

M E M O R A N D U M

TO: THE HONORABLE MAYOR AND
MEMBERS OF CITY COUNCIL

FROM: IGNACIO B. PESSOA *IBP/KS*
CITY ATTORNEY

KAREN S. SNOW *KS*
ASSISTANT CITY ATTORNEY

DATE: OCTOBER 20, 2004

SUBJECT: LICENSE AGREEMENT WITH XSPEDIUS MANAGEMENT CO. OF
VIRGINIA, LLC. d/b/a XSPEDIUS COMMUNICATIONS

Issue: Whether to approve a five-year license agreement with Xspedius Management Co. of Virginia, LLC. d/b/a Xspedius Communications (“Xspedius”), to authorize the installation of fibre optic cable in the public right-of-way.

Recommendation: That City council approve the attached five-year license agreement with Xspedius and authorize the City manager to execute the license agreement and to take any other actions that are necessary to implement the agreement.

Discussion: Xspedius is a certificated provider of telecommunications services in the Commonwealth Xspedius seeks to install approximately 11,500 feet of fiber optic cable in the City Xspedius seeks the license agreement to complete the building of a fiber optic ring that begins in D.C. and runs through Arlington. The proposed build is for a federal government customer who requires a fully redundant network .

The proposed route begins at the corner of Braddock Road and Commonwealth Avenue and then proceeds south on Commonwealth to the intersection of Commonwealth with Daingerfield and Diagonal Roads. The route turns west on Diagonal Road for approximately one block and then proceeds south on Reinekers Lane and continues to Duke Street. At this point the proposed route turns east on Duke Street for a short span before crossing Duke Street to Holland Lane. The route continues south on Holland Lane and then continues west on Eisenhower Avenue. The proposed route continues west on Eisenhower toward the crossover of Telegraph Road. The route parallels Eisenhower Avenue and turns northwest on Taylor Street to its intersection with Telegraph Road. The proposed route proceeds south on Telegraph Road and continues to the boundary of the City with Fairfax County on Telegraph Road. The proposed route is shown on the attached map.

The significant terms of the proposed agreement are summarized below.

The term of the agreement is for five years and runs from November 1, 2004 through October 31, 2009. It is not renewable. However, the agreement grants Xspedius the right to negotiate with the City for a new license at the conclusion of this agreement.

Second, as compensation to the City for the occupation of its rights-of-way, Xspedius will pay to the City, for each year of the agreement, a license fee equal to payment of the public right-of-way fee which is set forth in Virginia Code § 56-468.1, and which has been adopted by the City by § 5-2-160, et seq. of the City Code. The statutory fee is based upon the number of Xspedius' end users in the City.

Third, the agreement requires Xspedius to submit an Annual Operations Plan to the City's Department of Transportation and Environmental Services ("T&ES") for each of the five years covered by the agreement. Each operations plan will describe the construction that Xspedius intends to construct during the twelve-month period covered by the plan, the sites where the construction will occur and a tentative timetable for the work. The director of T&ES must review the plan and determine whether the public rights-of-way upon which the construction is planned are appropriate sites for the proposed equipment. These operations plans are intended to enable T&ES to coordinate Xspedius' construction activity with other planned construction in the City streets and public rights-of-way, thereby minimizing the disruption and inconvenience attendant to such work.

Fourth, the agreement requires Xspedius, prior to undertaking any specific construction project within a right -of-way to submit to T&ES a Construction Proposal which, among other things, will (i) identify the location within the right-of-way where the construction project is proposed, (ii) describe the equipment to be installed and the construction techniques to be used, (iii) state the dates on which the construction is expected to commence and to end, (iv) propose a traffic control plan and (v) verify that Xspedius has obtained, or will obtain prior to commencing the construction, all necessary approvals from other governmental entities including departments or agencies of the City.

Fifth, the agreement provides that the City can require Xspedius to remove or relocate, at Xspedius' expense, to the extent permitted by law, any conduits, cables or other equipment when City staff has determined that the equipment interferes with or disturbs the operation, improvement, repair or maintenance of the right-of-way or of other utility services.

Sixth, the agreement requires Xspedius to obtain permits from the City for any maintenance work and to repair all damages resulting from the work.

Seventh, the agreement provides that, upon its termination or non-renewal, Xspedius will remove all of its conduits, cable and other equipment from the City's rights-of-way.

Finally, the agreement provides that Xspedius must maintain adequate insurance to protect the City against claims arising from the system or the company's work on the system.

We will be pleased to answer any questions that you may have about this matter.

Attachment

cc: Philip Sunderland
City Manager

Michele Evans
Assistant City Manager

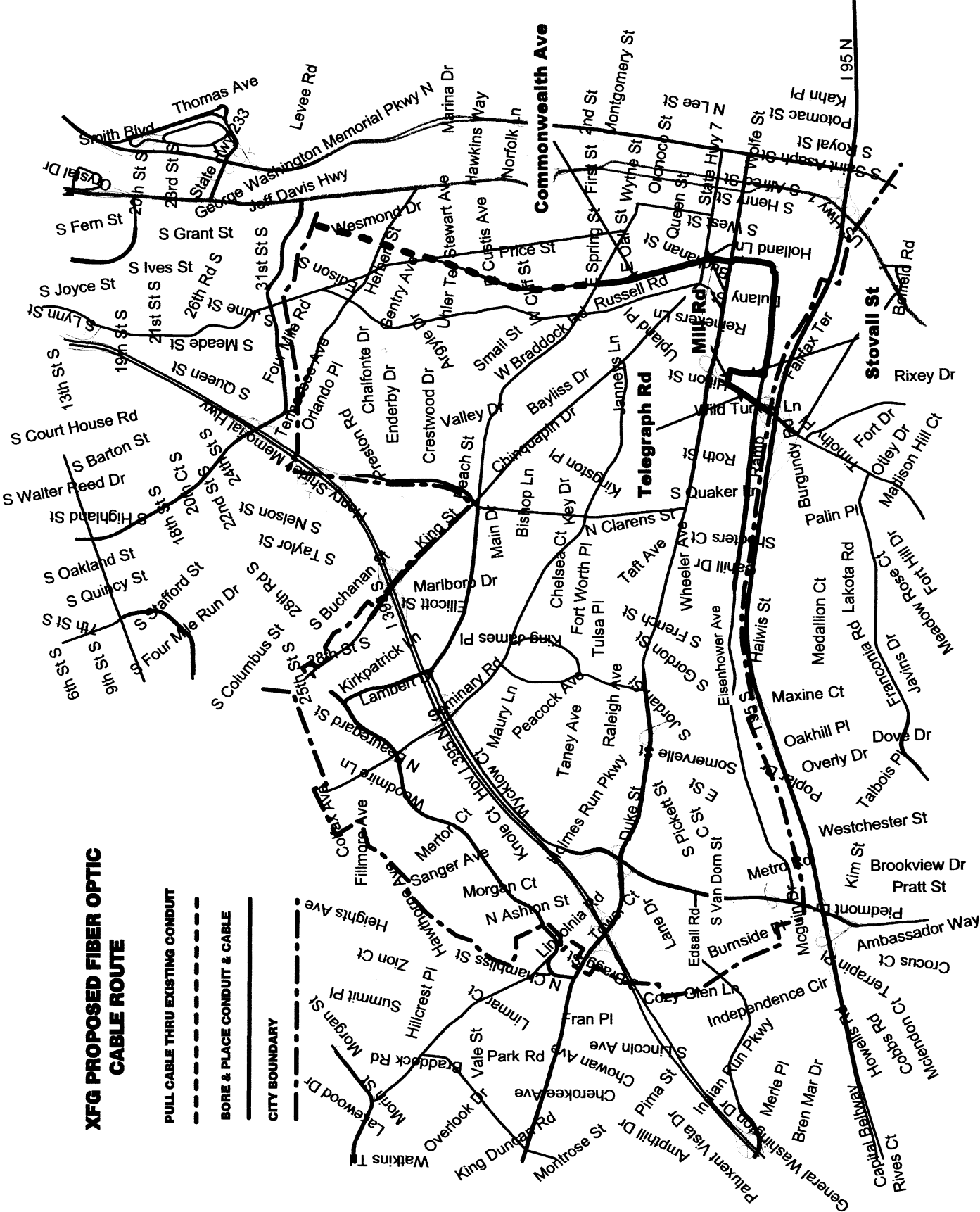
Rich Baier, Director
Transportation and Environmental Services

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**XFG PROPOSED FIBER OPTIC
CABLE ROUTE**

- PULL CABLE THRU EXISTING CONDUIT** (indicated by a dashed line)
- BORE & PLACE CONDUIT & CABLE** (indicated by a solid line)
- CITY BOUNDARY** (indicated by a thick solid line)



LICENSE AGREEMENT

CITY OF ALEXANDRIA

AND

**XSPEDIUS MANAGEMENT CO. OF VIRGINIA, LLC
D/B/A XSPEDIUS COMMUNICATIONS**

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LICENSE AGREEMENT

THIS AGREEMENT is made this _____ day of _____, 2004, by the City of Alexandria (“Licensor”), a municipal corporation of Virginia, and Xspedius Management Co. of Virginia, LLC d/b/a Xspedius Communications (“Licensee”), a Delaware corporation.

WHEREAS, Licensee desires to use Licensor’s streets in connection with its operation of a telecommunications system and delivery of telecommunications services; and

WHEREAS, Licensor is willing to permit Licensee to use its streets in connection with such system and service in accordance with the terms and conditions set forth below;

NOW, THEREFORE, in consideration of the premises, the mutual promises contained herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. Definitions.

(a) “Access Lines” shall include residence and business telephone lines and other switched common lines connecting a customer’s premises to an end office switch. “Access Lines” does not include local, state and federal government lines, interstate and intrastate WATS lines, special access lines, off-premises extensions, official lines used by providers of telecommunications service for administrative, testing, intercept and verification purposes, and commercial mobile radio service lines.

(b) Affiliate shall mean any Person controlling, controlled by or under common control with another Person.

(c) "Construction" shall mean the installation, construction and material expansion of any Facilities within a Public Way.

(d) "Director" shall mean any director of the Alexandria Department of Transportation and Environmental Services, or the Director's designee

(e) "Facilities" shall mean any and all cables, lines, wires, conduit, access manholes, switches, pedestals, boxes and other similar equipment and devices in the City owned by Licensee and used in the delivery of Telecommunications or on which Licensee performs repair, Maintenance, relocation or Removal in such a way as to require access to the Public Ways.

(f) "Maintenance" shall mean the maintenance, repair, replacement (including upgrading and non-material expansion), and Removal of the Facilities.

(g) "Person" shall mean a natural person or an association, partnership, corporation or other legally recognized entity.

(h) "Public Ways" shall mean the surface, the areas below the surface, and the air space above the surface of any and all of the following rights-of-way owned by or dedicated to the City of Alexandria which, during the term of this Agreement, are located within the corporate limits of the City of Alexandria: highways, roads, streets, lanes, alleys, curbs, sidewalks, bridges, overpasses, underpasses, and other similar rights-of-way.

2. Grant and Term of License.

(a) In exchange for the consideration described herein, Licensor grants to Licensee permission to use Licensor's Public Ways, in accordance with the provisions, terms and conditions in this Agreement and solely in order to provide Telecommunications, and for the Construction, Maintenance and Removal of Facilities. The permission granted by this

subsection is non-exclusive, and nothing in this Agreement shall affect the right of Licensor to permit other Persons to use the Public Ways.

(b) This Agreement and the permission granted by subsection (a) shall be subject to the police power of the City of Alexandria, and to all ordinances heretofore or hereafter enacted by the Alexandria City Council, to all regulations promulgated by Alexandria City officials, and to other applicable laws and regulations established by the Commonwealth of Virginia or the United States.

(c) The term of this license shall be from November 1, 2004, through October 31, 2009. This license may not be renewed. However, at any time before the conclusion of the term of this license Licensee shall have the right to negotiate with the Licensor for a new license for the Construction, Maintenance and Removal of Facilities within Public Ways.

(d) When used in this Agreement, the term "year" shall mean the period from November 1 of a year through October 31 of the following year.

3. License Fee.

(a) As compensation for this license, Licensee shall pay to Licensor, for each of the five years of this Agreement, a license fee as defined in this Section 3(a).

(i) Unless and until Licensee shows that its Facilities are being used to provide service to Access Lines in Virginia, and for any Subsequent Time Period (as defined in Section 3(a)(iv)) during which they are not so used, the license fee shall be \$3.50 per annum per linear foot of Licensee's Facilities installed in the Public Ways.

(ii) If and when Licensee shows that its Facilities are being used to provide service to access lines in Virginia, and until there is a Subsequent Time Period during which they are not so used, the license fee shall be calculated pursuant to § 5-2-160 *et seq.* of

The Code of the City of Alexandria, 1981, as amended (the “City Code”); provided, that should the City of Alexandria’s authority to impose the license fee provided in § 5-2-160 *et seq.* of the City Code be rescinded by the Virginia General Assembly or modified in a manner which would result in a lower fee being imposed upon Licensee, Licensee shall continue to pay, for the remainder of the term of this Agreement, the fee as defined in § 5-2-160 *et seq.* of the City Code immediately prior to such rescission or modification, so long as the fee is applied to all similar users of the Public Ways on a non-discriminatory basis.

(iii) The Licensee may show that its Facilities are being used to provide service to Access Lines in Virginia by filing with the City two written, signed certifications: (1) a certification by The Licensee stating that the Licensee’s Facilities are used to transmit signals for another telecommunications provider; and (2) a certification by that other telecommunications provider that the Licensee’s Facilities transmit signals that travel to or from at least one Access Line serving an end-user customer in the Commonwealth of Virginia, either of that provider or a local exchange carrier with which the provider is interconnected.

Alternatively, the Licensee may show that its Facilities in the City are being used to provide service to Access Lines in Virginia by filing with the City a certification by the Licensee stating that the Licensee uses its own Facilities in the City to transmit signals that travel to or from at least one Access Line serving an end-user customer of the Licensee in the Commonwealth of Virginia. The City may, at its discretion, accept in place of these filings other sufficient evidence showing that the Licensee’s Facilities in the City are being used to provide service to Access Lines in Virginia.

(iv) If any of the conditions certified to the City pursuant to Section 3(a)(iii) cease to be met for a period of one month or more (a “Subsequent Time Period”), the

Licensee shall immediately notify the City, and the license fee shall revert to the definition - specified in Section 3(a)(i) unless and until the Licensee can make a new showing pursuant to Section 3(a)(iii).

(b) The license fee shall be paid on a quarterly basis within two months after the end of the quarter for which the amount is due. Licensee acknowledges that the per-month fee defined in § 5-2-161 of the City Code may, at any time during the term of this Agreement, be increased by the Virginia Department of Transportation pursuant to § 56-462 of the Code of Virginia (1950), as amended. To the extent that fee is applicable under Section 3(a) hereof, Licensee agrees to pay any such increases in the per-month fee so long as the fee is applied to all similar users of the Public Ways on a non-discriminatory basis.

(c) A penalty, equal to 10 percent of the due and owing quarterly installment, shall be assessed against Licensee whenever it fails to pay a quarterly license fee installment on or before the date required by this section. In addition, interest, at 10 percent per annum on the due and owing quarterly license fee installment, shall be assessed against Licensee whenever it fails to pay the quarterly license fee installment on or before the date required by this section. Said interest shall start to run the day after the day that the quarterly license fee installment was due.

(d) Licensee shall furnish to the Licensor with each quarterly license fee installment payment a statement, executed by an authorized officer of Licensee or his or her designee, showing the basis for the payment (number of Access Lines or linear footage) and the calculation that derives the payment from that basis.

(e) If Licensee discovers that it has failed to make the entire or correct amount of the quarterly license fee payment due, it shall pay to Licensor the additional amount

due (including a penalty of 10 percent of such amount and interest calculated under subsection (c) above) within 15 days of its discovery of the underpayment. Any overpayment of the quarterly license fee by Licensee through error or otherwise shall be called to the attention of Licensor which, if satisfied that an overpayment was made, shall offset the amount of the overpayment, with interest at 10 percent per annum from the date paid, against the next quarterly license fee installment payment due from Licensee.

(f) Acceptance by the Licensor of any payment due under this section shall not be deemed to be a waiver by the Licensor of any breach of this license occurring prior thereto; nor shall the acceptance by the Licensor of any such payment preclude the Licensor from later establishing that a larger amount was actually due, or from collecting any balance due to the Licensor.

(g) The License Fee shall be paid in addition to, not instead of, any other amounts Licensee is required to pay Licensor by contract or under Licensor's taxing authority.

(h) On or before (i) November 1, 2005, (ii) November 1 of each subsequent year during the term of this Agreement, and (iii) November 1, 2009, Licensee shall furnish Licensor with a statement, executed by an authorized officer of Licensee or his or her designee, certifying that the total license fee paid by Licensee for the immediately preceding year was the correct amount required under this agreement.

(i) By agreeing to pay the license fee described in Section 3(a)(i) hereof, on the terms and conditions herein contained, Licensee does not waive its ability to take the position that such fees are not lawfully imposed under federal or Commonwealth of Virginia law. However, Licensee shall take no legal action against the City on that basis unless and until a court or agency of competent jurisdiction issues a decision that a compensation scheme of the

type described in Section 3(a)(i) hereof is unlawful under federal or Commonwealth of Virginia law, in which case Licensor agrees to meet with Licensee, at Licensee's request, and renegotiate the compensation arrangements in this Agreement. In the event that Licensee and Licensor cannot agree on the terms of the compensation arrangements within 60 days of Licensee's request to renegotiate, Licensee reserves all rights to challenge in any forum with competent jurisdiction the lawfulness of all license fee payments required and made under this Agreement and to seek injunctive relief against the prospective payment of such fees.

4. Licensee's Books of Account and Records; Reports.

(a) Licensee shall keep accurate books of account for the purpose of determining the license fee due to the Licensor. Licensee shall, within five business days after a written request by Licensor, forward to Licensee's primary office in Northern Virginia or another location of its choosing with the approval of the Licensor, copies of the books of account to the extent necessary to confirm the accuracy of payments due the Licensor, which Licensor may inspect at any time during regular business hours. Licensor may audit the books from time to time at Licensor's sole expense, but in each case only to the extent necessary to confirm the accuracy of payments due the Licensor.

(b) Upon reasonable request by Licensor, Licensee shall promptly transmit, mail or deliver, in accordance with sections 3 and 19 herein, copies of its financial records that will enable Licensor to determine the accuracy of any license fee payments made by Licensee.

(c) Licensor agrees to hold in confidence, to the maximum extent permitted by law, any information it receives from Licensee which, at the time that it is submitted to Licensor, is marked "proprietary information - confidential."

5. Operations Under License Agreement.

(a) Any Construction, Maintenance, or other activities in the Public Ways by the Licensee shall be subject to the City's general permit requirements.

(b) Annual Operations Plans

(i) Within thirty days after the effective date of this Agreement, and at least thirty days prior to each subsequent 12-month period, or partial period, occurring during the term of this Agreement, Licensee shall prepare and submit to the Director an initial Annual Operations Plan which shall describe or otherwise show each of the Public Ways in which Licensee intends to construct Facilities during the 12 months following the plan's submission, the type of Facilities Licensee intends to construct in each such Public Way, and the approximate date on which Licensee intends to begin construction in each Public Way. Such Annual Operations Plans shall be non-binding, but shall represent a reasonable projection by the Licensee of the activities it anticipates undertaking over the subsequent year. Licensor agrees to hold in confidence, to the maximum extent permitted by law, any information it receives from Licensee under its Annual Operations Plans which, at the time that it is submitted to Licensor, is marked "proprietary information— confidential."

(ii) The Licensee shall within a reasonable time period review any comments submitted, and shall respond within a reasonable time period to any questions posed, by the Director with respect to an Annual Operations Plan. In the event that, during a 12-month period covered by an Annual Operations Plan, Licensee makes significant changes in its anticipated routes, Licensee shall promptly submit to the Director an amendment to the Annual Operations Plan covering such changes.

(iii) Licensee shall, at the time it applies for a construction permit, submit to the Director accompanying information which (a) shall indicate how the proposed construction is related to the Annual Operations Plan, (b) shall identify the specific location within each Public Way in which the proposed construction is to take place, (c) shall describe the Facilities to be installed in each Public Way and the construction techniques to be used in accomplishing the installation, (d) shall provide a traffic control plan that shall be reviewed and approved by the Director, (e) shall state, as to each Public Way, the dates on which the proposed construction is to commence and on which the proposed construction is anticipated to be completed, (f) shall verify that Licensee has obtained, or will obtain prior to commencing the Construction, approval of the placement of the Facilities and any required permits from any other entity (including departments or agencies of the City of Alexandria) whose approval is required by law, and (g) shall provide whatever other information the Director reasonably requests. The Director shall have the discretion, which is to be reasonably exercised, to determine the timing of the proposed Construction, taking into account both the dates requested by Licensee and other planned or on-going construction work in the affected Public Ways. Licensee agrees that Construction of Facilities in Public Ways shall be done in such locations and in such manner so as not to unreasonably interfere with existing water, gas, sewer pipe, traffic signal, street light and other utilities and conduits in the Public Ways, or with the public's use of the Public Ways, and shall, to the maximum degree feasible, be coordinated (including through the sharing of Facilities and other equipment and devices) with any construction being simultaneously undertaken at the same location by another provider of Telecommunications or of cable service or by a provider of utilities.

(c) Licensee shall, in connection with any Construction, Maintenance, or other activities in the Public Ways, comply with all applicable laws and regulations, including all permits required by the City.

(d) Maintenance. Licensee may perform Maintenance on the Facilities from time to time without prior approval of the Director as long as neither the component of the Facilities being worked on, nor any of the equipment or workers involved in such Maintenance are located on the travel, parking, curb or sidewalk portion of a Public Way, or any other portion of a Public Way. At least 30 days prior to performing Maintenance on any Facilities while located on the travel, parking, curb or sidewalk portion of a Public Way, or any other portion of a Public Way, Licensee (i) shall inform the Director in writing of the location at which it intends to perform such Maintenance, (ii) shall provide whatever other information the Director requests, and (iii) shall obtain either a verbal or a written approval of the Maintenance from the Director. In performing Maintenance, Licensee shall comply with all requirements established by the Director. In addition to and notwithstanding the provisions of this subsection (b), Licensee shall maintain in good and safe condition all Facilities it places within Public Ways, and shall, in connection with any Maintenance activity it undertakes, comply with all applicable laws and regulations.

(e) Removal. Licensee may, at any time, in the exercise of its sole and absolute discretion, effect the Removal of any or all of the Facilities from the Public Ways, which Removal shall not terminate this Agreement. When performing any aspect of Removal where the Facilities being worked on or any of the equipment or workers involved in the Removal is located on the travel, parking, curb or sidewalk portion of a street, or any other portion of a Public Way, Licensee shall comply with all procedures applicable to Maintenance,

as set forth above in subsection (d). In addition to and notwithstanding the provisions of this subsection (e), Licensee shall, in connection with any Removal activity, comply with all applicable laws and regulations.

(f) Undergrounding. Chapter 3 of title 5 of the City Code contains undergrounding requirements that apply, *inter alia*, to the installation, repair and replacement of “customer utility services” and “transmission and distribution lines.” Licensee acknowledges that it is subject to these requirements and, consequently, that it will be required to install its Facilities underground. Nothing herein shall limit Licensee’s ability to seek a waiver of the undergrounding requirement for subsequent builds pursuant to the procedures set forth under § 5-3-1 *et seq.* of the City Code.

(g) Relocation. Licensee shall remove from or relocate within a Public Way, at its own expense and within 60 days of written notice provided by Licensor, or any such longer time as reasonably requested by the Licensee and consented to by the Licensor, any of the Facilities identified by Licensor in said written notice, whenever Licensor, in its sole discretion, determines that (i) the Facilities interfere, disturb or conflict with the operation, relocation, improvement, repair, construction or maintenance of present or future streets, alleys or other Public Ways, public grounds, storm drainage systems, sewer systems, water mains, other public facilities or private utility systems, or (ii) the Facilities interfere, disturb or conflict with any public communications system or equipment (including but not limited to AM/FM radio, shortwave radio and two-way radio systems), or with any private communications system which was in operation at the time the facilities were constructed. Any relocation of Facilities shall be subject to all the provisions, terms and conditions of this Agreement, and to all applicable laws and regulations. Notwithstanding the foregoing, the Licensor shall reimburse the Licensee for

any such relocation expense if such reimbursement is required by Section 56-468.2 of the Code of Virginia (1950), as amended, or any other applicable law.

(h) When engaged in Construction of Facilities pursuant to this Agreement, Licensee shall not cause any inconvenience to the general public or the Licensor's work forces, except as authorized by the Director. When performing Maintenance or Removal of Facilities, Licensee shall not hinder or impede the flow of traffic to any greater extent than is reasonably necessary. Licensee shall strictly abide by any requirements imposed by the Director, including requirements relating to time limitations and the submission of a traffic control plan.

6. Damage to Public Ways and Other Property by Licensee.

(a) If, in the course of Construction, Maintenance, Removal or otherwise dealing with any of the Facilities, Licensee damages any pavement, street, alley, sidewalk, sewer, water or other pipe, public ground or any other public property, real or personal, belonging or dedicated to Licensor, Licensee shall promptly repair the same at its own cost and expense. If Licensee shall default in this obligation, Licensor may cure the default itself, and may charge to Licensee the cost it incurs in curing the default; provided, that prior to performing any work to cure a default, Licensor shall give Licensee written notice of the default and a period of five business days from the date of the notice in which to initiate action to cure the default and a period of 30 days in which to complete the cure; provided further, that these 5-day and 30-day periods will be extended by the Director for a reasonable amount of time if a cure of the default cannot reasonably be commenced, or the default cannot reasonably be cured, within such periods respectively, and Licensee has diligently pursued commencement of, or completion of, a cure during the period, as applicable.

(b) Notwithstanding the provisions of subsection (a), if the Director determines, in his sole discretion consistent with applicable law, that damage, as described in subsection (a), threatens the public health or safety, Licensor may commence the repair of the damage and assess its costs upon Licensee, as provided in subsection (a); provided, that, prior to commencing such repair work, Licensor shall make a reasonable effort to provide Licensee with telephonic notice and an opportunity to immediately repair the damage itself. In the event Licensee is unable to, or otherwise fails to, immediately repair the damage and Licensor performs the repair work, Licensor shall, immediately upon completion of the work, provide Licensee with written notice of the work it has performed, and also shall, reasonably soon after the completion of the work, provide Licensee with a statement of the reasonable cost Licensor incurred in performing the work.

(c) Licensee shall repave or resurface the Public Ways in accordance with the then current standards set forth by the Director if there are any street cuts or other disturbances of the surface of the Public Ways as a result of any installation by Licensee of Facilities under this Agreement.

(d) Any costs assessed upon Licensee under this section shall be paid to Licensor within 60 days of the assessment.

7. Unauthorized Use. In the event of any use by Licensee of a Public Way or any other property owned by or dedicated to Licensor that is not authorized by this Agreement, Licensee shall, immediately upon notice by Licensor, cease the use and remove all Facilities associated with the use. In addition, Licensee shall pay to Licensor a sum of five hundred dollars (\$500) for each day that the unauthorized use occurs.

8. Insurance. Licensee shall obtain and maintain throughout the term of this Agreement the following insurance coverages:

(a) commercial general liability insurance in an amount not less than \$1,000,000 combined single limit coverage with \$1,000,000 general aggregate coverage, covering all premises and operations and including personal injury, completed operations, contractual liability, independent contractors and products liability; and

(b) Virginia statutory workers compensation coverage, including Virginia benefits and employers' liability with limits of \$100,000/\$100,000/\$500,000.

The general aggregate limits shall apply to all Facilities and activities under this Agreement. Licensor shall be named an additional insured on the liability policy. Prior to the start of any Construction, Licensee shall provide to the Director a certificate of insurance that demonstrates, to the satisfaction of the Director, that Licensee has in force the coverages required above, including contractual liability coverage, and that Licensor is an additional insured for purposes of the commercial general liability coverage.

9. Indemnification.

(a) Licensee shall indemnify and hold harmless Licensor and all of its officers, employees and agents from and against all suits, actions, causes of action, damages, claims, liability and expenses (including court costs and attorney's fees) resulting from or arising out of any bodily injury, death or property damage (including injury, death or damage, or other losses, sustained by Licensor or any of its officials, employees and agents) caused, in whole or in part, by any act or omission of the Licensee or its employees, officers, contractors, agents or servants relating to or involving the Construction, Maintenance or Removal of Facilities, or otherwise under this Agreement, or by any other act or omission by such persons under this

Agreement, except to the extent that such bodily injury, death or property damage, or losses, are caused by the gross negligence or willful misconduct of Licensor or any of its officers, employees and agents.

(b) If a suit or action for which Licensor and its officers, employees and agents are entitled to be indemnified and held harmless under subsection (a) shall be brought against the Licensor or one or more of its officers, employees or agents, either individually or jointly with Licensee, Licensee shall defend, indemnify and hold harmless the Licensor and the sued officers, employees and agents at the sole cost and expense of Licensee. The Licensor shall promptly provide the Licensee with written notice of the commencement of any such suit or action. The Licensee shall conduct the defense of such suit or action, subject to the Licensor's approval, which shall not be unreasonably withheld or delayed. The Licensor may also participate in this defense directly, at its own expense.

(c) If a final judgment is obtained against Licensor or one or more of its officers, employees or agents in a suit or action, either independently or jointly with Licensee, for which Licensor and its officers, employees and agents are entitled to be indemnified and held harmless under this section, Licensee shall pay every judgment, including all costs and attorneys' fees, entered against Licensor and any of its officers, employees and agents.

(d) The Licensee shall be entitled to settle a claim brought in a suit or action for which Licensor and its officers, employees and agents are entitled to be indemnified and held harmless under subsection (a), provided that the Licensee must obtain the prior written approval of Licensor for any settlement of such claims against the Licensor, which approval shall not be unreasonably withheld or unreasonably delayed.

(e) The indemnities in this section shall survive the expiration or earlier termination of this Agreement for a period of five years.

10. Termination and Expiration.

(a) This Agreement may be terminated by Licensee, at its election and without cause, by delivering written notice of termination to the Director at least 60 days prior to the effective date of such termination.

(b) In the event that Licensee violates any material term or condition of this Agreement, Licensee shall be considered in default. If such default continues for 30 days after Licensee has received written notice of the default from Licensor, Licensor may terminate the Agreement, effective immediately; provided, however, that such 30-day period will be extended for an additional period of time as is reasonable under the circumstances if Licensee's violation cannot reasonably be cured within the initial 30-day period and if Licensee has commenced a cure within such period and continues to diligently pursue such cure.

(c) If this Agreement is terminated, Licensee shall, at its sole expense, remove all Facilities from, and shall vacate, all Public Ways within 180 days of the effective date of the termination, or within such later time as may be prescribed by the Director.

(d) Licensee, at its sole expense, shall remove its Facilities from all Public Ways within 180 days after the expiration of this Agreement, or within such later time as may be prescribed by the Director, unless a new agreement shall have been entered into before such expiration date under which Licensee may continue to maintain its Facilities in the City.

(e) If Licensee fails to remove any of its Facilities as required by subsections (c) or (d), (i) Licensor may remove or cause the removal of the Facilities, and Licensee shall pay to Licensor its reasonable costs in effecting such removal within 30 days of Licensor's provision

of written notice of the costs, or (ii) the Facilities shall be considered to have been conveyed to Licensor by Licensee, in which case they shall be thereafter be become the property of Licensor.

11. Assignment.

(a) This license may not be assigned by Licensee without the written consent of Licensor, which consent may or may not be given at the sole discretion of Licensor and may require action by the Alexandria City Council. However, Licensee may assign its rights, without the consent of the Licensor, to any Affiliate of Licensee, or to any successor-in-interest acquiring fifty-one percent (51%) or more of Licensee's stock, provided the Licensor is given notice of the assignment before it becomes effective. Any successor of Licensee shall be bound by all of the provisions, terms and conditions of this Agreement and shall be subject to all the obligations, stipulations and penalties herein prescribed.

(b) In addition, nothing in this Agreement shall be construed to require Licensee to obtain approval from Licensor in order to (i) lease any Facilities or any portion thereof owned by the Licensee in, on, or above the Public Ways, or (ii) grant an indefeasible right of use ("IRU") in the Facilities owned by the Licensee, or any portion thereof, to any entity or person, as long as (1) such lease or grant does not require or permit any entity other than the Licensee to place Facilities or conduct activities within the Public Ways; and (2) the Licensee remains responsible, for all Facilities, and all activities, within the Public Ways under such lease or grant.

12. Condemnation. Nothing in this Agreement is intended to or shall affect Licensor's authority to acquire Facilities located in Public Ways pursuant to condemnation² proceedings or otherwise pursuant to law.

13. Effective Date. This Agreement and the rights and privileges hereby conferred shall not become effective until Licensee files with the Director (a) a copy of the Agreement executed by an authorized officer, and (b) a \$25,000 surety bond, with a good and sufficient surety reasonably acceptable to the Alexandria City Attorney, which guarantees the performance of Licensee under this Agreement, including without limitation that Licensee will maintain in good and safe condition all Facilities it places in Public Ways throughout the term of the Agreement, will remove said Facilities from the Public Ways in accordance with section 10 of the Agreement, and will comply with the provisions, terms and conditions of this Agreement in all respects.

14. Representations.

(a) By the signature below of its authorized legal representative, Licensee accepts this Agreement and the license it provides.

(b) This Agreement constitutes the entire agreement between the Licensor and Licensee, and it supersedes any prior agreements (if any) between the parties. Licensor and Licensee represent that no representation by either party or its officials or employees has induced the other party to execute this agreement. The parties agree that there are no representations inducements, promises or agreements, oral or otherwise, between them which are not embodied in this Agreement, which are of any force. No amendment of this Agreement shall be binding on either party unless set forth in a written document duly executed by authorized representatives of both parties.

15. Applicable Law. This Agreement was accepted in the Commonwealth of Virginia, and shall be interpreted and construed under Virginia law and any applicable federal law, which law shall prevail in any conflict of laws.

16. Waivers.

(a) Subject to the foregoing, any waiver of this Agreement or any of its provisions shall be effective and binding upon the parties only if it is made in writing and duly signed by the parties.

(b) If either party fails to enforce any right or remedy available under this Agreement, that failure shall not be construed as a waiver of any right or remedy with respect to any breach or failure by the other party. Nothing herein shall be construed as a waiver of any rights, privileges or obligations of the Licensor or Licensee, nor constitute a waiver of any remedies available at equity or at law.

17. Severability. The Licensee and Licensor shall comply with any applicable federal law regarding the use of the Public Ways. If any term, condition, or provision of this Agreement shall, to any extent, be held to be invalid or unenforceable, the remainder hereof shall be valid in all other respects and continue to be effective. In the event of a subsequent change in applicable law so that the provision which had been held invalid is no longer invalid, such provision shall thereupon return to full force and effect without further action by the parties and shall thereafter be binding on the Licensee and the Licensor. If the terms of this Agreement are materially altered due to changes in governing law, then the parties shall negotiate in good faith to reconstitute this Agreement in a way consistent with then-applicable law in a form that, to the maximum extent possible, is consistent with the original intent of the parties and preserves the benefits bargained for by each party.

18. Force Majeure. Neither the Licensee nor the Licensor shall be liable for any delay or failure in performance of any party of this Agreement from any cause beyond its control and without its fault or negligence, which may include, without limitation, acts of civil or

military authority, government regulations, embargoes, epidemics, terrorist acts, riots, insurrections, fires, explosions, earthquakes, nuclear accidents, floods, power blackouts, volcanic action, other major environmental disturbances, or unusually severe weather conditions.

19. Notice. All notices or other communications which are required or permitted herein shall be in writing and sufficient if (i) delivered personally, (ii) sent by facsimile transmission followed by written confirmation of receipt, (iii) sent by overnight commercial air courier (such as Federal Express), (iv) or sent by registered or certified mail, postage prepaid, return receipt requested, to the party at its addresses or facsimile number set forth below or to such other address or party in writing in accordance herewith. Any such communication shall be deemed to have been given when delivered if delivered personally, on the same day as a facsimile transmission (or the first business day thereafter if faxed on a Saturday, Sunday or legal holiday), on the first business day after dispatch if sent by overnight commercial air courier, or on the fifth business day after posting if sent by mail.

To Licensee: Xspedius Management Co. of Virginia, LLC d/b/a Xspedius
Communications
7125 Columbia Gateway Drive, Suite 200
Columbia, MD 21046
Attn: Sr. Vice President, Regulatory Affairs

With copy to: Xspedius Communications, LLC
5555 Winghaven Blvd.
O'Fallon, MO 63366
Attn: General Counsel

To Licensor: Director
Department of Transportation and
Environmental Services
301 King Street
Suite 4100
Alexandria, Virginia 22314

With copy to: City Attorney
301 King Street
Suite 1300
Alexandria, Virginia 22314

IN WITNESS WHEREOF, the parties hereto have executed this agreement.

CITY OF ALEXANDRIA, a municipal
corporation of Virginia

XSPEDIUS MANAGEMENT CO.
OF VIRGINIA, LLC D/B/A
XSPEDIUS COMMUNICATIONS

Dated: _____

Dated: _____

By: _____
Philip Sunderland, City Manager

By: _____
James C. Falvey, Sr. Vice President of
Regulatory Affairs

Approved as to form:

Assistant City Attorney