

MEMORANDUM

To: Mayor and City Council

From: Michael Smith, Public Works Director

Date: October 26, 2015

Subject: **Consideration of Pole Attachment Agreement with Mobilitie**

ITEM DESCRIPTION

Consideration of a pole attachment agreement with Mobilitie to allow for installation of small cellular antennae on city owned poles.

BACKGROUND

Representatives of Mobilitie have requested the city's consideration of an agreement to attach microcellular antennae and related equipment to city owned poles. Terms of the proposed agreement include:

- Fifteen year duration with three successive automatic renewals of five years.
- Compensation will be provided to the city in the amount of \$500 per facility per year with an adjustment every 5 years based on the Consumer Price Index.
- Mobilitie is required to obtain city approval prior to installing equipment on any city owned poles.
- The agreement may be terminated for default with 40 days written notice.

**AUTHORIZATION FOR MOBILITIE, LLC, TO
OPERATE AND MAINTAIN TELECOMMUNICATIONS FACILITIES
ON CERTAIN CITY OF DUNWOODY, GEORGIA-OWNED FACILITIES**

This agreement (“Authorization”) is made on the _____ day of _____, 2015 (“Effective Date”), by and between the City of Dunwoody (“Grantor”), a municipal corporation of the State of Georgia, and Mobilitie, LLC, a Nevada limited liability company (“Grantee”).

RECITALS

WHEREAS, the Grantor has the right and power to regulate and permit the installation, attachment, operation, and maintenance of telecommunications facilities on City-owned infrastructure in the Public Right-of-Way; and

WHEREAS, Grantee wishes to construct, install, operate, and maintain telecommunications facilities on certain Grantor-owned structures in the Public Right-of-Way.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, this agreement is entered into by and between the parties subject to the following terms and conditions:

SECTION 1. DEFINITIONS

For the purpose of this Authorization, the following terms, phrases, words and their derivations shall have the meaning given herein. Words not defined shall be given their meaning according to common usage within the telecommunications industry. Words not defined that have no meaning within the telecommunications industry shall be given their common and ordinary meaning:

- 1.1 “City” or “Grantor” shall mean the City of Dunwoody, Georgia, including areas annexed during the term of this Authorization.
- 1.2 “FCC” shall mean the Federal Communications Commission.
- 1.3 “Grantee” shall mean Mobilitie, LLC, and its successors, transferees or assignees.
- 1.4 “Owner” shall mean a person with a legal or equitable interest in ownership of real property.
- 1.5 “Person” shall mean any corporation, partnership, proprietorship, individual or organization, governmental organization, or any natural person.
- 1.6 “Public Property” shall mean any real property owned by Grantor other than a Public Right-of-Way.
- 1.7 “Public Right-of-Way” shall mean the surface, air space above the surface, and the area below any public street, road, highway, freeway, lane, path, public way, alley, court, sidewalk, boulevard, parkway, drive, bridge, tunnel, park, parkway, waterway, easement

or right-of-way now or hereafter held by Grantor, or dedicated for use by the Grantor, use by the general public, or use compatible with the Service or operations of the Telecommunications Equipment.

- 1.8 “Resident” shall mean a natural person who lives in the City.
- 1.9 “Service” means any Telecommunications Service that is offered to any Person in conjunction with, or distributed over, Telecommunications Equipment as provided hereunder.
- 1.10 “Telecommunications Equipment” or “Equipment” shall mean all facilities and equipment used by Grantee to provide Service, including but not limited to antennas, cables, wires, lines, waveguides, poles, towers, conductors, ducts, conduits, vaults, manholes, amplifiers, appliances, pedestals, or other associated conductors, converters, equipment or facilities, and related hardware, installed by Grantee at a particular location to be used for its distribution and provision of Telecommunications Services and other lawful services within the City.
- 1.11 “Telecommunications Service” shall mean the transmission, between or among points specified by the user, of information of the user’s choosing.

SECTION 2. INSTALLATION OF TELECOMMUNICATIONS EQUIPMENT

- 2.1 Grantor Facilities. The Grantor hereby authorizes and permits Grantee to, from time to time during the term of this Authorization, install, construct, operate, maintain, repair, locate, move, remove, replace, reattach, reinstall, reconstruct and retain its Telecommunications Equipment in or on utility poles, conduit, street light poles, and other structures owned or controlled by the Grantor (“Grantor Facilities”) as detailed in this Authorization, for the purposes of supporting the Telecommunications Equipment. In addition, Grantee shall have the right to draw electricity for the operation of the Telecommunications Equipment from the power source associated with each such attachment to Grantor Facilities, subject to the same usage charges paid for by members of the public for such power usage, if any.
- 2.2 Authorization Term. The initial term of this Authorization shall commence when adopted as of the Effective Date, and shall expire fifteen (15) years from said date, unless renewed as herein provided.
- 2.3 Scope of Authorization. Any and all rights expressly granted to Grantee under this Use Agreement, which shall be exercised at Grantee’s sole cost and expense, shall be subject to the prior and continuing right of the City under applicable Laws to use any and all parts of the Public Way exclusively or concurrently with any other person or entity and shall be further subject to all deeds, easements, dedications, conditions, covenants, restrictions, encumbrances, and claims of title of record which may affect the Public Way. Nothing in this Authorization shall be deemed to grant, convey, create, or vest in Grantee a real property interest in land, including any fee, leasehold interest, or easement.

Any work performed pursuant to the rights granted under this Authorization shall be subject to the reasonable prior review and approval of the City except that it is agreed that no zoning or planning board permit, variance, conditional use permit or site plan permit, or their equivalent under the City's ordinances, codes or laws, shall be required for the installation of Grantee's Equipment installed on City Facilities, unless such a process has been required for the placement of all communications facilities.

- 2.4 No Interference. Grantee in the performance and exercise of its rights and obligations under this Authorization shall not interfere in any manner with the existence and operation of any and all public and private rights of way, sanitary sewers, water mains, storm drains, gas mains, poles, aerial and underground electrical and telephone wires, electroliers, cable television, and other telecommunications, utility, or municipal property, without the express written approval of the owner or owners of the affected property or properties, except as permitted by applicable Laws or this Authorization.
- 2.5 Conditions of Authorization. The rights afforded to Grantee under this Section 2 are granted subject to the conditions herein provided.
- 2.6 Annual Fee. In order to compensate the City for use of City Facilities, Grantee shall pay to the City an annual fee (the "Annual Fee") in the amount of Five Hundred Dollars (\$500.00) for the use of each City Facility, if any, upon which Equipment has been installed pursuant to this Authorization. The aggregate Annual Fee with respect to each year of the term shall be an amount equal to the number of Equipment installed on City Facilities during the preceding twelve (12) months multiplied by the Annual Fee, prorated as appropriate, and shall be due and payable not later than forty-five (45) days after each anniversary of the Installation Date. The City represents and covenants that the City owns all City Facilities for the use of which it is collecting from Grantee the Annual Fee pursuant to this Section.
- CPI Adjustment. Effective commencing on the fifth (5th) anniversary of the Installation Date and continuing on each fifth (5th) anniversary thereafter during the term, the Annual Fee with respect to the ensuing five-year period shall be adjusted by a percentage amount equal to the percentage change in the U.S. Department of Labor, Bureau of Labor Statistics Consumer Price Index for the South.
- Accounting Matters. Grantee shall keep accurate books of account at its administrative office, and in electronic format, for the purpose of determining the amounts due to the City under this section. The City may inspect Grantee's books of account relative to the City, or request electronic copies, at any time during regular business hours on thirty (30) days' prior written notice and may audit the books from time to time at the City's sole expense, but in each case only to the extent necessary to confirm the accuracy of payments due under this section. The City agrees to hold in confidence any non-public information it learns from Grantee to the fullest extent permitted by Law.

Notwithstanding anything contained in this Agreement to the contrary, Grantee's obligation to pay the Annual Fee hereunder: (i) shall be conditioned on and shall not commence until commencement of installing the corresponding Telecommunications

Equipment on the applicable Grantor Facility, and (ii) shall terminate upon removal of such Telecommunications Equipment (other than certain components of such Telecommunications Equipment if Grantor authorizes the non-removal thereof).

SECTION 3. CONSTRUCTION, OPERATION AND MAINTENANCE

3.1 Applications.

- A. For installing Telecommunications Equipment on Grantor Facilities, the proposed location(s) of the Telecommunications Equipment on Grantor Equipment shall be approved by Grantor in its sole discretion within thirty days of receiving an Application from Grantee. After the initial approval of this Authorization, any further installations on Grantor Facilities shall first be authorized by the City Manager or designee, but without further need for legislative action. The Application for each of Grantor's facilities must include drawings and diagrams depicting the location(s) and proposed manner of installation. The Grantor may refuse to allow attachment of Telecommunications Equipment to Grantor Facilities only where there is insufficient capacity, or for reasons related to aesthetics, safety, reliability, or generally applicable engineering standards. If Grantee's application is denied, Grantor will send Grantee a denial, in writing, stating the particular aesthetic, safety, capacity, reliability or generally applicable engineering reason for denial. In no event shall the Grantor be obligated to replace any Grantor Facilities to accommodate the Telecommunications Equipment. Grantee must replace, at its sole cost and expense, any replacement pole owned by the Grantor that is needed to accommodate Telecommunications Equipment.
- B. For all other installations of Telecommunications Equipment in the public right-of-way, not on Grantor facilities, Grantee shall obtain a telecommunications franchise, and be obligated to the requirements of same, pursuant to O.C.G.A. §46-5-1.

3.2 Compliance with Law. The construction, operation, maintenance, and removal of the Telecommunications Equipment shall be in accordance with all applicable sections of the Occupational Safety and Health Act of 1970, as amended, the National Electrical Safety Code, the National Electric Code and other applicable federal, state and local laws and regulations.

3.3 FAA. Any Telecommunications Equipment antennae and their supporting structures shall comply with applicable rules and regulations of the Federal Aviation Administration.

3.4 Tree Trimming. Grantee may cut or trim select limbs on trees and vegetation interfering with National Electrical Safety Code and other clearance requirements. The grantee will not cut the tops out of trees.

3.5 Duty to Repair. Any of Grantor's Property, or the public right of way, that is disturbed or damaged during, or as a result of, the construction, reconstruction, repair, replacement,

relocation, operation or maintenance of the Telecommunications Equipment on Grantor's facilities shall be promptly repaired by the Grantee, at its sole expense.

- 3.6 Relocation and Displacement of Equipment. Grantee understands and acknowledges that the City may require Grantee to relocate one or more of its Equipment installations. Grantee shall at the City's direction relocate such Equipment at Grantee's sole cost and expense, whenever the City reasonably determines that the relocation is needed for any of the following purposes: (a) if required for the construction, completion, repair, relocation, or maintenance of a City project; (b) because the Equipment is interfering with or adversely affecting proper operation of any City-owned light poles, traffic signals, or other equipment in the Public Way; or (c) to protect or preserve the public health or safety. In any such case, the City shall use its best efforts to afford Grantee a reasonably equivalent alternate location. If Grantee shall fail to relocate any Equipment as requested by the City within a reasonable time under the circumstances in accordance with the foregoing provision, the City shall be entitled to relocate the Equipment at Grantee's sole cost and expense, without further notice to Grantee. To the extent the City has actual knowledge thereof, the City will attempt promptly to inform Grantee of the displacement or removal of any Equipment. Grantor will provide Grantee with sixty (60) days' notice of any required relocation.
- 3.7 Relocations at Grantee's Request. In the event Grantee desires to relocate any Equipment from one City Facility to another, Grantee shall so advise the City. The City will use its best efforts to accommodate Grantee by making another reasonably equivalent City Facility available for use in accordance with and subject to the terms and conditions of this Authorization.
- 3.8 Damage to Public Way. Whenever the removal or relocation of Equipment is required or permitted under this Authorization, and such removal or relocation shall cause the Public Way or City Facilities to be damaged, Grantee, at its sole cost and expense, shall promptly repair and return the Public Way and City Facilities in and on which the Equipment are located to a safe and satisfactory condition in accordance with applicable Laws, normal wear and tear excepted. If Grantee does not repair the site as just described, then the City shall have the option, upon fifteen (15) days' prior written notice to Grantee, to perform or cause to be performed such reasonable and necessary work on behalf of Grantee and to charge Grantee for the proposed costs to be incurred or the actual costs incurred by the City at the City's standard rates. Upon the receipt of an itemized list of repairs performed and a demand for payment by the City, Grantee shall promptly reimburse the City for such documented, actual costs.
- 3.9 Abandonment. If Grantee abandons its Equipment attached to City facilities, then, to the extent not inconsistent with applicable law, Grantee shall remove such Equipment within ninety (90) days. Equipment shall be considered "abandoned" if it has not been used for its intended purpose for more than one hundred eighty (180) consecutive days.

- 3.10 Inspection. Grantee shall inspect the Equipment to ensure that all attachments are structurally sound and that the equipment is operating properly not less than once per year.

SECTION 4. INSURANCE, INDEMNITY

4.1 Indemnity.

- A. Scope of Indemnity. To the extent permitted by law, and except for matters arising out of the Grantor's sole negligence or willful misconduct, or the negligence or willful misconduct of Grantor's agents and employees, Grantee shall, at its sole cost and expense, indemnify, hold harmless, and defend the Grantor, its officers, boards, commissions, agents and employees, against any and all claims, causes of action, proceedings, and judgments for damages or equitable relief arising out of the construction, repair, maintenance, or operation of the Telecommunications Equipment, including reasonable attorney's fees.
- B. Duty to Give Notice and Tender Defense. The Grantor must give the Grantee timely written notice of the making of any claim or of the commencement of any action, suit or other proceeding in connection with the Telecommunications Equipment. In the event such claim arises, the Grantor or any other indemnified party shall tender the defense thereof to the Grantee and the Grantee shall have the right to defend, settle or compromise any claims arising hereunder and the Grantor shall cooperate fully therein.

4.2 Insurance.

- A. The Grantee shall maintain throughout the duration of the term of this Authorization, Commercial General Liability insurance and Commercial Automobile Liability insurance covering the Grantee against any and all claims, injury or damage to persons or property, both real and personal, caused by the construction, erection, operation or maintenance of the Telecommunications Equipment, in an amount no less One Million Dollars (\$1,000,000) per occurrence (combined single limit), including bodily injury and property damage, and in an amount not less than Three Million Dollars (\$3,000,000) annual aggregate for each personal injury liability.
- B. The Grantee shall maintain throughout the duration of the term of this Authorization statutory workers' compensation and employer's liability insurance in an amount not less than One Million Dollars (\$1,000,000) and shall furnish the Grantor with a certificate showing proof of such coverage.
- C. All policies shall name the Grantor, its officers, agents and employees, whether elected or appointed, as additional insureds.

- D. Grantee shall provide thirty (30) days advance notice to the Grantor in the event of cancellation of any coverage.
- E. Evidence of all insurance required hereunder shall be furnished upon request to Grantor.

SECTION 5. REMEDIES

- 5.1 Notice of Violation. Grantor shall provide Grantee with a detailed written notice of any Authorization violation upon which it proposes to take action, and a ninety (90) day period within which Grantee may: (1) demonstrate that a violation does not exist or cure an alleged violation, (2) cure the violation, or (3) if the nature of the violation prevents correction of the violation within 90 days, to initiate a reasonable plan of action to correct such violation (including a projected date by which it will be completed) and notify the Grantor of such plan of action.
- 5.2 Default. If Grantee fails to disprove or correct the violation within ninety (90) days or, in the case of a violation which cannot be corrected in 90 days and Grantee has failed to initiate a reasonable plan of corrective action and to correct the violation within the specified time frame, then Grantor may declare the Grantee in default, which declaration must be in writing. In the event that the Grantor declares Grantee in default, the Grantor shall have the right to institute legal proceedings to collect damages from the date of declaration of default, terminate this Authorization or to exercise any other rights and remedies afforded to the Grantor in law or equity.
- 5.3 Procedures Governing Termination. Grantor shall give written notice to the Grantee of its intent to terminate the Authorization and the grounds therefor. Grantee shall have thirty (30) days from such notice to object, in writing, and to state its reasons for such objection. In the event the Grantor has not received a response that is reasonably satisfactory, it may then proceed to place its request for termination of the Authorization at a Council meeting. Grantor shall cause to be served upon the Grantee, at least ten (10) days prior to the time and place of such meeting, a written notice of this intent to request such termination, and the time and place of the meeting.
- 5.4 Right to Reimbursement. Upon removal of Telecommunications Equipment, Grantee will be entitled to reimbursement of a pro rata portion of the unused Annual Fee.

SECTION 6. AMENDMENT AND RENEWAL

- 6.1 Amendment. Requests to amend this Authorization, to accommodate a significant change in circumstances or to prevent unreasonable hardship to Grantee, may be made by the Grantee to Grantor. Grantor shall review such requests within fourteen (14) calendar days, or earliest meeting of the governing body of Grantor, and act on a request within thirty (30) days. If Grantee cannot reach agreement with the Grantor on the amendment within such time, Grantee may terminate this Agreement in accordance with Sections 5.3 and 5.4.
- 6.2 Renewal.
- A. Unless earlier terminated by either party pursuant to the provisions of this Authorization, this Authorization shall renew automatically on the same terms and conditions as herein for three (3) successive terms of five (5) years each, for a total of up to fifteen (15) years beyond the initial term of this Authorization, if the Grantee has substantially complied with the material terms of the existing Authorization.
- B. As between the Grantor and the Grantee, the Grantee shall at all times retain ownership of the Telecommunications Equipment, and upon expiration or non-renewal shall be afforded a reasonable time to remove Telecommunications Equipment that are installed on Grantor's facilities or alternatively, sell the same to a qualified buyer consistent with applicable law.

SECTION 7. MISCELLANEOUS

- 7.1 Severability. If any law, ordinance, regulation or court decision renders any provision of this Authorization invalid, the remaining provisions of the Authorization shall remain in full force and effect.
- 7.2 Force Majeure. Grantee shall not be deemed in default, non-compliance, or in violation with any provision of this Authorization where performance was hindered or rendered impossible by war or riots, civil disturbances, natural catastrophes or other circumstances beyond the Grantee's control.
- 7.3 Nonexclusive.
- A. This Authorization and the right it grants to use and occupy Grantor's facilities shall not be exclusive and does not, explicitly or implicitly, preclude the issuance of other Authorizations to operate Telecommunications Equipment on Grantor's facilities in the City of Dunwoody. Provided, however, that Grantor shall not authorize or permit another Person to construct, operate or maintain Telecommunications Equipment, or otherwise to utilize Grantor's facilities for the provision of any Service, on material terms and conditions which are more favorable or less burdensome than those applied to Grantee.

B. In the event another Person provides Services on terms and conditions that are more favorable or less burdensome than the terms and conditions applicable to Grantee under this Authorization (“Third Party Authorization”), the Grantor shall adjust the terms and conditions in the Third Party Authorization or in this Authorization so that the terms and conditions under which such other Person operates are not more favorable or less burdensome than those that are applicable to Grantee.

7.4 No Waiver.

A. The failure of either party on one or more occasions to exercise a right or to require compliance or performance under this Authorization, or any other applicable law, shall not be deemed to constitute a waiver of such right or a waiver of compliance or performance by such party, unless such right or such compliance or performance has been specifically waived in writing.

B. Both the Grantor and the Grantee expressly reserve all rights they may have under law to the maximum extent possible; neither the Grantor nor the Grantee shall be deemed to have waived any rights they may now have or may acquire in the future by entering into this Authorization.

7.5 Attorneys’ Fees. Should any dispute arising out of this Authorization lead to litigation, the prevailing party shall be entitled to recover its costs of suit, including (without limitation) reasonable attorneys’ fees.

7.6 Consent Criteria. Unless otherwise expressly stated, in any case where the approval or consent of one party hereto is required, requested or otherwise to be given under this Authorization, such party shall not unreasonably delay, condition, or withhold its approval or consent.

7.7 Notice. Any and all notices which shall or may be given pursuant to this Authorization must be in writing and delivered by hand or (a) through the United States mail, by registered or certified mail; (b) by prepaid overnight delivery service; or (c) by email transmission, if a hard copy of the same is delivered through the U. S. Postal Service or by overnight delivery service, to the following addresses:

if to Grantor:

City of Dunwoody
Attn: City Manager
41 Perimeter Center East, Suite 250
Dunwoody, Georgia 30346

if to Grantee:

Mobilitie, LLC
2220 University Drive
Newport Beach, CA 92660
Attn: Legal Department

Each party shall provide timely notice to the other of changes in the address for notification under this provision. Notice shall be deemed effective upon receipt in the case of hand delivery, three days after delivery to the U.S. Postal Service, or the next business day if delivery is effectuated by email or overnight delivery service.

- 7.7 Assignment. This Authorization shall not be assigned by Grantee without the express written consent of the City. Notwithstanding the foregoing, the transfer of the rights and obligations of Grantee to a parent, subsidiary, or other affiliate of Grantee or to any successor in interest or entity acquiring fifty-one percent (51%) or more of Grantee's stock or assets (collectively "Exempted Transfers") shall not be deemed an assignment for the purposes of this Agreement and therefore shall not require the consent of the City, provided that Grantee reasonably demonstrates to the City's lawfully empowered designee the following criteria (collectively the "Exempted Transfer Criteria"): (i) such transferee will have a financial strength after the proposed transfer at least equal to that of Grantee immediately prior to the transfer; (ii) any such transferee assumes all of Grantee's obligations hereunder; and (iii) the experience and technical qualifications of the proposed transferee, either alone or together with Grantee's management team, in the provision of telecommunications or similar services, evidences an ability to operate the Telecommunications Equipment. Grantee shall give at least thirty (30) days' prior written notice (the "Exempted Transfer Notice") to the City of any such proposed Exempted Transfer and shall set forth with specificity in such Exempted Transfer Notice the reasons why Grantee believes the Exempted Transfer Criteria have been satisfied. The City shall have a period of thirty (30) days (the "Exempted Transfer Evaluation Period") from the date that Grantee gives the City its Exempted Transfer Notice to object in writing to the adequacy of the evidence contained therein. Notwithstanding the foregoing, the Exempted Transfer Evaluation Period shall not be deemed to have commenced until the City has received from Grantee any and all additional information the City may reasonably require in connection with its evaluation of the Exempted Transfer Criteria as set forth in the Exempted Transfer Notice, so long as the City gives Grantee notice in writing of the additional information the City requires within fifteen (15) days after the City's receipt of the original Exempted Transfer Notice. If the City fails to act upon Grantee's Exempted Transfer Notice within the Exempted Transfer Evaluation Period (as the same may be extended in accordance with the foregoing provisions), such failure shall be deemed an affirmation by the City that Grantee has in fact established compliance with the Exempted Transfer Criteria to the City's satisfaction.

- 7.8 Representations and Warranties. Each of the parties to this Authorization represents and warrants that it has the full right, power, legal capacity, and authority to enter into and perform the parties' respective obligations hereunder and that such obligations shall be binding upon such party without the requirement of the approval or consent of any other person or entity in connection herewith.
- 7.9 Amendment. This Authorization may not be amended except pursuant to a written instrument signed by both parties.
- 7.10 Entire Agreement. This Authorization and all attachments hereto represent the entire understanding and agreement between the parties hereto with respect to the subject matter hereof, supersedes all prior oral negotiations between the parties, and can be amended, supplemented, modified or changed only by an agreement in writing which makes specific reference to this Authorization or the appropriate attachment and which is signed by the party against whom enforcement of any such amendment, supplement, modification or change is sought.
- 7.11 Laws Governing. This Authorization shall be governed by and construed in accordance with the laws of the State of Georgia, and applicable federal law.

[Remainder of page intentionally left blank – signature page follows]

IN WITNESS WHEREOF, and in order to bind themselves legally to the terms and conditions of this Authorization, the duly authorized representatives of the parties have executed this Authorization as of the dates set forth below.

Grantor: CITY OF DUNWOODY, GEORGIA

By: _____
Name: _____
Its: _____
Date: _____

Grantee: MOBILITIE, LLC

By: _____
Name: _____
Its: _____
Date: _____

PASSED AND ADOPTED as of the Effective Date.

ATTEST:

By: _____
Sharon Lowery, City Clerk

Approved as to Form and Content:

City Attorney