date of the Agreement are:

PERSONNEL	2016	2017	2018
Engineer V, Architect V, Land Surveyor V, Scientist V	\$140.00	\$148.00	\$155.00
Engineer IV, Architect IV, Land Surveyor IV, Scientist IV, Project Manager IV	\$130.00	\$136.00	\$142.00
Engineer III, Architect III, Land Surveyor III, Scientist III, Project Manager III, Landscape Architect III	\$124.00	\$128.00	\$132.00
Engineer II, Architect II, Land Surveyor II, Scientist II, Project Manager II, Geographer II	\$105.00	\$110.00	\$115.00
Engineer I, Architect I, Land Surveyor I, Scientist I	\$81.00	\$83.00	\$86.00
Computer Systems Specialist	\$120.00	\$124.00	\$127.00
Senior Funding Specialist	\$95.00	\$98.00	\$101.00
Funding Specialist	\$75.00	\$77.00	\$80.00
Technician V	\$97.00	\$100.00	\$103.00
Technician IV	\$96.00	\$99.00	\$102.00
Technician III	\$77.00	\$79.00	\$82.00
Technician II	\$65.00	\$67.00	\$69.00
Technician I	\$54.00	\$56.00	\$57.00
Administrative Assistant	\$45.00	\$46.00	\$48.00

CHARGEABLE EXPENSES

Mileage (Federal State Rate) subject to change	\$.575/mile
Meals/Lodging	Cost
Stakes & Expendable Materials.....	Cost
Waste Water Sampler	\$40.00/Day
ISCO Flow Recorder	\$60.00/Day
Photoionization Detection Meter	\$80.00/Day
Explosimeter.....	\$50.00/Day
Product Recovery Equipment.....	\$35.00/Day
Survey-Grade GPS (Global Positioning System)	\$75.00/Hour
Mapping GPS (Global Positioning System)	\$150.00/Day
Soil Drilling Rig	\$35.00/Hour
Ground Water Sampling Equipment	\$75.00/Day

All Accounts due and payable within 30 days of billing. A finance charge is computed on a periodic rate of 1% per month which is an annual percentage rate of 12% on any previous balance not paid within 30 days.

These rates are effective for the years indicated and are subject to yearly adjustments which reflect equitable changes in the various components.

**COMPENSATION PACKET RPR-3:
Resident Project Representative – Percentage of Construction Cost**

Article 2 of the Agreement is supplemented to include the following agreement of the parties:

C2.04 *Compensation for Resident Project Representative Basic Services – Percentage of Construction Cost Method of Payment, by hourly rates not to exceed 6% of construction cost.*

A. Owner shall pay Engineer for:

1. *Resident Project Representative Services:* For services of Engineer's Resident Project Representative under Paragraph A1.05.A of Exhibit A of the Agreement, an amount not to exceed 6 percent of the Construction Cost. This amount includes compensation for Resident Project Representative's services, and those of any assistants to the Resident Project Representative. The percentage of Construction Cost noted herein accounts for labor costs, overhead, profit, and expenses (other than any expressly allowed Reimbursable Expenses).
2. As a basis for payment to Engineer, Construction Cost will be based on one or more of the following determinations with precedence in the order listed for Work designed or specified by Engineer.
 - a. For Work designed or specified and incorporated in the completed Project, the actual final price of the Construction Contract(s), as duly adjusted by Change Orders.
 - b. For Work designed or specified but not constructed, the lowest bona fide Bid received from a qualified bidder for such Work; or, if the Work is not Bid, the lowest bona fide negotiated proposal for such Work.
 - c. For Work designed or specified but not constructed upon which no such Bid or proposal is received, Engineer's most recent opinion of probable Construction Cost.
 - d. Labor furnished by Owner for the Project will be included in the Construction Cost at current market rates including a reasonable allowance for overhead and profit. Materials and equipment furnished by Owner will be included at current market prices.
 - e. For purposes of determining Construction Cost under this provision, no deduction is to be made from Construction Contract price on account of any penalty, liquidated damages, or other amounts withheld from payments to Contractor(s).
3. *Reimbursable Expenses:* In addition to the Percentage of Construction Cost, Engineer is also entitled to reimbursement from Owner for the following RPR Reimbursable Expenses (see Appendix 1 for rates or charges)

**COMPENSATION PACKET AS-1:
Additional Services – Standard Hourly Rates**

Article 2 of the Agreement is supplemented to include the following agreement of the parties:

C2.05 Compensation for Additional Services – Standard Hourly Rates Method of Payment

A. Owner shall pay Engineer for Additional Services, if any, as follows:

1. *General:* For services of Engineer's personnel engaged directly on the Project pursuant to Paragraph A2.01 or A2.02 of Exhibit A, except for services as a consultant or witness under Paragraph A2.01.A.20, (which if needed shall be separately negotiated based on the nature of the required consultation or testimony) an amount equal to the cumulative hours charged to the Project by each class of Engineer's personnel times Standard Hourly Rates for each applicable billing class for all Additional Services performed on the Project, plus related Reimbursable Expenses and Engineer's Consultant's charges, if any.

B. *Compensation For Reimbursable Expenses:*

1. For those Reimbursable Expenses that are not accounted for in the compensation for Basic Services under Paragraph C2.01 and are directly related to the provision of Additional Services, Owner shall pay Engineer at the rates set forth in Appendix 1 to this Exhibit C.
2. Reimbursable Expenses include the expenses identified in Appendix 1 and the following categories: transportation (including mileage), lodging, and subsistence incidental thereto; providing and maintaining field office facilities including furnishings and utilities; toll telephone calls, mobile phone charges, and courier charges; reproduction of reports, Drawings, Specifications, bidding-related or other procurement documents, Construction Contract Documents, and similar Project-related items; and Consultants' charges. In addition, if authorized in advance by Owner, Reimbursable Expenses will also include expenses incurred for the use of highly specialized equipment.
3. The amounts payable to Engineer for Reimbursable Expenses, if any, will be the Additional Services-related internal expenses actually incurred or allocated by Engineer, plus all invoiced external Reimbursable Expenses allocable to such Additional Services, the latter multiplied by a factor of 1.1.
4. The Reimbursable Expenses Schedule will be adjusted annually (as of 1-1-16) to reflect equitable changes in the compensation payable to Engineer. Changes will not be effective unless and until concurred in by the Owner.

C. *Other Provisions Concerning Payment for Additional Services:*

1. Whenever Engineer is entitled to compensation for the charges of Engineer's Consultants, those charges shall be the amounts billed by Engineer's Consultants to Engineer times a factor of 1.1.

2. *Factors:* The external Reimbursable Expenses and Engineer's Consultant's Factors include Engineer's overhead and profit associated with Engineer's responsibility for the administration of such services and costs.
3. To the extent necessary to verify Engineer's charges and upon Owner's timely request, Engineer shall make copies of such records available to Owner at no cost.

This is **EXHIBIT D**, consisting of 5 pages, referred to in and part of the **Agreement between Owner and Engineer for Professional Services** dated 01-01-2016.

Duties, Responsibilities, and Limitations of Authority of Resident Project Representative

Article 1 of the Agreement is supplemented to include the following agreement of the parties:

ARTICLE 1 - SERVICES OF ENGINEER

D1.01 Resident Project Representative

- A. Engineer shall furnish a Resident Project Representative ("RPR") to assist Engineer in observing progress and quality of the Work. The RPR may provide full time representation or may provide representation to a lesser degree. RPR is Engineer's representative at the Site, will act as directed by and under the supervision of Engineer, and will confer with Engineer regarding RPR's actions.
- B. Through RPR's observations of the Work, including field checks of materials and installed equipment, Engineer shall endeavor to provide further protection for Owner against defects and deficiencies in the Work. However, Engineer shall not, as a result of such RPR observations of the Work, supervise, direct, or have control over the Work, nor shall Engineer (including the RPR) have authority over or responsibility for the means, methods, techniques, sequences, or procedures of construction selected or used by any Constructor, for security or safety at the Site, for safety precautions and programs incident to the Work or any Constructor's work in progress, for the coordination of the Constructors' work or schedules, or for any failure of any Constructor to comply with Laws and Regulations applicable to the performing and furnishing of its work. The Engineer (including RPR) neither guarantees the performances of any Constructor nor assumes responsibility for any Constructor's failure to furnish and perform the Work, or any portion of the Work, in accordance with the Construction Contract Documents. In addition, the specific terms set forth in Exhibit A, Paragraph A1.05, of this Agreement are applicable.
- C. The duties and responsibilities of the RPR are as follows:
 1. *General:* RPR's dealings in matters pertaining to the Work in general shall be with Engineer and Contractor. RPR's dealings with Subcontractors shall only be through or with the full knowledge and approval of Contractor. RPR shall generally communicate with Owner only with the knowledge of and under the direction of Engineer.
 2. *Schedules:* Review the progress schedule, schedule of Shop Drawing and Sample submittals, schedule of values, and other schedules prepared by Contractor and consult with Engineer concerning acceptability of such schedules.
 3. *Conferences and Meetings:* Attend meetings with Contractor, such as preconstruction conferences, progress meetings, job conferences, and other Project-related meetings

(but not including Contractor's safety meetings), and as appropriate prepare and circulate copies of minutes thereof.

4. *Safety Compliance:* Comply with Site safety programs, as they apply to RPR, and if required to do so by such safety programs, receive safety training specifically related to RPR's own personal safety while at the Site.
5. *Liaison:*
 - a. Serve as Engineer's liaison with Contractor. Working principally through Contractor's authorized representative or designee, assist in providing information regarding the provisions and intent of the Construction Contract Documents.
 - b. Assist Engineer in serving as Owner's liaison with Contractor when Contractor's operations affect Owner's on-Site operations.
 - c. Assist in obtaining from Owner additional details or information, when required for proper execution of the Work.
6. *Clarifications and Interpretations:* Receive from Contractor submittal of any matters in question concerning the requirements of the Construction Contract Documents (sometimes referred to as requests for information or interpretation—RFIs), or relating to the acceptability of the Work under the Construction Contract Documents. Report to Engineer regarding such RFIs. Report to Engineer when clarifications and interpretations of the Construction Contract Documents are needed, whether as the result of a Contractor RFI or otherwise. Transmit Engineer's clarifications, interpretations, and decisions to Contractor. ,
7. *Shop Drawings and Samples:*
 - a. Record date of receipt of Samples and Contractor-approved Shop Drawings.
 - b. Receive Samples that are furnished at the Site by Contractor, and notify Engineer of availability of Samples for examination.
 - c. Advise Engineer and Contractor of the commencement of any portion of the Work requiring a Shop Drawing or Sample submittal, if RPR believes that the submittal has not been received from Contractor, or has not been approved by Contractor or Engineer.
8. *Proposed Modifications:* Consider and evaluate Contractor's suggestions for modifications to the Drawings or Specifications, and report such suggestions, together with RPR's recommendations, if any, to Engineer. Transmit Engineer's response (if any) to such suggestions to Contractor.
9. *Review of Work; Defective Work:*
 - a. Report to Engineer whenever RPR believes that any part of the Work is defective under the terms and standards set forth in the Construction Contract Documents, and provide recommendations as to whether such Work should be corrected,

removed and replaced, or accepted as provided in the Construction Contract Documents.

- b. Inform Engineer of any Work that RPR believes is not defective under the terms and standards set forth in the Construction Contract Documents, but is nonetheless not compatible with the design concept of the completed Project as a functioning whole, and provide recommendations to Engineer for addressing such Work. ; and
- c. Advise Engineer of that part of the Work that RPR believes should be uncovered for observation, or requires special testing, inspection, or approval.

10. *Inspections, Tests, and System Start-ups:*

- a. Consult with Engineer in advance of scheduled inspections, tests, and systems start-ups.
- b. Verify that tests, equipment, and systems start-ups and operating and maintenance training are conducted in the presence of appropriate Owner's personnel, and that Contractor maintains adequate records thereof.
- c. Observe, record, and report to Engineer appropriate details relative to the test procedures and systems start-ups.
- d. Observe whether Contractor has arranged for inspections required by Laws and Regulations, including but not limited to those to be performed by public or other agencies having jurisdiction over the Work.
- e. Accompany visiting inspectors representing public or other agencies having jurisdiction over the Work, record the results of these inspections, and report to Engineer.

11. *Records:*

- a. Maintain at the Site orderly files for correspondence, reports of job conferences, copies of Construction Contract Documents including all Change Orders, Field Orders, Work Change Directives, Addenda, additional Drawings issued subsequent to the execution of the Construction Contract, RFIs, Engineer's clarifications and interpretations of the Construction Contract Documents, progress reports, approved Shop Drawing and Sample submittals, and other Project-related documents.
- b. Prepare a daily report or keep a diary or log book, recording Contractor's hours on the Site, Subcontractors present at the Site, weather conditions, data relative to questions of Change Orders, Field Orders, Work Change Directives, or changed conditions, Site visitors, deliveries of equipment or materials, daily activities, decisions, observations in general, and specific observations in more detail as in the case of observing test procedures; and send copies to Engineer.
- c. Upon request from Owner to Engineer, photograph or video Work in progress or Site conditions.

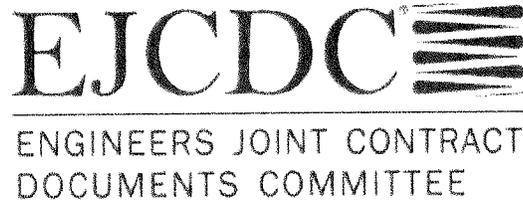
- d. Record and maintain accurate, up-to-date lists of the names, addresses, fax numbers, e-mail addresses, websites, and telephone numbers (including mobile numbers) of all Contractors, Subcontractors, and major Suppliers of materials and equipment.
 - e. Maintain records for use in preparing Project documentation.
 - f. Upon completion of the Work, furnish original set of all RPR Project documentation to Engineer.
12. *Reports:*
- a. Furnish to Engineer periodic reports as required of progress of the Work and of Contractor's compliance with the progress schedule and schedule of Shop Drawing and Sample submittals.
 - b. Furnish to Engineer and Owner copies of all inspection, test, and system start-up reports.
 - c. Immediately inform Engineer of the occurrence of any Site accidents, emergencies, acts of God endangering the Work, possible force majeure or delay events, damage to property by fire or other causes, or the discovery of any potential differing site condition or Constituent of Concern.
13. *Payment Requests:* Review applications for payment with Contractor for compliance with the established procedure for their submission and forward with recommendations to Engineer, noting particularly the relationship of the payment requested to the schedule of values, Work completed, and materials and equipment delivered at the Site but not incorporated in the Work.
14. *Certificates, Operation and Maintenance Manuals:* During the course of the Work, verify that materials and equipment certificates, operation and maintenance manuals and other data required by the Contract Documents to be assembled and furnished by Contractor are applicable to the items actually installed and in accordance with the Contract Documents, and have these documents delivered to Engineer for review and forwarding to Owner prior to payment for that part of the Work.
15. *Completion:*
- a. Participate in Engineer's visits to the Site regarding Substantial Completion, assist in the determination of Substantial Completion, and prior to the issuance of a Certificate of Substantial Completion submit a punch list of observed items requiring completion or correction.
 - b. Participate in Engineer's visit to the Site in the company of Owner and Contractor, to determine completion of the Work, and prepare a final punch list of items to be completed or corrected by Contractor.

- c. Observe whether all items on the final punch list have been completed or corrected, and make recommendations to Engineer concerning acceptance and issuance of the Notice of Acceptability of the Work (Exhibit E).

D. Resident Project Representative shall not:

1. Authorize any deviation from the Construction Contract Documents or substitution of materials or equipment (including "or-equal" items).
2. Exceed limitations of Engineer's authority as set forth in this Agreement.
3. Undertake any of the responsibilities of Contractor, Subcontractors, or Suppliers, or any Constructor.
4. Advise on, issue directions relative to, or assume control over any aspect of the means, methods, techniques, sequences or procedures of the Work, by Contractor or any other Constructor.
5. Advise on, issue directions regarding, or assume control over security or safety practices, precautions, and programs in connection with the activities or operations of Owner or Contractor.
6. Participate in specialized field or laboratory tests or inspections conducted off-site by others except as specifically authorized by Engineer.
7. Accept Shop Drawing or Sample submittals from anyone other than Contractor.
8. Authorize Owner to occupy the Project in whole or in part.

This is **EXHIBIT E**, consisting of 2 pages, referred to in and part of the **Agreement between Owner and Engineer for Professional Services** dated 01-01-2016.



NOTICE OF ACCEPTABILITY OF WORK

PROJECT:

OWNER:

CONTRACTOR:

OWNER'S CONSTRUCTION CONTRACT IDENTIFICATION:

EFFECTIVE DATE OF THE CONSTRUCTION CONTRACT:

ENGINEER:

NOTICE DATE:

To: _____
Owner

And To: _____
Contractor

From: _____
Engineer

The Engineer hereby gives notice to the above Owner and Contractor that Engineer has recommended final payment of Contractor, and that the Work furnished and performed by Contractor under the above Construction Contract is acceptable, expressly subject to the provisions of the related Contract Documents, the Agreement between Owner and Engineer for Professional Services dated _____, and the following terms and conditions of this Notice:

CONDITIONS OF NOTICE OF ACCEPTABILITY OF WORK

The Notice of Acceptability of Work ("Notice") is expressly made subject to the following terms and conditions to which all those who receive said Notice and rely thereon agree:

1. This Notice is given with the skill and care ordinarily used by members of the engineering profession practicing under similar conditions at the same time and in the same locality.
2. This Notice reflects and is an expression of the Engineer's professional opinion.
3. This Notice is given as to the best of Engineer's knowledge, information, and belief as of the Notice Date.
4. This Notice is based entirely on and expressly limited by the scope of services Engineer has been employed by Owner to perform or furnish during construction of the Project (including observation of the Contractor's work) under Engineer's Agreement with Owner, and applies only to facts that are within Engineer's knowledge or could reasonably have been ascertained by Engineer as a result of carrying out the responsibilities specifically assigned to Engineer under such Agreement.
5. This Notice is not a guarantee or warranty of Contractor's performance under the Construction Contract, an acceptance of Work that is not in accordance with the related Contract Documents, including but not limited to defective Work discovered after final inspection, nor an assumption of responsibility for any failure of Contractor to furnish and perform the Work thereunder in accordance with the Construction Contract Documents, or to otherwise comply with the Construction Contract Documents or the terms of any special guarantees specified therein.
6. This Notice does not relieve Contractor of any surviving obligations under the Construction Contract, and is subject to Owner's reservations of rights with respect to completion and final payment.

By: _____

Title: _____

Dated: _____

This is **EXHIBIT G**, consisting of 2 pages, referred to in and part of the **Agreement between Owner and Engineer for Professional Services** dated 01-01-2016.

Insurance

Paragraph 6.05 of the Agreement is supplemented to include the following agreement of the parties:

G6.05 *Insurance*

A. The limits of liability for the insurance required by Paragraph 6.05.A and 6.05.B of the Agreement are as follows:

1. By Engineer:

- a. Workers' Compensation: Statutory
- b. Employer's Liability --
 - 1) Bodily injury, each accident: \$100,000.00
 - 2) Bodily injury by disease, each employee: \$500,000.00
 - 3) Bodily injury/disease, aggregate: \$100,000.00
- c. General Liability --
 - 1) Each Occurrence (Bodily Injury and Property Damage): \$3,000,000.00
 - 2) General Aggregate: \$3,000,000.00
- d. Excess or Umbrella Liability --
 - 1) Per Occurrence: \$1,000,000.00
 - 2) General Aggregate: \$2,000,000.00
- e. Automobile Liability --Combined Single Limit (Bodily Injury and Property Damage):
\$1,000,000.00
- f. Professional Liability --
 - 1) Each Claim Made \$2,000,000.00
 - 2) Annual Aggregate \$2,000,000.00
- g. Other (specify): \$[REDACTED]

2. By Owner:

- a. Workers' Compensation: Statutory

Exhibit G – Insurance.

b. Employer's Liability --

- 1) Bodily injury, Each Accident \$[]
- 2) Bodily injury by Disease, Each Employee \$[]
- 3) Bodily injury/Disease, Aggregate \$[]

c. General Liability --

- 1) General Aggregate: \$[]
- 2) Each Occurrence (Bodily Injury and Property Damage): \$[]

d. Excess Umbrella Liability

- 1) Per Occurrence: \$[]
- 2) General Aggregate: \$[]

e. Automobile Liability – Combined Single Limit (Bodily Injury and Property Damage):

\$[]

f. Other (specify):

\$[]

B. Additional Insureds:

- 1. The following individuals or entities are to be listed on Owner's general liability policies of insurance as additional insureds:

a. []

Engineer

b. []

Engineer's Consultant

c. []

Engineer's Consultant

d. []

[other]

- 2. During the term of this Agreement the Engineer shall notify Owner of any other Consultant to be listed as an additional insured on Owner's general liability policies of insurance.

- 3. The Owner shall be listed on Engineer's general liability policy as provided in Paragraph 6.05.A.

Exhibit G – Insurance.

EJCDC® E-500, Agreement Between Owner and Engineer for Professional Services.

This is **EXHIBIT H**, consisting of 2 pages, referred to in and part of the **Agreement between Owner and Engineer for Professional Services** dated 01-01-2016.

Dispute Resolution

Paragraph 6.09 of the Agreement is supplemented to include the following agreement of the parties:

H6.08 *Dispute Resolution*

A. *Mediation:*

1. Owner and Engineer agree that they shall first submit any and all unsettled claims, counterclaims, disputes, and other matters in question between them arising out of or relating to this Agreement or the breach thereof ("Disputes") to mediation. If such mediation is unsuccessful in resolving a Dispute, then (a) the parties may mutually agree to a dispute resolution of their choice, or (b) either party may seek to have the Dispute resolved by a court of competent jurisdiction.

This is **EXHIBIT I**, consisting of 1 pages, referred to in and part of the **Agreement between Owner and Engineer for Professional Services** dated 01-01-2016.

Limitations of Liability

Paragraph 6.11 of the Agreement is supplemented to include the following agreement of the parties:

A. *Limitation of Engineer's Liability*

1. *Engineer's Liability Limited to Amount of Engineer's Compensation:* To the fullest extent permitted by Laws and Regulations, and notwithstanding any other provision of this Agreement, the total liability, in the aggregate, of Engineer and Engineer's officers, directors, members, partners, agents, employees, and Consultants, to Owner and anyone claiming by, through, or under Owner for any and all claims, losses, costs, or damages whatsoever arising out of, resulting from, or in any way related to the Project or the Agreement from any cause or causes, including but not limited to the negligence, professional errors or omissions, strict liability, breach of contract, indemnity obligations, or warranty express or implied of Engineer or Engineer's officers, directors, members, partners, agents, employees, or Consultants shall not exceed the total compensation received by Engineer under this Agreement.
-

This is **EXHIBIT J**, consisting of 1 pages, referred to in and part of the **Agreement between Owner and Engineer for Professional Services** dated 01-01-2016.

Special Provisions

- A. Special Assessment Policy
 - 1. The Report of Feasibility will be at no cost to the Owner.
 - 2. The reimbursement for plans and specifications will be as follows:
 - a. Normal city assessment project as per the percentages on page 1 of Exhibit C.
 - b. For State Aid or Federal Aid projects will be 12% of the construction cost.
 - 3. The reimbursement for Resident Project Representative (RPR), staking (S) and Construction Administration (CA), will be as follows:
 - a. Normal city assessment project, will be billed hourly not to exceed 6% of the construction cost.
 - b. State Aid or Federal Aid projects, will be billed hourly not to exceed 10% of the construction cost.
 - 4. Reimbursement for the preparation of the assessment roll will be one percent (1%) of the actual construction cost. This shall also include the preliminary and final assessment hearings
- B. Review of site plans for conformance with design guidelines (sidewalks, ROW, utilities and storm sewer)
- C. Engineer will provide 20 hours of any labor class free of charge each month for General Services.
- D. Owner shall reimburse the Engineer for the construction testing performed by an Independent Contractor. This amount shall not be included in the Engineer's reimbursable percentages.

COMPARISON OF WASTE WATER OPTIONS

3-Sep-15

Project	Cost	Year	Fixed Rate	6000 gallon cost	Projected Cash Balance
Interconnect	10,600,000	2015	17	42	
		2016	17	43	3,513,065
		2025	17	50	2,423,058
Assumption 3% water increase		2036	17	63	3,071,531
		2046	17	79	12,363,451
Interconnect	10,600,000	2015	17	42	
		2016	17	43	3,524,868
		2025	18	55	3,200,207
Assumption 4% water increase		2036	18	75	7,662,805
		2046	18	93	20,611,543

Request for Council Action

Date: September 8

To: East Grand Forks City Council Mayor Lynn Stauss, President Mark Olstad, Council Vice President Chad Grassel, Council Members: Clarence Vetter, Mike Pokrzywinski, Craig Buckalew, Henry Tweten, and Marc DeMers.

Cc: File

From: City Administrator David Murphy

RE: 2016 Budget Discussion.

Background

Information will be presented at the meeting. Finance Director Anderson and I are working on an alternative to the 32% tax levy increase. We are preparing a plan for a two-year correction plan along with the one-year correction plan. Unfortunately we were unable to have the information together prior to the packet deadline and will present the up to date information at the meeting.

Budget Impact

Unknown at this time.

Action Required

Discussion and questions to staff..

COMMERCIAL REFUSE

Current Rates

City of East Grand Forks

Size	1 Time/Wk	2 Times/Wk	3 Times/Wk	4 Times/Wk	5 Times/Wk	Saturday
1yd	\$28.50	\$41.75	\$55.00	\$68.25	\$81.50	\$161.50
2yr	\$57.00	\$83.50	\$110.00	\$136.50	\$163.00	\$243.00
4yd	\$100.75	\$140.50	\$180.25	\$220.00	\$253.75	\$333.75
6yd	\$131.25	\$171.00	\$210.75	\$250.50	\$290.25	\$370.25

Proposed Increased Rates

City of East Grand Forks

Size	1 Time/Wk	2 Times/Wk	3 Times/Wk	4 Times/Wk	5 Times/Wk	Saturday
1yd	\$35.63	\$58.45	\$82.50	\$102.38	\$122.25	\$202.25
2yr	\$57.00	\$96.03	\$132.00	\$163.80	\$195.60	\$285.60
4yd	\$101.75	\$182.65	\$270.38	\$352.00	\$406.00	\$526.00
6yd	\$137.81	\$273.60	\$379.35	\$450.90	\$551.48	\$671.48

Grand Forks 2016 Rates

Size	1 Time/Wk	2 Times/Wk	3 Times/Wk	4 Times/Wk	5 Times/Wk	Saturday
1yd						
2yr	\$48.79	\$97.56	\$146.34	\$195.12	\$243.90	\$292.70
4yd	\$95.11	\$190.25	\$285.35	\$380.85	\$475.58	\$570.71
6yd	\$141.45	\$282.90	\$424.36	\$565.80	\$707.26	\$847.78

RESIDENTIAL REFUSE RATES

EGF

Current

\$11.75 35 gallon
\$14.75 64 gallon

EGF

Proposed Increased Rate

\$13.00 35 gallon
\$16.25 64 gallon

Grand Forks

Current

\$15.82 flat fee-doesn't matter what size container you have

Grand Forks

Proposed Increased Rate (3% increase)

\$16.29 flat fee-doesn't matter what size container you have