

CITY OF SAN DIEGO USE AND OCCUPANCY PERMIT

This CITY OF SAN DIEGO USE AND OCCUPANCY PERMIT ("Permit") is entered into between The City of San Diego, a California municipal corporation ("CITY"), and PACIFIC BELL TELEPHONE COMPANY, a California corporation doing business as AT&T California ("PERMITTEE"), hereinafter collectively referred to as the "Parties," to be effective as of January 1, 2011 ("Effective Date"), provided this Permit is signed by the Parties and approved by the San Diego City Attorney.

FOR VALUABLE CONSIDERATION, the sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. DEFINITIONS.

As used in this Permit, the following terms shall be defined as follows:

- 1.1. **"Hazardous Substances"** – those hazardous substances listed by the Environmental Protection Agency in regularly released reports and any other substances incorporated into the State of California's list of hazardous substances.
- 1.2. **"Permit Area"** – a 10-foot wide by 1,896-foot long corridor located on a portion of that certain CITY-owned real property (commonly known as the North City Water Reclamation Plant area at 4949 Eastgate Mall in the City of San Diego, State of California), extending from Eastgate Mall to the north property line of the parcel, both the real property and the corridor thereon being more particularly described in Exhibit A and depicted in Exhibit B.
- 1.3. **"Permit Use"** – the non-exclusive use of the Permit Area for the purposes of installing, operating, and maintaining PERMITTEE'S Underground Communication Facilities (defined below) within the Permit Area.
- 1.4. **"PERMITTEE'S Operations"** – PERMITTEE'S development, occupancy, use, maintenance, and/or restoration of the Permit Area.
- 1.5. **"Underground Communication Facilities"** – include, but are not limited to, wires, cables, conduits, pipes, manholes, handholes, service boxes, aboveground markers, risers, service pedestals, underground and aboveground switches, fuses, terminals, terminal equipment cabinets, transformers with associated concrete pads, associated electrical conductors, and related fixtures and appurtenances, more particularly described in Exhibit C.

2. RIGHT TO ENTER AND OCCUPY.

Subject to the terms and conditions of this Permit, CITY hereby grants permission to PERMITTEE, its officers, employees, agents, and contractors to enter upon and occupy the Permit Area solely for the purpose of the Permit Use.

2.1. License Only. This Permit is a license to use CITY-owned property. It is not a lease.

3. USE OF PERMIT AREA.

PERMITTEE may use the Permit Area solely for the Permit Use and for no other purpose whatsoever without CITY'S prior written consent in each instance.

3.1. No Nuisance. PERMITTEE shall not use the Permit Area in any manner which creates a nuisance or unreasonably disturbs the quiet enjoyment of persons in the surrounding area.

3.2. Endangered Species Habitat. PERMITTEE acknowledges the existence of Vernal Pools and federally endangered San Diego Fairy Shrimp within the vicinity of the Permit Area. PERMITTEE further acknowledges that there will be no vehicular use within and/or adjacent to the Permit Area. PERMITTEE agrees that all access to PERMITTEE'S maintenance vaults will be made using the existing maintenance road along the eastern boundary of the City-owned property described in Exhibit A and depicted in Exhibit B.

4. TERM.

The Term of this Permit ("Term") shall be ten (10) years, commencing on the Effective Date. "Permit Year" shall mean each twelve (12) month period during the Term, commencing on the month and day of the Effective Date and continuing to the same month and day of the following year, minus one (1) calendar day.

4.1. No Holdover. PERMITTEE may not continue in possession of the Permit Area past the expiration or earlier revocation or termination of this Permit. Any extension of the Term shall require approval by the City Council pursuant to City Council Policy No. 700-10 ("Disposition of City-Owned Real Property").

5. PERMIT FEE.

Upon execution of this Permit by PERMITTEE, PERMITTEE shall pay CITY a one-time, non-refundable permit processing fee in the amount of \$600 (six hundred dollars).

6. RENT.

PERMITTEE shall pay to CITY rent in the amount of \$3,900 (three thousand nine

hundred dollars) per year, in advance, subject to annual adjustments as of the first day of the second Permit Year and each Permit Year thereafter, as follows:

“Annual Rent” shall be as follows:

Permit Year Two	\$4,056
Permit Year Three	\$4,218
Permit Year Four	\$4,387
Permit Year Five	\$4,562
Permit Year Six	\$4,745
Permit Year Seven	\$4,935
Permit Year Eight	\$5,132
Permit Year Nine	\$5,337
Permit Year Ten	\$5,551

The above rent schedule reflects an annual rent escalation equal to four percent (4%) above the annual rent for each preceding Permit Year.

- 6.1. Time and Place of Payment. Rent is due annually in advance on or before the first day of each Permit Year, following PERMITTEE’S receipt of an invoice from CITY. Annual Rent checks shall be made payable to “City Treasurer” and delivered to the Office of the City Treasurer, Civic Center Plaza Building, 1200 Third Avenue, First Floor, San Diego, CA 92101, or mailed with an invoice to:

THE CITY OF SAN DIEGO
Office of the City Treasurer
P.O. Box 122289
San Diego, CA 92112-4165

- 6.2. Delinquent Rent. If PERMITTEE fails to pay annual rent when due, PERMITTEE shall pay, in addition to the unpaid annual rent, five percent (5%) of the delinquent annual rent. If the annual rent is still unpaid fifteen (15) calendar days after the first day of the Permit Year, PERMITTEE shall pay an additional five percent (5%), for a total of ten percent (10%) of the delinquent annual rent, which is agreed by the parties to be appropriate to compensate CITY for loss resulting from fee delinquency, including lost interest, opportunities, legal costs, and the cost of servicing the delinquent account. In no event shall the charge for late payments of annual rent be less than \$250 (two hundred fifty dollars). Acceptance of late charges and any portion of the late payment by CITY shall neither constitute a waiver of PERMITTEE’S default with respect to late payment nor prevent CITY from exercising any other rights and remedies available at law or in equity.

7. INSURANCE.

- 7.1. Prerequisites to PERMITTEE’S Operations. Prior to PERMITTEE’S Operations,

PERMITTEE shall complete each of the following:

- 7.1.1. PERMITTEE shall obtain a Commercial General Liability insurance policy providing coverage for bodily injury (including death), personal injury, and property damage with limits of \$2,000,000 (two million dollars) per occurrence, subject to an annual aggregate of \$4,000,000 (four million dollars), and deliver to CITY'S Real Estate Assets Department ("READ") a certificate of such insurance currently in effect;
 - 7.1.2. PERMITTEE shall obtain an All-Risk Property Insurance policy on all of PERMITTEE'S insurable property within the Permit Area in an amount to cover one hundred percent (100%) of the replacement cost, and deliver to READ a certificate of such insurance currently in effect;
 - 7.1.3. PERMITTEE shall obtain an Automobile Liability Insurance policy, providing coverage for bodily injury and property damage, with a combined single limit of \$1,000,000 (one million dollars) per occurrence. Such insurance shall cover liability arising out of any vehicle (including owned, hired, and non-owned vehicles) operated within the Permit Area. Coverage shall be written on ISO form CA 00 01 12 90, or a substitute form providing equivalent liability coverage. PERMITTEE shall deliver to READ a certificate of such insurance currently in effect;
 - 7.1.4. PERMITTEE shall obtain a Workers' Compensation Insurance policy, as required by the laws of the State of California, for all of PERMITTEE'S employees who perform any work associated with this Permit, providing \$1,000,000 (one million dollars) of Employers' Liability coverage. PERMITTEE shall deliver to READ a certificate of such insurance currently in effect;
 - 7.1.5. PERMITTEE shall obtain a separate endorsement(s) [CG2010 (11/85) or equivalent form], naming "The City of San Diego, its elected officials, officers, employees, representatives, and agents" as additional insureds in each of PERMITTEE'S liability policies described in Sections 7.1.1 and 7.1.3, and deliver to READ a copy of such endorsement(s); and
 - 7.1.6. Each of the insurance policies described above shall be endorsed so that the coverage is primary and noncontributory to any coverage carried or maintained by CITY.
- 7.2. Qualified Insurer(s). All insurance required under this Permit must be provided by insurers licensed to do business in the State of California which are rated at least "A-, VI" by the current AM Best Ratings Guide and which are acceptable to CITY. CITY may accept non-admitted surplus lines insurers, provided they are included on the most recent list of California eligible surplus lines insurers (LESLI list) and otherwise meet CITY requirements.

- 7.3. Deductibles and Retentions. All deductibles and self-insured retentions on any insurance policy required under this Permit shall be the sole responsibility of PERMITTEE, and shall be disclosed and acceptable to CITY at the time evidence of insurance is provided.
- 7.4. Continuity of Coverage. Each insurance policy required under this Permit shall be in effect prior to PERMITTEE'S Operations, except that "course of construction fire insurance" shall be in force upon commencement of all authorized construction, and full applicable fire insurance coverage shall be effective upon completion of each insurable improvement. PERMITTEE shall keep in force each of the insurance policies required under this Permit throughout the Term and any extended use, without lapse. At least ten (10) calendar days prior to the expiration of each insurance policy, PERMITTEE shall furnish a certificate(s) showing that a new or extended policy has been obtained which meets the requirements of this Permit.
- 7.5. Modification. To assure protection from and against the kind and extent of risk existing within the Permit Area, CITY, in its sole discretion, may require the reasonable revision of amounts and coverage, at any time during the Term but no more frequently than once every two years during the Term, by providing PERMITTEE thirty (30) calendar days prior written notice. PERMITTEE shall also obtain any additional insurance required by CITY for new improvements, changed circumstances, or CITY'S reasonable re-evaluation of risk levels related to PERMITTEE'S use of the Permit Area.
- 7.6. Accident Reports. PERMITTEE shall immediately report to CITY any accident causing property damage or injury to persons within the Permit Area. Such report shall contain the names and addresses of the involved parties, a statement of the circumstances, the date and hour of the accident, the names and addresses of any witnesses, and other pertinent information.
- 7.7. Self-Insurance. PERMITTEE may provide READ evidence of self-insurance. If such evidence of self-insurance is deemed satisfactory and approved, in writing, by CITY'S Risk Management Department, such evidence of self-insurance shall be in lieu of the foregoing insurance requirements set forth in Sections 7.1 through 7.6, and no further proof of insurance is required unless changes are made to PERMITTEE'S insurance status.
- 7.8. Failure to Comply. Except where self-insured, if PERMITTEE fails or refuses to obtain or maintain any of the insurance required under this Permit, or fails to provide CITY proof of such insurance, CITY may obtain the insurance. PERMITTEE shall reimburse CITY for the premiums paid, with interest at the maximum allowable legal rate then in effect in California. CITY shall notify PERMITTEE of such payment of premiums, stating the amount paid, the name of each insurer, and the rate of interest. PERMITTEE shall pay such reimbursement and interest on the first day of the month following CITY'S notice.

Notwithstanding any other provision of this Permit, if PERMITTEE fails or refuses to obtain or maintain any of the insurance required under this Permit, or fails to provide proof of such insurance, CITY may revoke this Permit at will and at any time during the Term if PERMITTEE fails to cure the breach within ten (10) calendar days after written notice from CITY. If CITY exercises its right to revoke this Permit, CITY will provide PERMITTEE written notice of the revocation, and upon PERMITTEE'S receipt of the notice, PERMITTEE shall immediately cease PERMITTEE'S Operations and remove PERMITTEE'S improvements and personal property from the Permit Area (pursuant to Section 27 of this Permit).

8. PERMITTEE'S RISK.

PERMITTEE shall bear all risks and liability arising out of or in any manner directly or indirectly connected with PERMITTEE'S Operations and any damages to the improvements on, under, or in the vicinity of the Permit Area resulting directly or indirectly thereby.

9. ACCEPTANCE OF PERMIT AREA.

By signing this Permit, PERMITTEE represents and warrants that it has independently inspected the Permit Area and made all tests, investigations, and observations necessary to satisfy itself as to the condition of the Permit Area and its suitability for the Permit Use. PERMITTEE further represents and warrants that PERMITTEE is not relying on any representation by CITY as to the condition of the Permit Area or its suitability for the Permit Use, and that PERMITTEE is relying solely on its own and independent inspections, tests, investigations, and observations of the Permit Area in entering into this Permit. PERMITTEE accepts the Permit Area in its current condition, and acknowledges and agrees that CITY has fulfilled all obligations CITY may have had to improve, modify, repair, replace, alter, or otherwise develop the Permit Area prior to the Effective Date. PERMITTEE shall not hold CITY responsible for any defects within the Permit Area. PERMITTEE accepts and assumes all risk of harm to all persons and property, including, without limitation, PERMITTEE'S employees, from any defects within the Permit Area, and shall be solely responsible therefor.

10. ENTIRE INSTALLATION; IMPROVEMENTS AND ALTERATIONS.

10.1. Entire Installation. PERMITTEE represents and warrants that the Underground Communication Facilities listed in Exhibit C constitute the entire installation, which PERMITTEE shall update from time to time upon CITY'S request.

10.2. Improvements and Alterations. PERMITTEE shall not construct any improvements, structures, or installations within the Permit Area, nor alter the Permit Area, without the express written consent of CITY. Except as required by law, CITY shall not be obligated to make any repair or assume any expense for any improvements or alterations to the Permit Area.

11. COMPLIANCE WITH LAWS AND POLICIES.

- 11.1. General. PERMITTEE shall, at its sole cost and expense, comply with the requirements of all rules, regulations, ordinances, laws, and directives of governing authorities now in effect or which may hereafter be in effect, which pertain to PERMITTEE'S Operations.
- 11.2. No Discrimination. PERMITTEE shall not discriminate in any manner against any person on account of race, color, religion, gender, sexual orientation, medical status, national origin, age, marital status, or physical disability in PERMITTEE'S Operations, including, without limitation, the provision of goods, services, facilities, privileges, advantages, and accommodations, and the hiring of employees and contractors.
- 11.3. Local Business and Employment. PERMITTEE acknowledges that CITY seeks to promote employment and business opportunities for local residents and firms in all CITY contracts. For work associated with this Permit and to the extent legally possible, PERMITTEE shall use its best efforts to solicit applications for employment, and for bids and proposals for contracts, from local residents and firms as opportunities occur. PERMITTEE shall use its best efforts to hire qualified local residents and firms whenever practicable.
- 11.4. Drug-free Workplace. PERMITTEE shall abide by the omnibus drug legislation passed by Congress on November 18, 1988, by adopting and enforcing a policy to maintain a drug-free workplace by doing all of the following:
 - 11.4.1. Publish a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of controlled substances are prohibited within the Permit Area and specifying the actions that will be taken against employees for violations of the prohibition;
 - 11.4.2. Establish a drug-free awareness program to inform employees about all of the following:
 - a) The dangers of drug abuse in the workplace;
 - b) PERMITTEE'S policy of maintaining a drug-free workplace;
 - c) Any available drug counseling, rehabilitation, and employee assistance programs;
 - d) The penalties that may be imposed upon employees for drug abuse violations; and
 - 11.4.3. PERMITTEE shall include, in each of its sublicenses and contracts

related to this Permit, language obligating each sub-licensee and contractor to comply with the provisions of this section to maintain a drug-free workplace. PERMITTEE, and each of its sub-licensees and contractors, shall be individually responsible for their own drug-free workplace program.

- 11.5. Disabled Access. PERMITTEE shall comply with each of the following: the 1990 Americans with Disabilities Act; Title 24 of the California Code of Regulations (i.e., the California Building Standards Code); and any other applicable federal, state, or local regulations hereafter enacted protecting the rights of people with disabilities.

12. WATER QUALITY ASSURANCES.

PERMITTEE shall comply with CITY'S Storm Water Management and Discharge Control Ordinance ("Ordinance"), codified in San Diego Municipal Code sections 43.0301 et seq., and employ "Best Management Practices," including a "Storm Water Pollution Prevention Plan" (as those terms are defined in the Ordinance), hereinafter collectively referred to as the "Prevention Plan," as approved by CITY under its Stormwater Management Program. Within thirty (30) calendar days after the Effective Date, PERMITTEE shall submit a Prevention Plan satisfactory to CITY that will control erosion and reduce the amount of "Pollutants" (as defined in the Ordinance) and other sediments discharged from the Permit Area. CITY may review the Prevention Plan periodically. Within thirty (30) calendar days after written notice from CITY requesting an update of the Prevention Plan, PERMITTEE shall submit an updated Prevention Plan satisfactory to CITY. PERMITTEE shall implement all changes to the Prevention Plan as required by CITY, to ensure compliance with all applicable laws, ordinances, and regulations. PERMITTEE shall inform its employees, contractors, subcontractors, agents, and vendors of the Prevention Plan and ensure their compliance therewith.

13. WASTE, DAMAGE, OR DESTRUCTION.

PERMITTEE shall immediately give notice to CITY of any fire or any other damage that occurs within the Permit Area. PERMITTEE shall not commit, or allow to be committed, any waste or injury, or any public or private nuisance, in connection with PERMITTEE'S Operations. If the Permit Area is damaged by any cause that puts the Permit Area into a condition which is not decent, safe, healthy, and/or sanitary, PERMITTEE shall make, or cause to be made, full repair of the damage and restore the Permit Area to the condition which existed prior to the damage; or, at CITY'S option, PERMITTEE shall clear and remove from the Permit Area all debris resulting from the damage and restore the Permit Area in accordance with plans and specifications previously submitted to and approved by CITY, in writing, in order to replace in kind and scope the operation which existed prior to the damage. PERMITTEE shall commence preliminary steps toward performing repairs and/or restoration of the Permit Area as soon as practicable, but no later than thirty (30) calendar days after the occurrence of the fire or damage, and shall complete the required repairs and/or restoration of the Permit Area

within one hundred eighty (180) calendar days after such occurrence.

14. HAZARDOUS SUBSTANCES.

PERMITTEE shall not allow the installation or release of Hazardous Substances within or from the Permit Area by PERMITTEE, its officers, employees, invitees, guests, agents, or contractors. PERMITTEE and all such parties shall not store, utilize, or sell any Hazardous Substance within the Permit Area without CITY'S prior written consent. For the purposes of this provision, a release shall include, but not be limited to, any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or otherwise disposing of Hazardous Substances. A copy of the presently effective EPA and State lists of Hazardous Substances is on file in the Office of the City Clerk as Document 769704, and by this reference is incorporated into this Permit.

- 14.1. Remediation. If any release of a Hazardous Substance occurs as a result of PERMITTEE'S Operations, PERMITTEE shall pay all costs of remediation and removal of the Hazardous Substance in accordance with all applicable laws, rules, and regulations of governmental authorities.
- 14.2. Indemnification. PERMITTEE shall protect, defend, indemnify, and hold CITY harmless from and against any and all claims, costs, and expenses related to environmental liabilities resulting from PERMITTEE'S Operations, including, without limitation, costs of environmental assessments, costs of remediation and removal, any necessary response costs, damages for injury to natural resources or the public, and costs of any health assessment or health effect studies.
- 14.3. Notice of Release. If PERMITTEE knows, or has reasonable cause to believe, that any Hazardous Substance has been released within or from the Permit Area, PERMITTEE shall give written notice to CITY within three (3) calendar days after receipt of such knowledge or cause for belief. If PERMITTEE knows, or has reasonable cause to believe, that such substance is an imminent and substantial danger to public health and/or safety, PERMITTEE shall notify CITY by the most immediate means available, and immediately upon receipt of such knowledge or belief, shall take all actions necessary to minimize the danger. PERMITTEE shall notify CITY immediately of any notice of violation received, environmental actions initiated, or private lawsuits filed related to the Permit Area.
- 14.4. Environmental Assessment. Upon reasonable cause to believe that PERMITTEE'S Operations resulted in a Hazardous Substance being released within or from the Permit Area, CITY may cause an environmental assessment of the Permit Area to be performed by a professional environmental consultant registered with the State of California as a Professional Engineer, Certified Engineering Geologist, or Registered Civil Engineer. The environmental assessment shall be obtained at PERMITTEE'S sole cost and expense, and shall

establish what, if any, Hazardous Substances have more likely than not been caused by PERMITTEE'S Operations and in what quantities. If any such Hazardous Substances exist in quantities greater than allowed by municipal, county, state, or federal laws, statutes, ordinances, and/or regulations, then the environmental assessment shall include a discussion of such substances with recommendations for remediation and removal necessary to effect compliance with those laws, statutes, ordinances, and/or regulations and estimates of the cost of such remediation or removal. PERMITTEE shall cause, or if PERMITTEE fails to do so within a reasonable period of time, CITY may cause, the remediation and/or removal recommended in the environmental assessment such that compliance with environmental law is achieved, and PERMITTEE shall pay all costs and expenses therefor. If the environmental assessment conclusively establishes that PERMITTEE'S Operations did not result in a Hazardous Substance being released within or from the Permit Area, CITY shall reimburse PERMITTEE for the cost of the assessment.

15. SIGNS.

PERMITTEE shall not erect or display any banners, pennants, flags, posters, signs, decorations, marquees, awnings, or similar devices or advertising without CITY'S prior written consent. If any such unauthorized item is found within the Permit Area, PERMITTEE shall remove the item at its expense within twenty-four (24) hours after notice by CITY, or CITY may thereafter remove the item at PERMITTEE'S cost and expense.

16. MAINTENANCE OF THE PERMIT AREA.

PERMITTEE shall, at PERMITTEE'S sole cost and expense and to CITY'S satisfaction, maintain the Permit Area in good order and repair, and in a safe, healthy, and sanitary condition at all times during the Term, subject to normal and ordinary wear and tear resulting from the use of the Permit Area. At no time during the term shall CITY be required, to make any improvements or repairs to the Permit Area. PERMITTEE shall, at all times, keep the Permit Area free and clear of rubbish, debris, and litter.

17. ENTRY AND INSPECTION.

CITY may, at all times during the Term, enter and inspect the Permit Area after twenty-four (24) hours prior written notice to PERMITTEE.

18. UTILITIES.

PERMITTEE shall order, obtain, and pay for all utilities, including installation and service charges, in connection with its use of the Permit Area.

19. TAXES.

PERMITTEE shall pay, before delinquency, all taxes, assessments, and fees assessed or levied upon PERMITTEE or the Permit Area, including the land, any buildings, structures, machinery, equipment, appliances, or other improvements or property of any nature whatsoever erected, installed, or maintained by PERMITTEE, or levied by reason of PERMITTEE'S Operations, including any licenses or permits. PERMITTEE acknowledges that this Permit may create a possessory interest subject to property taxation, and that PERMITTEE may be subject to the payment of taxes levied on that interest. PERMITTEE shall pay all such possessory interest taxes. PERMITTEE'S payment for such taxes, assessments, and/or fees shall not reduce any payment due CITY.

20. SUPERIOR INTERESTS.

This Permit is subject to all liens, encumbrances, covenants, conditions, restrictions, reservations, contracts, permits, licenses, easements, and rights-of-way pertaining to the Permit Area, whether or not of record. PERMITTEE shall obtain all licenses, permits, and agreements from such third parties as may be or become necessary or reasonably advisable to allow PERMITTEE'S use of the Permit Area, relative to any such superior interest. If PERMITTEE'S use of the Permit Area is or becomes inconsistent or incompatible with a preexisting superior interest, PERMITTEE shall take such actions and pay all costs and expenses necessary to remove such inconsistency or incompatibility to the satisfaction of the holder of the superior interest.

21. ENCUMBRANCES.

PERMITTEE shall keep the Permit Area, and any CITY-owned property of which the Permit Area is a part, free from all encumbrances and liens of any nature which arise out of, or are in any manner directly or indirectly connected with, this Permit or PERMITTEE'S Operations. PERMITTEE shall protect, defend, indemnify, and hold CITY harmless from and against any and all such encumbrances and/or liens, and from and against any claim, liability, cost, or expense, including, without limitation, all attorney fees and costs, relating to or charged against the Permit Area, including, without limitation, PERMITTEE'S failure, or the failure of any contractor or subcontractor hired by PERMITTEE, to pay any person or persons referred to in Section 3181 of the California Civil Code or other applicable sections thereof.

22. ASSIGNMENT AND SUBLICENSE.

PERMITTEE shall not assign or sublicense any rights granted by this Permit or any interest in this Permit without CITY'S prior written consent, which may be withheld or delayed in CITY'S sole and absolute discretion. If, however, such assignment or sublicense is to an affiliate of PERMITTEE that is licensed and registered to conduct business in the State of California, CITY'S consent to the assignment or sublicense shall not be unreasonably withheld. Any assignment by operation of law shall automatically terminate this Permit.

23. INDEMNIFICATION.

PERMITTEE shall protect, defend, indemnify, and hold CITY and its elected officials, officers, employees, representatives, and agents harmless from and against any and all claims asserted or liability established for damages or injuries to any person or property, including injury to PERMITTEE'S officers, employees, invitees, guests, agents, or contractors, which arise out of, or are in any manner directly or indirectly connected with this Permit or PERMITTEE'S Operations, and all expenses of investigating and defending against same, including, without limitation, attorney fees and costs; provided, however, that PERMITTEE'S duty to indemnify and hold harmless shall not include any claims or liability arising from the established active negligence, sole negligence, or sole willful misconduct of CITY and its elected officials, officers, employees, representatives, and agents. CITY may, at its election, conduct the defense or participate in the defense of any claim related in any way to this indemnification. If CITY chooses at its own election to conduct its own defense, participate in its own defense, or obtain independent legal counsel in defense of any claim related to this indemnification, PERMITTEE shall pay all of the costs related thereto, including, without limitation, reasonable attorney fees and costs.

24. OTHER GOVERNMENTAL ACTIONS.

By entering into this Permit, neither CITY nor CITY'S City Council is obligating itself to any governmental agent, board, commission, or agency with regard to any other discretionary action relating to PERMITTEE'S Operations. Discretionary action includes, without limitation, re-zonings, variances, environmental clearances, and all other required governmental approvals.

25. CITY'S RESERVATION OF RIGHTS.

- 25.1. Resources. CITY reserves all rights, title, and interest in any and all subsurface natural gas, oil, minerals, and water within the Permit Area.
- 25.2. Use. CITY reserves the right to grant and use easements or to establish and use rights-of-way over, under, along, and across the Permit Area for utilities, thoroughfares, or access as CITY deems advisable, in its sole discretion, for the public good, provided such easements and rights-of-way do not unreasonably interfere with PERMITTEE'S Operations.
- 25.3. Entry. CITY may enter the Permit Area to develop and/or make repairs to municipal resources and services, after twenty-four (24) hours prior written notice to PERMITTEE. CITY shall not unreasonably interfere with PERMITTEE'S use of the Permit Area and shall reimburse PERMITTEE for physical damages, if any, to the permanent improvements located within the Permit Area or to PERMITTEE'S communications equipment resulting from CITY exercising the rights reserved in this section. Such reimbursement may include a reduction in

the rent proportionate to the amount of physical damage, as reasonably determined by CITY. CITY shall pay the costs of maintenance and repair of all CITY installations made pursuant to these reserved rights.

26. REVOCATION AND TERMINATION.

26.1. Revocation by CITY.

26.1.1. Revocable License. This Permit is not a lease; it is a license to use CITY-owned property. As such, the Parties hereby acknowledge and agree that CITY, as the licensor, may revoke this Permit at will and at any time during the Term. However, CITY agrees that CITY will not exercise its right to revoke this Permit at will unless CITY determines, in its sole discretion, that PERMITTEE is in default of this Permit, the events of default being set forth in Section 29.1.2. Upon such default, CITY may thereafter, in its sole discretion, exercise its right to revoke this Permit at will and at any time during the Term. If CITY exercises its right to revoke this Permit, CITY will provide PERMITTEE written notice of the revocation, and upon PERMITTEE'S receipt of the notice, PERMITTEE shall immediately cease PERMITTEE'S Operations and remove PERMITTEE'S improvements and personal property from the Permit Area (pursuant to Section 27 of this Permit).

26.1.2. Events of Default. Each of the following shall constitute an event of default under this Permit:

- a. PERMITTEE'S failure to make any payment required under this Permit when due, if the failure continues for five (5) calendar days past due following written notice of the failure by CITY;
- b. PERMITTEE'S breach of any of its obligations under this Permit, other than those requiring payment to CITY, and PERMITTEE either:
 - i. fails to cure the breach within thirty (30) calendar days following written notice from CITY; or
 - ii. if such breach is not curable within thirty (30) calendar days following written notice from CITY, fails to immediately commence to cure the breach and to diligently pursue the cure to completion;
- c. PERMITTEE voluntarily files any petition under any bankruptcy or insolvency act or law;
- d. PERMITTEE has involuntarily filed against it any petition under any bankruptcy or insolvency act or law and the matter is not

dismissed by a court of competent jurisdiction within ninety (90) calendar days of filing;

- e. PERMITTEE is adjudicated a bankrupt;
- f. PERMITTEE makes a general assignment for the benefit of creditors; and
- g. PERMITTEE uses the Permit Area for any unauthorized purpose.

26.2. Termination by PERMITTEE. PERMITTEE may terminate this Permit for any reason upon one hundred eighty (180) calendar days prior written notice to CITY. Upon PERMITTEE'S termination of this Permit, PERMITTEE shall immediately cease PERMITTEE'S Operations and remove PERMITTEE'S improvements and personal property from the Permit Area (pursuant to Section 27 of this Permit).

26.3. No Obligation. CITY shall not be obligated for any loss, financial or otherwise, which may be incurred by PERMITTEE as a result of CITY'S revocation or PERMITTEE'S termination of this Permit. PERMITTEE expressly waives any claim for expense or loss which PERMITTEE might incur as a result of CITY'S revocation or PERMITTEE'S termination of this Permit.

26.4. Cumulative Remedies. CITY'S rights and remedies under this Permit are cumulative and shall not limit or otherwise waive or deny any of CITY'S rights or remedies at law or in equity.

26.5. Waiver. The property constituting the Permit Area is publicly owned and held in trust for the benefit of CITY'S citizens. CITY'S failure to insist upon the strict performance of any of PERMITTEE'S obligations under this Permit, in one or more instances, shall not be construed as a waiver of any such obligation, and the same shall remain in full force and effect. CITY'S waiver of a default shall not be a waiver of any other default. Any waiver of a default must be in writing and executed by CITY to constitute a valid and binding waiver. CITY'S delay or failure to exercise a right or seek a remedy shall not be deemed a waiver of that or any other right or remedy under this Permit, at law or in equity. The exercise of any particular right or the use of any particular remedy for any default shall not waive the use of any other right or remedy for the same default or for another or later default. CITY'S acceptance of any rents shall not be a waiver of any default preceding the rent payment. CITY'S failure to discover a default or take prompt action to require the cure of any default shall not result in an equitable estoppel, but CITY may, at any and all times, require the cure of the default.

27. REMOVAL OF IMPROVEMENTS AND PERSONAL PROPERTY.

27.1. Improvements. Upon expiration of this Permit (without the Parties' execution of a new permit for the Permit Area) or upon earlier revocation or termination of this Permit, PERMITTEE shall, at PERMITTEE'S sole cost and expense, remove all

PERMITTEE-installed improvements, trade fixtures, structures, and installations as soon as practicable, but in no event, later than sixty (60) calendar days after such expiration or earlier revocation or termination of this Permit. If any removal of such improvements, trade fixtures, structures, and/or installations by PERMITTEE results in damage to the Permit Area, PERMITTEE shall repair all such damage at PERMITTEE'S sole cost and expense. If PERMITTEE fails to remove any improvements, trade fixtures, structures, and/or installations as required by this Permit, CITY may, at its option, remove them at PERMITTEE'S sole cost and expense.

27.2. Personal Property. Upon expiration of this Permit (without the Parties' execution of a new permit for the Permit Area) or upon earlier revocation or termination of this Permit, PERMITTEE shall remove PERMITTEE-owned machines, appliances, equipment, and other items of personal property as soon as practicable, but in no event, later than sixty (60) calendar days after such expiration or earlier revocation or termination of this Permit. If any removal of such personal property by PERMITTEE results in damage to the Permit Area, PERMITTEE shall repair all such damage at PERMITTEE'S sole cost and expense. Any such items which PERMITTEE fails to remove shall be deemed abandoned and become CITY'S property free of all claims and liens, or CITY may, at its option, remove such items at PERMITTEE'S sole cost and expense.

27.3. CITY'S Right to Acquire. Notwithstanding the foregoing, if PERMITTEE elects to dispose of any of its personal property used in connection with PERMITTEE'S Operations, then upon expiration or earlier revocation or termination of this Permit, CITY shall have the first right to acquire or purchase such personal property.

28. NOTICES.

Any notice required or permitted to be given under this Permit shall be in writing and may be served personally or delivered by United States mail, postage prepaid, and addressed to PERMITTEE at PERMITTEE'S Address for Notices, and to CITY as follows:

If to PERMITTEE:

AT&T Right of Way Department
ATTN: Manager – Right of Way
4220 Arizona Street, Rm. 200
San Diego, CA 92104

With a copy to:

AT&T Services, Inc.
One AT&T Way
Room 3A118A
Bedminster, NJ 07921
Attn: Legal ROW Mgr.

If to CITY:

City of San Diego
Real Estate Assets Department
Attention: Real Estate Assets Director
1200 Third Avenue, Suite 1700, MS 51A
San Diego, CA 92101-4155
With a copy by First Class Mail to:

Office of the City Attorney
Attn: Real Estate and Economic Development Unit
1200 Third Avenue, Suite 1620
San Diego, CA 92101-4106

29. MISCELLANEOUS PROVISIONS.

- 29.1. Governing Law. This Permit shall be governed, construed, and enforced in accordance with the laws of the State of California.
- 29.2. Entire Understanding. This Permit constitutes the entire understanding between the Parties and supersedes any and all prior understandings, representations, warranties, and agreements between them pertaining to this Permit and PERMITTEE'S Operations.
- 29.3. No Affiliation. Nothing contained in this Permit shall be deemed or construed to create a partnership, joint venture, or other affiliation between the Parties, or between CITY and any other entity or party, or cause CITY to be responsible in any way for the debts or obligations of PERMITTEE or any other party or entity.
- 29.4. Joint and Several Liability. If PERMITTEE is comprised of more than one person or legal entity, such persons and entities, and each of them, shall be jointly and severally liable for the performance of each and every obligation of PERMITTEE under this Permit.
- 29.5. CITY'S Consent or Approval. Whenever required under this Permit, CITY'S consent or approval shall mean the written consent or approval of the San Diego City Manager, or his designee ("City Manager"), unless otherwise expressly provided, without need for further resolution by the City Council. CITY'S discretionary acts hereunder shall be made in the City Manager's discretion, unless otherwise expressly provided.

- 29.6. San Diego's Strong Mayor Form of Governance. All references to "City Manager" in this Permit (and all subsequent amendments to this Permit) shall be deemed to refer to the Mayor of San Diego or his designee for the duration CITY operates under the mayor-council (commonly referred to as the "strong mayor") form of governance, pursuant to Article XV of The City Charter.
- 29.7. Permit Modifications. Any modification, alteration, or amendment of this Permit shall be in writing and signed by the Parties.
- 29.8. Survival. Any obligation under this Permit that requires a party's performance of that obligation after the expiration or earlier termination of this Permit shall survive such expiration or termination.
- 29.9. Legal Proceedings. If one party brings an action or proceeding against the other party under this Permit, the prevailing party shall be entitled to recover from the non-prevailing party all reasonable costs and expenses thereof, including, without limitation, reasonable attorney fees and costs. The "prevailing party" shall be that party who obtains substantially the result sought, whether by settlement, dismissal, or judgment. If, as a result of an action brought by or against PERMITTEE in connection with this Permit, CITY is made a party thereto, PERMITTEE shall pay all of CITY'S costs and expenses thereof, including, without limitation, reasonable attorney fees and costs.
- 29.10. Number and Gender. In this Permit, words in the singular number shall include the plural, and *vice versa*, as appropriate to the context. Words of either gender shall include the other gender.
- 29.11. Authority to Execute and Deliver Permit. Each individual executing this Permit on behalf of another person or legal entity represents and warrants that he or she is authorized to execute and deliver this Permit on behalf of such person or entity in accordance with duly adopted resolutions or other authorizing actions which are necessary and proper and under such legal entity's articles, charter, bylaws, or other written rules of conduct or governing agreement, and that this Permit is binding upon such person or entity in accordance with its terms. Each person executing this Permit on behalf of another person or legal entity shall provide CITY with evidence, satisfactory to CITY, that such authority is valid, and such entity is a valid, qualified corporation, limited liability company, partnership, or other unincorporated association, in good standing in its home state, and that such entity is qualified to do business in the State of California.

29.12. Exhibits Incorporated. All exhibits referenced in this Permit are incorporated into the Permit by this reference.

IN WITNESS WHEREOF, this Permit is executed by CITY and PERMITTEE, to be effective as of the Effective Date.

Date: 11/19/11

THE CITY OF SAN DIEGO, a California municipal corporation

By [Signature]

(Print Name) James F. Barwick, CCIM

Director, Real Estate Assets

(Title) _____

Date: 1/11/2011

PERMITTEE: PACIFIC BELL TELEPHONE COMPANY, a California corporation doing business as AT&T California

By [Signature]

(Print Name) Tiffany Lowery

(Title) Manager, Right of Way

ENVIRONMENTAL CLEARANCE:

This Use and Occupancy Permit is Categorically Exempt from CEQA pursuant to State CEQA Guidelines Section §15301.

City of San Diego Development Services Department
Environmental Analysis Section

Date: 1/20/11

BY: [Signature]

Name: _____

Title: Myra Herrmann, Senior Planner

APPROVED AS TO FORM AND LEGALITY:

Date: 1/24/11

JAN I. GOLDSMITH, City Attorney

By [Signature]

Brock Ladewig

Deputy City Attorney

Exhibit A: Legal Description of CITY-Owned Real Property and Description of Ten-Foot Wide Corridor on the Property

Legal Description of CITY-Owned Real Property:

Those portions of Pueblo Lots 1318 and 1319 of the Pueblo Lands of San Diego, in the City of San Diego, County of San Diego, State of California, according to map thereof made by James Pascoe in 1870 and filed for record on November 14, 1921, as Miscellaneous Map No. 36, in the Office of the County Recorder of San Diego County, lying Easterly of and coincident with the Easterly right-of-way line of State of California Interstate 11-SD-805 and Northerly of and coincident with the Northerly right-of-way line of Eastgate Mall.

Description of Ten-Foot Wide Corridor on the Property:

The centerline of the ten-foot wide corridor is described as follows:

Beginning at the intersection of the Easterly right-of-way line of said State of California Interstate 11-SD-805 and the Northerly right-of-way line of Eastgate Mall; thence North $74^{\circ}01'39''$ East, 5.04 feet to the TRUE POINT OF BEGINNING; thence North $08^{\circ}33'34''$ West, 482.74 feet to the beginning of a curve concave Westerly having a radius of 100.00 feet; thence Northerly along said curve through a central angle of $07^{\circ}24'50''$, 12.94 feet; thence North $15^{\circ}58'24''$ West, 1,352.61 feet to the beginning of a curve concave Westerly having a radius of 100.00 feet; thence Northerly along said curve through a central angle of $18^{\circ}14'20''$, 31.83 feet; thence North $02^{\circ}15'56''$ East, 16.00 feet to the Point of Termination.



Exhibit B

Exhibit C: PERMITTEE'S Underground Communication Facilities

1 Manhole

13 Conduits with Associated Cables