

4/6/2016

24-R-16

A RESOLUTION

Authorizing the City Manager to Negotiate and Execute a Right-of-Way Agreement with Sigecom, LLC d/b/a WOW! Internet, Cable and Phone for the Installation of Dark Fiber Optic Cable

WHEREAS, the City and Sigecom, LLC d/b/a WOW! Internet, Cable and Phone, an Indiana limited liability company (“WOW”) desire to enter into a right-of-way agreement granting WOW the right to install and maintain its fiber optic cable and related equipment (the “Agreement”) on public property all within the City of Evanston (the “Agreement Route”); and

WHEREAS, WOW desires a right-of-way agreement for a term of ten (10) years with the right to renew upon mutual agreement thereafter for the Agreement Route, more fully detailed in the Agreement Route attached as Exhibit “1”; and

WHEREAS, the Agreement will be for WOW to construct, reconstruct, operate, maintain, and repair a dark fiber optic system (“the Dark Fiber System”) via the fiber optic system lines more fully detailed in the Agreement Route attached as Exhibit “1”; and

WHEREAS, the installation of the dark fiber optic system requires attachment of cable to existing utility poles and by boring for underground conduits; and

WHEREAS, the City is willing to grant to WOW the aforementioned Agreement upon the conditions and representations set forth.

NOW THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF EVANSTON, COOK COUNTY, ILLINOIS:

SECTION 1: That the City Manager is hereby authorized and directed to sign, and the City Clerk is hereby authorized and directed to attest, on behalf of the City of Evanston, an Agreement for the term of ten (10) years with the right to renew upon mutual agreement thereafter between the City of Evanston and WOW, attached hereto as Exhibit "2" and incorporated herein by reference, providing for the installation dark fiber optic cable in the City.

SECTION 2: That the City Manager or his designee is hereby authorized and directed to negotiate any additional terms and conditions of the Agreement as may be determined to be in the best interests of the City.

SECTION 3: That WOW shall, at its cost, record a certified copy of this resolution, including all Exhibits attached hereto, with the Cook County Recorder of Deeds, before the City may issue any permits related to the construction or installation of the utility cabinets on the Subject Property.

SECTION 4: That this resolution shall be in full force and effect from and after the date of its passage and approval in the manner provided by law.


Elizabeth B. Tisdahl, Mayor

Attest:


Rodney Greene City Clerk

Adopted: April 11, 2016

EXHIBIT 1
AGREEMENT ROUTE

Small Cell Plan

Legend

- Aerial
- Conduit Path to Bld
- EVANSTON MAIN ST METRA SC
- Underground

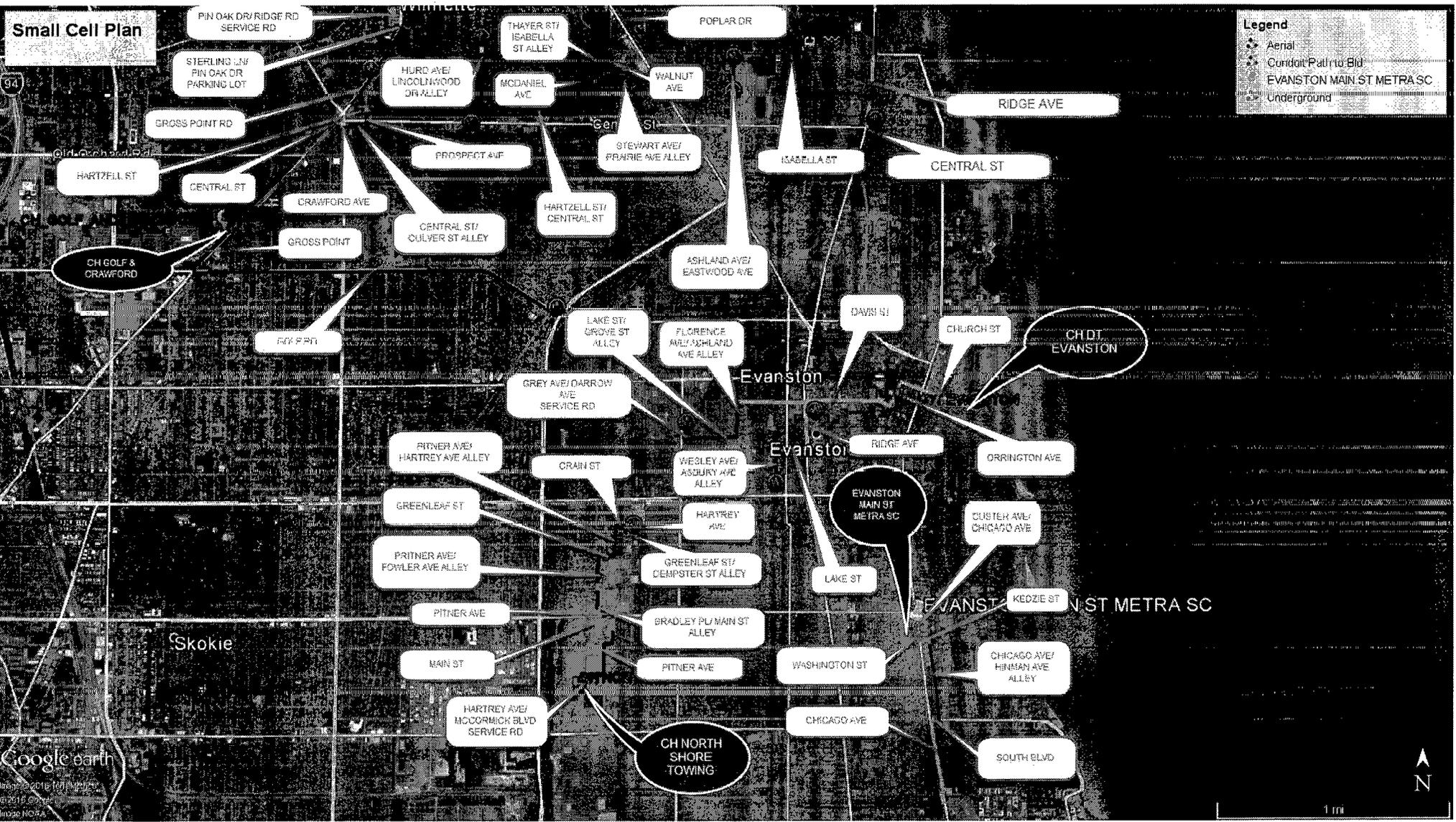


EXHIBIT 2
AGREEMENT

AGREEMENT

between

SIGECOM, LLC

an Indiana limited liability company

and

CITY OF EVANSTON

An Illinois municipal corporation

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AGREEMENT FOR USE OF RIGHT OF WAY

THIS AGREEMENT FOR USE OF RIGHT OF WAY ("Agreement") is made this ___ day of April, 2016 by and between the City of Evanston, an Illinois municipal corporation (the "City") and Sigecom, LLC d/b/a WOW! Internet, Cable and Phone, an Illinois limited liability company (the "Company"). Hereinafter, the City and the Company will be referred to as the "Parties."

RECITALS

1. The Company has requested permission from City to install fiber optic cable ("Communication Facilities") in the right of way of certain City streets, by attaching said cable to existing utility poles located in said rights of way, and also by means of underground installation.
2. The route of the fiber optic cable will be as shown on Exhibit A, attached hereto and made a part hereof.
3. The City is willing to allow installation of the Company's fiber optic cable upon the City right of way under the terms and conditions of this Agreement.
4. The City and Company have the authorization to execute this Agreement as an exercise of the City's home rule authority and the Company's corporate authority.
5. The City Council enacted Resolution 24-R-16 on April 11, 2016 to authorize the City Manager to negotiate and execute this Agreement.
6. The purposes, powers, rights, objectives, and responsibilities of the City and Company under this Agreement are fully set forth herein.

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

1. Recitals. The recitals are a material part of this Agreement and are incorporated herein by reference.
2. Installation of Cable. The City hereby grants to the Company the right to install and maintain its fiber optic cable and related equipment (the "System") in the right of way of the City along the route described in Exhibit A, subject to the terms of this Agreement. The City Engineer will have the authority to approve minor deviations of the route upon written application of the Company. This grant is not to be considered permission to provide local telecommunications in the City of Evanston, and the City reserves any and all rights it has under law to require a franchise for such services to properties located with the City.

The Company understands, acknowledges, and agrees that the Company must obtain all permits that are required for the installation of the System. In exchange for the Company's installation of City fiber as described in Section 8, the City will waive the ongoing Municipal Telecommunications Infrastructure Maintenance Fee of 1% for the initial five (5) years of the agreement for the installation and maintenance of the System within the City Right of Way (ROW). The Company agrees that upon the expiration of five (5) years after the execution of this Agreement, the Company must pay all Municipal Telecommunications Infrastructure Maintenance Fees as required under City Code Title 3, Chapter 26, "Telecommunications Infrastructure Maintenance Fees."

The Company will be responsible for obtaining, at its own cost and expense, all permits, licenses, or other forms of approval or authorization necessary to construct, operate, maintain, upgrade, rebuild or repair the System. This responsibility includes, but is not limited to the following: pavement degradation costs, parking meter reservation fees, and any other applicable fees.

3. Construction and Maintenance.

- A. Prior to installation of any cable in the City right of way, the Company must submit plans and specifications for the installation to the City Engineer. The cable must be installed in a reasonable manner as approved by the City Engineer. The plans and specifications must be provided by the Company to the City not less than thirty (30) days prior to the commencement of work. The City Engineer will specify the portion of the right-of-way upon which the System may be placed, used and constructed. Communication facilities within the City rights-of-way must be constructed, operated, and maintained in conformity with the provisions of 83 Ill. Adm. Code Part 305 (formerly General Order 160 of the Illinois Commerce Commission) entitled "Rules for Construction of Electric Power and Communication" be submitted to the City Engineer for approval prior to the work being completed. As-built drawings must be supplied to the City Engineer within 90 days of completion of the permitted work. The As-built drawings must specifically identify where the locations of the actual facilities deviate from the locations approved in the permit. Additionally, the As-built drawings must be submitted to the City in an electronic version that is GIS-compatible.
- B. A permit for work in the City right-of-way must be obtained before any work is commenced. The Company must provide any necessary or required traffic control at its expense. No material will be stored on the right of way without the prior written approval of the City Engineer. When such storage is permitted, all pipe, conduit, wire, poles, cross arms, or other materials will be distributed along the right-of-way prior to and during installation in a manner to minimize hazards to the public or an obstacle to right of way maintenance or damage to the right-of-way and other property.
- C. The System hereafter installed must be so placed and all work in connection

with such installation must be so performed as not to interfere with ordinary travel on the right of way of the City unless specifically authorized by the City Engineer, or with any water, gas or sewer pipes or other utility conduits or cable television conduits or wires then in place, or hereafter placed. Company, after doing any excavating, must leave the surface of the ground in the same condition as existed prior to such excavation. All sidewalks, parkways or pavements, including driveway approaches, disturbed by said Company must be restored by it, and the surface to be restored must be with the same type of material as that existing prior to its being disturbed unless otherwise specified by the City Engineer. In the event that any right-of-way, real property, or fixed improvement thereon will become uneven, unsettled, damaged, or otherwise require restoration, repair or replacement because of such disturbance or damage of the Company, then the Company must promptly, but in no event longer than fourteen (14) days after receipt of notice from the City, and at the Company's sole cost and expense, restore as nearly as practicable to their former condition said property or improvement which was disturbed or damaged.

Should adverse weather conditions cause delay in completing the work, the Company must promptly notify the City immediately upon onset of the delay. Thereafter, the City Engineer, in his sole discretion, may direct temporary repairs be made to remain in place until the weather allows permanent repairs to be installed and the Company must promptly install said temporary repairs or extend such time for work completion to a date certain. The date extension will take into account the weather conditions and other factors affecting the work. The Company must complete the work on or before the date certain. Any such restoration of the City's right-of-way by the Company must be made in accordance with such materials and specification as may from time to time, be then provided for the ordinance or regulation of the City and to the satisfaction of the City Engineer. The Company must notify the City when the work is completed. If the Company fails to restore the property in accordance with the above, then the City may, if it so desires, contract with a third party for such restoration or utilize its own work forces to restore such property. The Company must pay the reasonable cost incurred by the City for such restoration within twenty-one (21) days after the receipt of a written bill for such cost.

- D. The City will have no obligation to mark the location of Company's facilities. Company acknowledges that it has the opportunity to become a member of the statewide "One Call" Utility Location system (JULIE), and that the Company agrees that it will become a member as a requirement of this Agreement and that such a system is designed to alert Company to planned work in the right of way, so that Company can mark the location of its facilities to avoid damage. The City will have no obligation to alert Company to proposed work by itself or others, other than as a participating member of the JULIE system.
- E. Construction operations on rights-of-way may, at the discretion of the City, be required to be discontinued when such operations would create hazards to

traffic or the public health, safety, and welfare. Such operations may also be required to be discontinued or restricted when conditions are such that construction would result in extensive damage to the right of way or other property.

F. Within one hundred eighty (180) days following written notice from the City, the Company must at its own expense, protect, support, temporarily or permanently disconnect, remove, relocate, change or alter the position of any System facilities within the rights of way whenever the corporate authorities have determined that such removal, relocation, change or alteration, is reasonably necessary for the construction, repair, maintenance or installation of any City improvement in or upon, or the operations of the City in or upon, the rights of way. Within thirty (30) days following written notice from the City, the Company must, at its own expense, remove from the rights of way all or any part of any unauthorized facility or related appurtenances that Company owns, controls, or maintains within the rights of way. A facility is unauthorized and subject to removal in the following circumstances:

- 1) Upon expiration or termination of the permittee's license or franchise, unless otherwise permitted by applicable law;
- 2) If the facility was constructed or installed without the prior grant of a license or franchise, if required;
- 3) If the facility was constructed or installed without prior issuance of a required permit; or
- 4) If the facility was constructed or installed at a location not permitted by the permittee's license or franchise.

The City retains the right and privilege to cut or move any facilities located within the rights of way of the City, as the City may determine to be necessary, appropriate or useful in response to any public health or safety emergency. If circumstances permit, the municipality will attempt to notify the Company, if known, prior to cutting or removing a facility and will notify the Company, if known, after cutting or removing a facility.

G. Except as provided in the following Section, the Company must not spray, inject or pour any chemicals on or near any trees, shrubs or vegetation in the City for any purpose, including the control of growth, insects or disease.

H. The Company must annually provide one or more contact persons who can act on its behalf in connection with emergencies involving the Company's facilities in the right of way and a 24-hour telephone number for such persons.

4. Performance Security. Prior to issuance of any permits, the Company must provide to

the City a surety bond in the amount of seventy-five thousand dollars (\$75,000.00). The surety bond must be maintained at the seventy-five thousand dollar level throughout the term of the fiber construction. The surety bond must be available to the City to satisfy all claims, liens or other amounts due the City from the Company which arise by reason of work by the Company, to satisfy and actual damages arising out of a breach of this franchise agreement, and to satisfy any assessments under this agreement.

If the surety bond is drawn upon by the City in accordance with the procedures in this agreement, the Company must cause the surety bond to be reissued in the full amount required no later than the later of thirty (30) days after the last withdrawal. Failure to reissue the surety bond will be deemed a material breach of the permit.

Nothing in this Agreement will be deemed a waiver of the normal permit and bonding requirements generally applicable to persons performing work in the City's right of way except the waivers provided for in Section 2 of this Agreement.

The surety bond will be partially released in the amount of ninety percent (90%) of the original amount upon satisfactory completion of the work as described in Exhibit A. The remaining ten percent (10%) of the surety bond must remain one year after completion of project.

5. Insurance. The Company will, at its own expense, secure and maintain in effect throughout the duration of this contract, insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the work hereunder by the Company, its agents, representatives, employees or subcontractors. Company acknowledges and agrees that if it fails to comply with all requirements of this Section 5, the City may void the Agreement after a cure period of thirty (30) days.

The Company must give to the City Certificates of Insurance identifying the City to be an Additional Insured for all work done pursuant to this Agreement before City staff recommends award of the contract to City Council. Any limitations or modifications on the Certificate(s) of Insurance issued to the City in compliance with this Section that conflict with the provisions of Section 5 will have no force and effect.

The Company must give the City a certified copy(ies) of the insurance policy(ies) evidencing the amounts set forth in this Section, and copies of the Additional Insured endorsement to such policy(ies) which name the City as an Additional Insured for all work done pursuant to this Agreement before Company does any work pursuant to this Agreement. Company's Certificate of Insurance must contain a provision that the coverage afforded under the policy(s) will not be canceled or reduced without thirty (30) days prior written notice (hand delivered or registered mail) to the City. Company must promptly forward new certificate(s) of insurance evidencing the coverage(s) required herein upon renewal of the subject policies, if applicable.

The policies and the Additional Insured endorsement must be delivered to the City

within two (2) weeks of the request. All insurance policies must be written with insurance companies licensed or authorized to do business in the State of Illinois and having a rating of not less than A-VVII according to the A.M. Best Company. Should any of the insurance policies be canceled before the expiration date, the issuing company will mail thirty (30) days written notice to the City. The Company must require and verify that all subcontractors maintain insurance meeting all of the requirements stated herein.

Any deductibles or self-insured retentions must be declared to and approved by the City. At the option of the City, either the insurer will reduce or eliminate such deductibles or self-insured retentions as respects the City, its officers, officials, employees and volunteers; or the Company will provide a financial guarantee satisfactory to the City guaranteeing payment of losses and related investigations, claim administration and defense expenses.

Contractor must carry and maintain at its own cost with such companies as are reasonably acceptable to the City all necessary liability insurance (which must include as a minimum the requirements set forth below) during the term of this Agreement, for damages caused or contributed to by Company, and insuring Company against claims which may arise out of or result from Company's performance or failure to perform the services hereunder:

- A. Commercial general liability insurance, including premises- operations, explosion, collapse, and underground hazard (commonly referred to as "X," "C," and "U" coverages) and products-completed operations coverage with limits not less than:
 - 1) Three million dollars (\$3,000,000) for bodily injury or death to each person;
 - 2) Three million dollars (\$3,000,000) for property damage resulting from any one accident; and
 - 3) Five million dollars (\$5,000,000) for all other types of liability;
- B. Automobile liability for owned, non-owned and hired vehicles with a combined single limit of one million dollars (\$1,000,000) for personal injury and property damage for each accident;
- C. Worker's compensation with statutory limits; and
- D. Employer's liability insurance with limits of not less than five hundred thousand dollars (\$500,000) per employee and per accident.
- E. The Parties agree that the insurance requirements in this Section can be met through a combination of primary and excess or umbrella policies.

Company understands that the acceptance of Certificates of Insurance, policies, and any

other documents by the City in no way releases the Company and its subcontractors from the requirements set forth herein.

Company expressly agrees to waive its rights, benefits and entitlements under the "Other Insurance" clause of its commercial general liability insurance policy as respects the City. In the event Company fails to purchase or procure insurance as required above, the parties expressly agree that Company will be in default under this Agreement, and that the City may recover all losses, attorney's fees and costs expended in pursuing a remedy, or reimbursement, at law or in equity, against Company.

6. Indemnification. The Company must defend, indemnify, and hold harmless the City and its officers, elected and appointed officials, agents, and employees from any and all liability, losses, or damages as a result of claims, demands, suits, actions, or proceedings of any kind or nature, including but not limited to costs, and fees, including attorney's fees, judgments or settlements, resulting from or arising out of any negligent or willful act or omission on the part of the Company or Company's subcontractors, employees, agents or subcontractors during the performance of this Agreement. Such indemnification will not be limited by reason of the enumeration of any insurance coverage herein provided. This provision will survive completion, expiration, or termination of this Agreement.

Nothing contained herein will be construed as prohibiting the City, or its officers, agents, or employees, from defending through the selection and use of their own agents, attorneys, and experts, any claims, actions or suits brought forth against them. The Company will be liable for the costs, fees, and expenses incurred in the defense of any such claims, actions, or suits. Nothing herein will be construed as a limitation or waiver of defenses available to the City and employees and agents, including but not limited to the Illinois Local Governmental and Governmental Employees Tort Immunity Act, 745 ILCS 10/1-101 *et seq.*

At the City Corporation Counsel's option, Company must defend all suits brought upon all such losses and must pay all costs and expenses incidental to them, but the City has the right, at its option, to participate, at its own cost, in the defense of any suit, without relieving Company of any of its obligations under this Agreement. Any settlement of any claim or suit related to this project by Company must be made only with the prior written consent of the City Corporation Counsel, if the settlement requires any action on the part of the City.

To the extent permissible by law, Company waives any limits to the amount of its obligations to indemnify, defend, or contribute to any sums due under any losses, including any claim by any employee of the Company that may be subject to the Illinois Workers Compensation Act, 820 ILCS 305/1 *et seq.* or any other related law or judicial decision. The City, however, does not waive any limitations it may have on its liability under the Illinois Workers Compensation Act, the Illinois Pension Code or any other statute.

The Company will be responsible for any losses and costs to repair or remedy work performed under this Agreement resulting from or arising out of any act or omission, neglect, or misconduct in the performance of its work or subcontractors' work. Acceptance of the work by the City will not relieve the Company of the responsibility for subsequent correction of any such error, omission and/or negligent acts or of its liability for loss or damage resulting therefrom.

All provisions of this Section 6 will survive completion, expiration, or termination of this Agreement.

7. Term. The term of this Agreement will be for a period of ten (10) years from and after the date first set forth above, unless terminated earlier in accordance with Section 10. This Agreement can be extended upon mutual agreement of City and Company within 60 days prior to the expiration of any term.
8. Company's Installation of City Fibers. The Company agrees to provide twelve (12) single mode fiber strands as new fiber extensions from the city's existing fiber backbone to each of the two locations listed below for the exclusive use of the City at all times ("City Fibers") at no cost to the City. Each location's fiber run will include locater wire for easy identification and depth measurement. The two locations to be provided with City Fibers are as follows:
 - A. Clark Street Beach, 1811 Sheridan Road, Evanston, IL;
 - B. North Standpipe, 2526 Gross Point Road, Evanston, IL; and

Company agrees to include splicing and fiber termination, including resources to assist in the identification of which spare strands from the City's existing network can be spliced into the new fiber extensions. Company will ensure City Fibers are properly working prior to transfer to the City. A citywide map showing the as-built locations of the City Fibers must be provided to the City Engineer showing all facilities including hand holes that are located within the City right-of-way.

Legal title to the twelve (12) City Fibers at each location will be held by the City.

Legal title to all property of the City will remain with the City, and nothing herein will be deemed to relinquish City's right, title, interest or control of such property, including public rights of way.

Company must provide the City with a one (1) year warranty against the City Fiber's unacceptable signal loss once the City Fibers have been integrated or spliced into the City's fiber network.

Company agrees to install the City Fibers by November 15, 2016. If the Company fails to install City Fibers by November 15, 2016, Company agrees to pay the City five percent (5%) of monthly gross revenues until installation of the City Fibers is finalized.

Company acknowledges and agrees that the aforementioned payment will not be deemed to be in the nature of a tax, and will be in addition to any and all taxes of general applicability and other fees and charges which do not fall within the definition of a franchise fee under 47 U.S.C. § 542.

9. Default. Failure or unreasonable delay by any party to perform any term or provision of this Agreement for a period of ten (10) days after written notice thereof from another party will constitute a default under this Agreement. If the default is of a nature which is not capable of being cured within sixty (60) days, the cure will be commenced within such period, and diligently pursued to completion. The notice must specify the nature of the alleged default and the manner in which the default may be satisfactorily cured. In the event of a default hereunder by any party, each non-defaulting party will be entitled to all remedies at both law and in equity.
10. Remedies. Any material violation by the Company, its contractors, or its successors of the material provisions of this Agreement, will be cause for the termination of this Agreement and all rights hereunder, provided again that the City will first notify the Company in writing, the condition or act on which the violation is charged, and the Company will have sixty (60) days within which to remedy such condition or act, and provided further, that should the immediate remedy thereof be out of the control of the Company, the company will have a reasonable time thereafter to make said correction.
11. Removal upon Termination. Upon termination of the privileges herein granted, by lapse of time or otherwise, if ordered by the City Engineer, the Company without cost or expense to the City, will remove the System herein authorized and restore the public way to as good a condition as existed prior to such installation and to the reasonable satisfaction of the City Engineer. In the event of the failure, neglect or refusal of said Company to remove the System, the City will have the choice of either performing said work and charging the cost thereof to the Company or determining that said work will be performed by a contractor, and billing the Company for the costs of said contract. The cost incurred by the City in such system removal will be properly paid by the Company within twenty-one (21) days after a bill for costs is deposited in the mail or presented to the Company, or the City may proceed against the surety bond of the Company or pursue any other remedies provided by law.
12. Abandonment of Facilities. Upon abandonment of a facility within the rights-of- way of the City, the Company must notify the City within ninety (90) days. Following receipt of such notice the City may direct the Company to remove all or any portion of the facility if the City Engineer determines that such removal will be in the best interest of the public health, safety and welfare. In the event that the City does not direct the Company to remove it, by giving notice of abandonment to the City, the Company will be deemed to consent to the acquisition, alteration or removal of all or any portion of the facility by the City or another utility or person. In the event that the City or another utility or person acquires the Company's facilities after the abandonment notification is sent, the Company will have no further costs associated with removal or alteration of the facilities.

the Company from its obligations hereunder without a separate written release by the City.

Company must notify the City in writing not less than sixty (60) days prior to any proposed assignment or transfer of interest in this Agreement. Company must identify the name and address of the proposed assignee/transferee and deliver to the City original or certified copies of the proposed assignment, a recital of assignee's personal and financial ability to comply with all the terms and conditions of this Agreement and any other information or documentation requested by the City. The City must not unreasonably withhold the consent to assignment or transfer.

Any attempted assignment or transfer of any type not in compliance with these sections will be void and without force and effect.

16. Binding Effect. This Agreement will be binding on the parties, their successors, heirs and assigns.
17. Severability. If any provision of this Agreement is invalid for any reason, such invalidation will not affect any provision of this Agreement which can be given effect without the invalid provision; and, to this end, the provisions of this Agreement are to be severable.
18. Governing Law. The Parties agree that this Agreement will be governed by and interpreted in accordance with the laws of the State of Illinois and that venue for any disputes will be Cook County, Illinois.

CITY OF EVANSTON

SIGECOM, LLC d/b/a WOW! INTERNET,
CABLE, AND PHONE

By: _____

By: _____

Its: _____

Its: _____

Attest: _____

Attest: _____

Its: _____

Its: _____

EXHIBIT A
RIGHT-OF-WAY FIBER OPTIC ROUTE