

CONDUIT OCCUPANCY AGREEMENT

This conduit occupancy agreement (the "Agreement") is entered into this _____ day of _____, 2010, by and between **THE SCHOOL BOARD OF LAKE COUNTY, FLORIDA**, whose mailing address is 201 West Burleigh Boulevard, Tavares, Florida 32778 ("School Board") and **THE CITY OF LEESBURG, FLORIDA**, a Florida municipal corporation whose mailing address is 501 West Meadow Street, Post Office Box 490630, Leesburg, Florida 34749-0630 ("City"), each referred to throughout this Agreement individually as a "Party" and severally as the "Parties".

WHEREAS School Board owns and operates Sorrento Elementary School located approximately at the intersection of Wolf Branch Road and County Road 437 in Lake County, Florida; and,

WHEREAS School Board wishes to have access to certain services from a cable television provider at Sorrento Elementary School; and,

WHEREAS School Board owns a short length of coaxial cable ("School Board's Cable") by means of which it wishes to connect Sorrento Elementary School to a cable television service provider's cable end located on the side of Wolf Branch Road; and,

WHEREAS City owns two underground conduits, the first crossing north to south under Wolf Branch Road and the second crossing west to east under County Road 437 ("City's Conduit"); and,

WHEREAS the portion of City's Conduit crossing under County Road 437 does so subject to an encroachment agreement between City and Florida Gas Transmission Company LLC; and,

WHEREAS City values its extended business relationship with School Board; and,

WHEREAS City is willing to pull School Board's Cable into City's Conduit; and,

WHEREAS City's encroachment agreement with Florida Gas Transmission Company LLC ("City's Encroachment Agreement") permits City to place other party's cable in the portion of City's Conduit passing under County Road 437 only by means of a written conduit occupancy agreement between City and such other party wishing its conduit to be placed into City's Conduit; and,

WHEREAS City's Encroachment Agreement requires City or City's agents to be the only parties performing any installation, maintenance, repair or any other work on the portion of City's Conduit crossing under County Road 437 or on any cables placed in the portion of City's Conduit crossing under County Road 437; and,

WHEREAS each Party agrees to provide good and valuable consideration to the other as more fully stated below;

NOW THEREFORE the Parties agree as follows.

1. SCOPE OF AGREEMENT

- 1.1 **Geographic Scope.** This Agreement shall only address City's Conduit.
- 1.2 **Relational Scope.** This Agreement shall only address the matter of City granting a nonexclusive license for School Board's Cable to occupy City's Conduit. The Parties' relationships on other matters are not addressed by this Agreement.

2. TERM OF AGREEMENT

- 2.1 **Initial Term.** This Agreement shall be effective upon the date stated above and shall continue in force for a period of ten (10) years ("Initial Term").
- 2.2 **Extensions.** The Parties may extend the term of this Agreement ("Extension") by means of one or more written amendments per the provisions of Section 22 of this Agreement.
3. **CONSIDERATION**
- 3.1 **From School Board To City.** School Board shall pay to City the sum of one (1) dollar along with other good and valuable consideration, receipt of which is hereby recognized.
- 3.2 **From City To School Board.** City shall grant to School Board a nonexclusive license, subject to the provisions of this Agreement, for School Board's Cable to occupy City's Conduit.
4. **PARTIES' RIGHTS AND OBLIGATIONS SUBJECT TO ENCROACHMENT AGREEMENT.** Any rights or obligations either Party may have under this Agreement shall be subject to any requirements of City's Encroachment Agreement.
5. **CITY TO KEEP APPROVALS IN FORCE.** During the Initial Term of this Agreement and any Extension, City shall keep in force all necessary licenses, permits and approvals, including City's Encroachment Agreement, necessary: (i) for City's Conduit to occupy space beneath the Wolf Branch / CR 437 intersection; or (ii) for City to make available to other parties the right to occupy City's Conduit.
6. **NO WARRANTY. CITY MAKES NO WARRANTIES OR REPRESENTATIONS, EXPRESS OR IMPLIED, EITHER IN FACT OR BY OPERATION OF LAW, STATUTORY OR OTHERWISE, INCLUDING WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR USE, EXCEPT THOSE EXPRESSLY SET FORTH IN THIS AGREEMENT.**
7. **NO SPECIAL DAMAGES.** Neither Party shall be liable for any damages for lost profits, lost revenues, loss of goodwill, loss of anticipated savings, loss of data or cost of purchasing replacement services, or any indirect, incidental, special, consequential, exemplary or punitive damages arising out of the performance or failure to perform under this Agreement.
8. **MAINTENANCE AND REPAIR**
- 8.1 **Only City or City's Agent to Perform.** Per the requirements of City's Encroachment Agreement, only City or City's Agent shall: (i) perform any maintenance or repair work on City's Conduit; or (ii) remove School Board's Cable from City's Conduit for repair, maintenance or any other reason; or (iii) reinstall School Board's Cable into City's Conduit following any repair, maintenance or any other activity.
- 8.2 **School Board's Right to Observe.** School Board shall have the right to have an observer present at any repair or maintenance activity on City Conduit.
- 8.3 **City to Notify.** Except for emergency repairs or repairs arising from Force Majeure Events, City shall make reasonable efforts to provide School Board with no less than seventy-two (72) hours notice of any maintenance or repair activity on City's Conduit.
- 8.4 **City Fees for Repairs.** Should School Board's Cable require repair or maintenance: (i) School Board shall submit a written request to City for such repair and maintenance; (ii) within seventy-two (72) hours of receipt of School Board's written request City shall provide to School Board a written estimate of the cost to effect the repair or maintenance; (iii) within seventy-two (72) hours

of receipt of City's estimate School Board shall provide written direction to City to either proceed or not proceed with the repair or maintenance. Upon completion of the requested repair or maintenance, City shall issue an invoice to School Board in an amount not to exceed 125% of City's previous written estimate. School Board shall pay invoice in full no later than thirty (30) days from invoice date.

9. REMOVAL OF SCHOOL BOARD'S CABLE.

9.1 Upon Termination Agreement. Upon termination of this Agreement for any reason, City shall have the right to remove School Board's Cable from City's Conduit and dispose of it in any manner upon giving School Board no less than thirty (30) days' written notice.

9.2 Upon Abandonment By School Board. If City believes that School Board appears at any time to have abandoned School Board's Cable: (i) City shall provide written notice to School Board that it believes School Board to have abandoned its cable; (ii) School Board shall, no less than thirty (30) days from date of City's notice, provide a written response to City confirming either its abandonment or continued use of School Board's Cable; (iii) if School Board so confirms its abandonment of School Board's Cable, City may remove School Board's Cable from City's Conduit and dispose of it in any manner without further notice to School Board.

10. DEFAULT. If either Party fails to observe or perform any material term of this Agreement and such failure continues for thirty (30) or more days after written notice from the other Party, then the non-defaulting Party may: (i) terminate this Agreement as described in subsections 10.1 and 10.2 below, and/or (ii) subject to Sections 15, 16, 18, 19 and 21 of this Agreement, pursue any remedies it may have at law or in equity.

10.1 Default by City. If City materially defaults in performance of any duty or obligation imposed by this Agreement, School Board may terminate this Agreement after giving written notice to City specifying the existence and nature of the default, and giving City thirty (30) days from the effective date of the notice to cure the default. Events of material default by City shall include, but are not limited to, failure to maintain proper licenses per Section 5 of this Agreement.

10.2 Default by School Board. If School Board defaults in the performance of any duty or obligation imposed on it by this Agreement, City may terminate this Agreement after giving written notice to School Board specifying the existence and nature of the default, and giving School Board thirty (30) days from the effective date of the notice to cure the default.

11. TERMINATION. Other than as provided by Section 10 and subsections 10.1 & 10.2 above, this Agreement may be terminated only by mutual written agreement of the Parties.

12. FORCE MAJEURE. City shall not be liable, nor shall any remedy be extended, for any failure of performance or equipment due to causes beyond City's reasonable control including without limitation acts of God, acts of any public enemy, sabotage or other criminal acts of third parties, floods, strikes, statutory or other laws, regulations, rules or orders of the federal, state or local government or any agency thereof ("Force Majeure Event"). A Force Majeure Event shall not, apart from City's gross negligence or willful misconduct, make City a defaulting party per subsection 10.1 of this Agreement.

13. NOTICES. Any notice permitted or required by this Agreement shall be in writing and shall be either: (i) delivered in person; (ii) mailed by United States Postal Service, certified with return receipt requested and all postage prepaid; or (iii) delivered by Federal Express, UPS or other widely recognized overnight courier services. Notice sent by mail shall be effective on the third business day following postmark, whether or not actually received, if properly addressed with postage prepaid. Notice delivered in person shall be effective upon delivery. Notice sent by overnight courier

service, properly addressed with all charges prepaid, shall be effective at noon on the next business day following placement of the notice in the hands of the courier service for delivery. Notices shall be given to the following addresses or such other addresses as the Parties may specify in writing from time to time during the Initial Term or any Extensions:

If to City:

Manager, Communications Utility
The City of Leesburg, Florida
Post Office Box 490630
Leesburg, Florida 34749-0630

If to School Board:

Facilities Design/Construction Dept.-Project Mgr.
The School Board of Lake County, Florida
201 West Burleigh Blvd.
Tavares, Florida 32778

14. **ASSIGNMENT.** Neither Party may assign its rights or delegate its duties hereunder, in whole or in part, without the prior, written consent of the other Party.
15. **LIMITATION OF LIABILITY AND REMEDIES.** Each Party understands and agrees that the other Party's liability and its sole remedy against the other Party for any loss or damage that arises directly or indirectly out of, or resulting from impairment of, any service provided pursuant to this Agreement, or any mistake, omission, interruption, delay, error, or defect in the provision of services, or for loss or damage caused by delayed performance, negligent performance or non-performance regardless of form of action shall be limited to recovery of actual damages in an amount equivalent to the amount of actual and direct damages that are proven.
16. **INDEMNIFICATION.** Each Party agrees to indemnify and hold the other harmless from and against any loss or damage, claim or cause of action, and any reasonable attorney's fees and court costs, arising out of: (i) any failure of the Party's performance under this Agreement; (ii) any negligence of the Party in the performance of its duties under Agreement; or (iii) any act or omission on the part of the Party, its agents, employees or servants.
17. **COMPLIANCE WITH APPLICABLE LAWS.** Each Party agrees to comply with all federal, state, and local statutes, regulations, rules, ordinances, judicial decisions, and administrative rulings applicable to its performance under this Agreement.
18. **SURVIVAL.** The obligations of the Parties under this Agreement, to the extent that they arose while the Agreement was in effect and remained unfulfilled at the time of termination, shall survive both the termination of this Agreement and/or the termination the nonexclusive license granted hereunder. Any such termination shall not release either Party from any liabilities, claims, or obligations arising hereunder including, but not limited to, indemnities which may have accrued or are accruing prior to or at the time of termination.
19. **DISPUTES AND ATTORNEYS' FEES.**
 - 19.1 **Alternative Dispute Resolution.** Any and all disputes arising hereunder shall be attempted to be resolved through a collaborative and mutually acceptable process with open discussions and cooperative effort. Dispute shall be resolved in accordance with the provisions of Chapter 164, Florida Statutes, "Governmental Disputes." The parties agree not to pursue litigation on any matter that is the subject of this Agreement until they have exhausted all good faith attempts at the alternative dispute resolution as set forth in Chapter 164, Florida Statutes.
 - 19.2 **Attorneys' Fees and Costs.** In the event resolution is not achieved under the efforts set forth in Paragraph 19.1 of this Agreement, then the prevailing party in any dispute under this Agreement shall be entitled to all reasonable costs, expenses and attorneys' fees, including but not limited to

those associated with alternative dispute resolution, trial and appellate proceedings in connection with any litigation or arbitration, if arbitration is mutually agreed upon, and in bankruptcy proceedings.

20. OWNERSHIP OF EQUIPMENT AND MATERIALS.

20.1 School Board's Cable. City understands and accepts that School Board's Cable shall remain the property of School Board.

20.2 City Property. School Board understands and agrees that, except for School Board's Cable, any and all equipment or materials installed or maintained by City pursuant to this Agreement shall remain the property of City.

21. GOVERNING LAW. This Agreement shall be governed by and construed in accordance with the laws of the State of Florida, without regard to its choice of law rules, and jurisdiction for any claim or cause of action shall lie only in Lake County, Florida.

22. AMENDMENT. This Agreement may only be modified or supplemented by an instrument executed by an authorized representative of each Party or their lawful successors.

23. NO WAIVER. No failure by either Party to enforce any right hereunder shall constitute a waiver of such right.

24. ENTIRE AGREEMENT. This Agreement sets forth the entire understanding of the Parties with regard to its subject matter. This Agreement supersedes and takes precedence over any and all prior negotiations, representations and agreements, oral or written, all of which are deemed to have merged into this Agreement and to have been extinguished except to the extent specifically set forth herein. This Agreement may not be amended orally, by implication, by course of conduct, or in any other manner whatsoever other than by way of a written instrument signed by both Parties hereto or their lawful successors. This Agreement shall be binding on the Parties hereto, as well as on their lawful successors and assigns. The Parties enter into this Agreement without either reliance on, or on the basis of, any promise, negotiation, representation, undertaking or agreement, either oral or written, which is not specifically set forth within this Agreement.

25. CONSTRUCTION. Any word in this Agreement shall be read as singular or plural, and as either masculine, feminine, or neuter gender, as the context may require. Captions are included for convenience only, and shall not be construed to limit, expand, or otherwise modify the text of this Agreement in any manner.

26. SEVERABILITY. If a court of competent jurisdiction finds or holds any part of this Agreement to be unenforceable, then only the unenforceable provision or section shall be effected and the remaining portions of this Agreement shall continue in full force and effect.

27. COUNTERPARTS. This Agreement may be executed in one or more counterparts, all of which taken together shall constitute one instrument.

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EXECUTED:

City of Leesburg, Florida

(signed)

Its Mayor

The School Board of Lake County, Florida

Debbie Stivender

(signed)

Its *Chairman*

ATTESTED:

(signed)

Its City Clerk

APPROVED AS TO FORM AND CONTENT:

(signed)

Its City Attorney