

**DOCUMENT B**

RD:EK  
4/11/2018

**FUNDING AND REIMBURSEMENT AGREEMENT  
BY AND BETWEEN  
THE CITY OF SAN JOSE  
AND  
FOR PERMITTING AND PROCESS IMPROVEMENT COSTS  
RELATED TO THE PERMITTING OF SMALL CELLS ON CITY OWNED  
ASSETS IN THE PUBLIC RIGHT OF WAY**

THIS FUNDING AND REIMBURSEMENT AGREEMENT ("AGREEMENT") is made and entered into this \_\_\_\_\_ day of \_\_\_\_\_ 2018 ("EFFECTIVE DATE"), by and between the CITY OF SAN JOSE, a municipal corporation of the State of California ("CITY"), and ("COMPANY").

**RECITALS**

**WHEREAS**, COMPANY and CITY entered into a Master Non-Exclusive Installation and Property Use Agreement ("MASTER AGREEMENT") for small cells dated September 9, 2016; and

**WHEREAS**, COMPANY and CITY have proposed a small cell value exchanged partnership outlined in a non-binding letter of intent dated November 30, 2017; and

**WHEREAS**, COMPANY AND CITY wish to enter into this AGREEMENT whereby CITY will provide a Usage Fee of \$1,500 for the first five (5) years on the average applicable small cell usage fee rates in Exhibit B to the MASTER AGREEMENT for approximately 170 small cells in return for alignment with the City's goals for broadband deployment equity, digital inclusion, and the payments made by COMPANY herein and the other terms of this AGREEMENT.

**NOW, THEREFORE**, subject to the terms, provisions and conditions hereinafter set forth, the parties hereto agree as follows:

**DEFINITIONS**

"SMALL CELL SCOPE" means approximately 170 small cell sites for the term of this AGREEMENT.

In the event of redevelopment or other activity impacting a licensed site and the parties cannot agree upon an appropriate alternate site, COMPANY may select another location within the CITY under this AGREEMENT.

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### 1. Payment of Funds.

1.1 Payment of CITY's Costs. COMPANY shall advance funds to pay for CITY permitting and improvement costs as provided herein for the proposed SMALL CELL SCOPE (referred to herein as the "WORK"), including WORK performed by CITY's consultants and staff.

### 1.2 Payment Schedule.

1.2.1 Payment. COMPANY shall make an initial payment to CITY in the amount of Eight Hundred Fifty Thousand and No/100 Dollars (\$850,000.00) ("Permitting Fee Payment") to pay for CITY's costs related to the WORK, including engineering, permitting and inspecting pole attachments and other work necessary to accelerate broadband deployment and in furtherance of CITY's commitment to hire more CITY staff to provide the permitting services required to process COMPANY's small cell applications. The Permitting Fee Payment shall be made within thirty (30) days following full execution and delivery of this AGREEMENT by CITY and COMPANY. The Permitting Fee Payment shall be in lieu of individual permit fees for the SMALL CELL SCOPE

1.2.2 Additional Payments. COMPANY shall make additional payments to CITY in an amount not to exceed One Million and No/100 Dollars (\$1,000,000.00) ("SMALL CELL SCOPE Completion Fee Payment") as set forth below: (a) within 45 days of the EFFECTIVE DATE, an amount of \$250,000; (b) within 30 days after issuance of a total of 85 permits, an additional \$250,000, (c) within 30 days after issuance of a total 125 permits, an additional, \$250,000, and (d) as of the issuance of all permits in the SMALL CELL SCOPE, an additional \$250,000 payment.

The Permitting Fee Payment and SMALL CELL SCOPE Completion Fee Payment shall be hereinafter collectively referred to as the "Payment." CITY and COMPANY agree that in the event of any early termination of this AGREEMENT, any such amount of the Payment not actually expended by CITY for the SMALL CELL SCOPE shall be reimbursed to COMPANY in accordance with the terms and conditions of this AGREEMENT.

**1.3 Accounting.**

1.3.1 The CITY will establish a Billing Account (“Account”) to which costs incurred pursuant to this AGREEMENT will be charged. CITY will bill work against the Account at hourly rates based on CITY’s direct costs for the work, including, but not limited to salaries, benefits, overhead and other administrative expenses, as reflected in the Department’s schedule of fees and charges approved by City Council resolution and in effect at the time of billing. Costs of any consultants hired by CITY in connection with the scope of the WORK described in Section 2 below shall be billed at the rate actually incurred by CITY, without any markups. In no event shall any such cost or expense exceed the Payment agreed to hereunder without the prior written consent of COMPANY which consent may be withheld in COMPANY’S sole discretion.

1.3.2 The CITY will keep records of all funds advanced by COMPANY pursuant to this AGREEMENT and of all expenditures of such funds. If requested by COMPANY, CITY will provide such records to COMPANY at no additional cost to COMPANY in the form of a quarterly computer printout summarizing the deposits and charges to the Account. Within thirty (30) calendar days following the expiration date, as defined in Section 3.1 below, or earlier termination of this AGREEMENT, the Department will submit to COMPANY a final written accounting of the Account and promptly refund to COMPANY any unused amounts at that time. The foregoing City covenant will survive the expiration or earlier termination of this Agreement.

**1.4 Refunds.**

1.4.1 If this AGREEMENT expires or is terminated by COMPANY as provided herein, the balance of the Permitting Fee Payment made by COMPANY that is not required to pay for costs already incurred by CITY in accordance with this AGREEMENT prior to the expiration date or the date of the termination notice, shall be refunded to COMPANY within thirty (30) calendar days of the final accounting pursuant to Section 1.3.2 of this AGREEMENT.

**1.5 Interest.**

1.5.1 Interest shall not accrue on any Payment and shall not be paid by CITY in refunding a Payment or any portion thereof.

**1.6 Commitment by CITY.**

1.6.1 COMPANY acknowledges and understands that this AGREEMENT is only for the purpose of providing a funding mechanism to allow CITY staff and CITY consultants to perform necessary tasks connected with expedited permitting of the SMALL CELL SCOPE, and upgrading the City’s pole attachment process and associated technology solution refresh. COMPANY agrees and acknowledges that this AGREEMENT in no way commits CITY to approving non-compliant encroachment permit requests. CITY agrees and acknowledges that it will process the SMALL CELL SCOPE in an efficient manner and make good faith efforts to achieve an average processing time of 60 business days. The average processing time of 60 business days does not include any days taken by COMPANY to respond to any reasonable request for information concerning a permit. CITY shall also use all reasonable efforts to issue final permits for each of the 170 sites identified by COMPANY for the SMALL CELL SCOPE, or such lesser number as determined by COMPANY to enable COMPANY to provide sufficient signal coverage and operational capacity for COMPANY’s proprietary coverage area plan for the CITY, as determined by COMPANY in its sole discretion.

**2. Small Cell Agreement.**

2.1 CITY shall work in good faith with COMPANY in the efficient processing of any small cell permits submitted by COMPANY in connection with the use and lease of CITY facility or property consistent with this AGREEMENT and all applicable laws, regulations, policies and processes of the CITY within an average processing time of sixty (60) days.

2.2 Notwithstanding anything to the contrary in the MASTER AGREEMENT, a Usage Fee of \$1,500 per small cell site shall be applied for the first five (5) years of all SLAs within the SMALL CELL SCOPE. Thereafter, the Usage Fee shall increase in accordance with Section 3.B.1 of the MASTER AGREEMENT. Accordingly, the Usage Fee for the first 15 years of each SLA shall be as follows:

Year 1:	\$1,500	Year 6:	\$1,545	Year 11:	\$1,794
Year 2:	\$1,500	Year 7:	\$1,592	Year 12:	\$1,848
Year 3:	\$1,500	Year 8:	\$1,640	Year 13:	\$1,904
Year 4:	\$1,500	Year 9:	\$1,690	Year 14:	\$1,962
Year 5:	\$1,500	Year 10:	\$1,741	Year 15:	\$2,021

Where CITY approves COMPANY’s plans for a particular small cell site showing the use of CITY’s infrastructure and/or electrical circuits, the Usage Fee will include such use.

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- 2.3 CITY hereby represents and warrants that as of the date hereof, that no rates or fees have been or are currently offered to any other entity with respect to communications facilities that is or will be more favorable to such entity than those being proposed to COMPANY herein. If the CITY agrees to a rate or fee that is more favorable than those imposed on COMPANY under the MASTER AGREEMENT, then the CITY shall make the more favorable rate or fee available to COMPANY for any future agreement under the same terms and conditions that were used to derive the more favorable rate or fee.
- 2.4 CITY intends and shall use good faith efforts to evaluate and consider modifying its standard MASTER AGREEMENT to include annual small cell lease discounts for volume batching of permits and commitments for substantial progress on an equitable and inclusive broadband deployment. These discounts may result in ongoing annual small cell usage rates of approximately \$1,500 or lower.
- 2.5 Any SLAs issued before the EFFECTIVE DATE of this AGREEMENT, shall be modified to conform with this AGREEMENT.

### **3. Procurement of Consultants.**

- 3.1 CITY may select and retain the services of a consultant or consultants ("Selected Consultant") to conduct the WORK. The Selected Consultant may engage sub consultants as approved and deemed appropriate by CITY. CITY shall direct and control the Selected Consultant's services and determine the scope of the WORK to be performed by CITY staff and the Selected Consultant. CITY shall work together with COMPANY to utilize COMPANY expertise and consulting to create technical solutions that efficiently minimize costs and expenses contemplated hereunder.
- 3.2 Consultant or staff services for the WORK is anticipated to include, but not limited to: adopting a SCRUM methodology of performing work, revising design standards, creating process flows, evaluating and implementing technology solutions and associated data accuracy and completeness. CITY may determine in its discretion whether additional tasks shall be performed in completing the WORK.

### **4. Termination and Expiration.**

- 4.1 This AGREEMENT shall expire upon the effective date of the completion of the SMALL CELL SCOPE, but in no event later than the expiration or earlier termination of the MASTER AGREEMENT.

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**4.2** Either COMPANY or CITY may terminate this AGREEMENT after 85 SLAs and permits are issued by delivering to the other party twenty (20) calendar days' advance written notice of election to terminate. If not subject to earlier termination, as provided herein, this AGREEMENT shall expire upon the last to occur of: (1) withdrawal of the SMALL CELL SCOPE applications by COMPANY; or (2) a final determination and action by CITY's City Council on the SMALL CELL SCOPE. COMPANY's obligations to reimburse CITY for any outstanding amounts due, however, shall survive, and remain enforceable after, the termination or expiration of this AGREEMENT. CITY shall refund to COMPANY a pro rata portion of the Permitting Fee Payment based on the number of final permits issued by CITY to COMPANY as of the effective date of termination of this AGREEMENT, CITY shall pay the refund to COMPANY within 30 days following the termination date. This Section 4.2 obligation shall survive the expiration or earlier termination of this AGREEMENT, and shall be applicable notwithstanding the provisions in Section 1.4 Refunds above.

**4.3** Upon termination or expiration of this AGREEMENT, the MASTER AGREEMENT annual small usage fee schedule shall apply to future SLAs; however those small cell locations which were approved as an SLA by CITY prior to the date of termination or expiration of this AGREEMENT, as the case may be shall remain in effect, unless the parties enter into a subsequent written agreement under an amended MASTER AGREEMENT.

**5. Indemnification.** Section 10, Indemnification of the MASTER AGREEMENT is hereby incorporated into this AGREEMENT by reference.

**6. Default.** Section 15, Remedies for Default by Company of the MASTER AGREEMENT is hereby incorporated into this AGREEMENT by reference.

### **7. Miscellaneous Provisions**

**7.1 Notices.** All notices to be given hereunder shall be in writing and shall be served, either personally or by mail, postage prepaid, to the addresses set forth below, or to any other address provided by one party to the other in writing.

To CITY:	City of San José Office of Civic Innovation Attn: Dolan Beckel 200 E. Santa Clara Street, 17 <sup>rd</sup> Floor Tower San José, CA 95113
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To COMPANY:

With a Copy to:

Such written notice shall be effective when properly sent and received, refused or returned undelivered.

- 7.2 Entire Agreement.** This AGREEMENT and the MASTER AGREEMENT contain the entire understanding between the parties with respect to the subject matter herein. In the event of any conflict between this AGREEMENT and the MASTER AGREEMENT, this AGREEMENT shall control. This AGREEMENT supersedes any and all prior representations, agreements, arrangements, or understandings (whether oral or written) between or among the parties relating to the subject matter of this AGREEMENT. This AGREEMENT may not be amended except pursuant to a written instrument signed by all parties.
- 7.3 Assignment.** COMPANY shall not assign any interest in this AGREEMENT and shall not transfer any interest in the same (whether by assignment or notation), without the prior written approval of CITY; provided that COMPANY may assign any interest in this AGREEMENT only to (i) any entity that is an affiliate of COMPANY, or (ii) to any entity that acquires all or substantially all of the COMPANY's assets in the market as defined by the Federal Communications Commission in which the real property is located with notice to CITY but without CITY's consent.
- 7.4 Waiver.** [Intentionally Omitted].

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- 7.5 **Applicable Law and Venue.** This AGREEMENT shall be governed by and interpreted in accordance with the laws of the State of California. In the event that suit shall be brought by either party to enforce or interpret the terms of this AGREEMENT, the parties agree that venue shall be exclusively vested in the state courts of the County of Santa Clara, or if federal jurisdiction is appropriate, exclusively in the United States District Court, Northern District of California, San José, California.
- 7.6 **No Third Party Beneficiaries.** This AGREEMENT shall not be construed as, or deemed to be an AGREEMENT for the benefit of, any third party or parties; and no third party or parties shall have any right or action hereunder for any cause whatsoever.
- 7.7 **No Joint Venture.** Neither this AGREEMENT, nor the reimbursements made hereunder, shall constitute or create any form of association, joint venture, partnership, or cooperative activity of any nature whatsoever for any purpose between CITY and COMPANY.
- 7.8 **Counterparts.** This AGREEMENT may be signed in counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same AGREEMENT.

APPROVED AS TO FORM:

“CITY”

CITY OF SAN JOSE,  
a municipal corporation

\_\_\_\_\_  
ELIZABETH KLOTZ  
Senior Deputy City Attorney

By \_\_\_\_\_  
NAME:  
TITLE:  
Date \_\_\_\_\_, 2018

“COMPANY”

By: \_\_\_\_\_  
Print Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_, 2018

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Funding and Reimbursement Agreement

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