

CONDUIT OCCUPANCY AGREEMENT

THIS CONDUIT OCCUPANCY AGREEMENT ("Agreement"), is made and entered into as of the ____ day of _____, 2022 ("Commencement Date"), by and between the City of Mesa, Arizona, ("City") and Gigapower, LLC ("Gigapower"). City and Gigapower may be referred to individual as a "Party" and collectively as the "Parties."

RECITALS

WHEREAS, City owns an underground conduit system and associated communications network Facilities;

WHEREAS, in exchange for a fee, and as set forth in this Agreement, Gigapower desires to occupy portions of the City-Owned Conduit and Facilities with fiber optic cable;

WHEREAS, the Parties intend to make provision for Gigapower to identify occupancy pathways at or around the time occupancy, and to allow for an in-kind exchange to offset occupancy fees along certain alignments that Gigapower may construct;

NOW THEREFORE, for good and valuable consideration, the Parties agree as follows:

TERMS AND CONDITIONS

1. DEFINITIONS.

"Access Manholes" means a structure placed in the ground and accessible from the surface that is used to provide pass-through access to conduits, ducts and/or fiber optic cables; typically, 4' x 4' (approx. size).

"Conduit" means a pipe-like structure which may consist of polyvinyl chloride (PVC), high density polyethylene (HDPE), and other materials placed underground to contain Ducts and/or Fiber Optic Cables as part of a communications network.

"City-Owned Conduit" mean portions of City Conduit and Facilities for which a license for conduit occupancy is granted to Gigapower under this Agreement,

"Duct" means a single enclosed raceway for Fiber Optic Cable and is sometimes installed in a Conduit. The term Duct may include micro-duct, inner duct, or other industry standard duct-like materials.

"Facility" and "Facilities" means the various elements or components of an underground communications network, including without limitation Conduit, Ducts, handholes, Manholes, microduct, Slack Coils, and other ancillary materials, items, equipment, pull rope, mule tape, buried locate tape, markers and structures (e.g., pedestals and vaults).

"Fiber Optic Cable" means fiber optic communications cable.

"Operational Vaults" means a structure placed in the ground and accessible from the surface that is used to provide pass-through access to Conduits, Ducts and/or Fiber Optic Cables; typically, 7' x 13' (approx. size).

"Pull Boxes" means a small structure placed in the ground and accessible from the surface that is used to provide pass-through access to Conduits, Ducts and/or Fiber Optic Cables.

"Manhole" means a structure large enough to admit a person's entire body through an opening at ground level and accessible from the surface that is used to provide access to Conduits, Ducts and/or

City or a third party such easement, ownership, or another property right by virtue of the activities contemplated by this Agreement.

j) This Agreement shall include access to and use of all associated rights-of-way, including, but not limited to, rights-of-way required to access any City Facilities subject to occupancy by Gigapower under this Agreement. City will place no restrictions on Gigapower's ability to construct, maintain, access and monitor its Fiber Optic Cable and Facilities that are more restrictive than those the City places on itself or are placed on City by the owner of the rights-of-way.

k) City will permit Gigapower to pull through and utilize City's Access Manholes and Pull Boxes, as may be required to install Gigapower's Facilities. Gigapower is not permitted, however, to store Slack Coils, fiber optic cables, or splice enclosures in the Access Manholes or Pull Boxes. For clarity, pursuant to City Standards, Gigapower fiber optic cables are allowed to be routed through City access manholes and pull boxes as long as Gigapower is not using City access manholes and pull boxes for storage. Nevertheless, Gigapower may store Slack Coils in Operational Vaults pursuant to the applicable City standards and specifications, and payment of the City's storage fee. Gigapower shall identify the exact locations of termination points for conduit, fiber, and microducts during the permitting process for City's review and approval before installation or construction.

l) In the event that Gigapower chooses to install in-kind conduit or fiber optic cables in connection with a Conduit Request, Gigapower shall install the in-kind conduit or fiber pursuant to an approved City plan and standards listed in section 2(f) of this agreement. In-kind Fiber Optic Cable shall be spliced pursuant to City's ITS/ITD Technical Specifications and Details. Additionally, Gigapower shall provide a fiber optic splice detail map of all in-kind facilities as approved by City.

m) Gigapower shall maintain accurate records and as-built drawings of Gigapower's facilities, including City-Owned Facilities, new installations, repairs, modifications, and make-ready work before City's final acceptance of facilities. Gigapower shall furnish a copy electronically and in hardcopy form.

3. RATES AND CHARGES; BILLING; PAYMENT

a) Occupancy Fees: The annual cost shall be negotiated upon request, plus a two percent (2%) annual escalation fee, provided that the License Fee shall not be increased in any calendar year by more than the increase in the average Consumer Price Index as published by the United States Department of Labor, Bureau of Labor Statistics. Pricing for conduit greater than 2" in diameter and bridge and canal crossings, etc. will be negotiated upon request for the use of any such facility. There shall be no more than one License Fee owed for any length of City-Owned Conduit irrespective of the amount of Gigapower Fiber Optic Cable or Facilities installed in that City-Owned Conduit.

b) Payment. The License Fee shall be due and payable annually, in advance, with the fee for each new Gigapower Conduit Request calculated from the date the request is finalized and the conduit becomes subject to this License. Gigapower may pay pro-rated License Fees (less than the full twelve months) for additional approved Gigapower Conduit Requests for the purpose of synchronizing the annual payment cycle of all License Fees under the Agreement.

c) Adjustments to License Fees. Gigapower may credit (offset) against any License Fees due and payable under this Agreement any costs or expenses for which Gigapower is entitled to reimbursement from the City, provided that the Parties agree in writing that Gigapower is entitled to such reimbursement. If the Gigapower Conduit Request terminates or expires during the annual payment cycle (and is not renewed), Gigapower may take a credit on its next payment of License Fees of the

portion of the License Fee that would have been payable for the period of time subsequent to the termination or expiration of the approved Gigapower Conduit Request that was terminated or expired.

d) One Time Charges. All one-time charges for reimbursement, make-ready, or other such work shall be invoiced by and between the Parties upon completion of the work to which the charges relate. All such invoices are due and payable within thirty (30) days of receipt. Failure to invoice such charges within twelve months from completion of the work to which such charges related shall result in a full and complete waiver of such charges.

e) Permits. Gigapower shall pay all charges, fees, and taxes required by the Mesa City Code, including without limitation, all required application and permit fees, and the applicable fees under Schedule of Fees and Charges (as amended for time to time) including traffic barricading fees.

f) Disputes; Late Payment Charges. Each Party shall pay all undisputed amounts when due and provide a detailed description of any amounts that are in dispute. The Parties shall cooperate in good faith to resolve any billing disputes. Any and all late payments shall accrue a late payment charge of the greater of (i) one percent (1%) per month or (ii) the highest rate permitted by applicable law.

g) No Accord and Satisfaction. No acceptance of any payment hereunder by either Party shall be deemed to constitute any accord or satisfaction with respect thereto, and each Party reserves all rights with respect to any such matters.

4. MAINTENANCE AND REPAIR; DECOMMISSIONING

a) City shall maintain and repair City-Owned Conduit and Facilities at no charge to Gigapower and keep them in good working order according to applicable Requirements and Standards. When conducting these activities, City shall be responsible for any verifiable and documented damages it causes to Gigapower Fiber Optic Cable and Facilities.

b) Gigapower shall maintain and repair its Fiber Optic Cable and Facilities at no charge to City and keep them in good working order according to applicable Requirements and Standards. If any damage to City-Owned Conduit and Facilities or the facilities of other authorized users of City-Owned Conduit occurs when Gigapower is conducting these activities, Gigapower shall immediately notify the City, and shall be responsible for the cost of repairing any such damage.

c) Gigapower shall have the right, but not the duty or obligation, to undertake emergency repair to the City-Owned Conduit and Facilities if there is a significant impact from such emergency on the Gigapower Fiber Optic Cable or Facilities. When conducting these activities, Gigapower shall be responsible for any damages it causes to the City-Owned Conduit and Facilities.

d) For excavation damage not caused by Gigapower, the City shall reimburse Gigapower for the reasonable cost of Gigapower's repair to City-Owned Conduit and Facilities under this subsection.

e) During the term of this License, the City may inspect the City Facilities. Such inspections or the failure to do so shall not relieve Gigapower of any responsibility, obligation or liability assumed under this License.

f) Each Party shall use reasonable efforts to provide at least one week prior written notice of all maintenance and repair activity by sending notice to the contacts listed in Schedule 2 (attached). Emergency repair activity may be undertaken without prior notice, if necessary, provided continued efforts will be made to notify the other Party as soon as practicable under the circumstances. Each Party shall provide and staff an on-call, all-hours telephone number, listed on Schedule 2 for the other Party to use to provide such notification.

g) City shall comply with all applicable Requirements and Standards with respect to its use and occupation of City Facilities and cooperate with Gigapower in good faith to address any interference

or other such issues. City shall require all other authorized users of City Facilities to comply with all applicable Requirements and Standards with respect to their use and occupation of City Facilities and to cooperate with Gigapower in good faith to address any conflict or other such issues.

h) Gigapower may decommission and abandon Gigapower Facilities in City-Owned Conduit in its sole discretion, provided that Gigapower must first notify City of any such action at least sixty (60) days prior, and work with City in good-faith to address any desire on the part of City to have Gigapower Facilities removed from City-Owned Conduit. Ownership of any Gigapower Facilities abandoned in-place shall automatically vest in the City sixty (60) days after the date of Gigapower's notice of abandonments delivered pursuant to this Section. The City will have no obligation to notify Gigapower before making a disposition of such Gigapower Facilities.

5. NETWORK RELOCATION

a) If City Facilities are required to be relocated for reasons other than a request by Gigapower, the Parties shall work together to jointly plan for and agree-upon the performance of such relocation work. City shall bear 100% of its own individual costs of relocating City Facilities. In the absence of any rights to reimbursement Gigapower may otherwise have under applicable law or any other agreement, Gigapower shall bear 100% of its individual costs of relocating Gigapower Fiber Optic Cable and Facilities.

b) If City Facilities are required to be relocated at the request of Gigapower, the Parties shall work together to jointly plan for and agree upon the performance of such relocation work. Gigapower shall bear 100% of the costs of such relocation. The City reserves the right to refuse to relocate City Facilities at Gigapower's request.

6. TERM; TERMINATION

a) The Agreement begins on the Commencement Date and will continue until the expiration or termination of all approved Gigapower Conduit Requests ("Term"). The Term for each individual approved Gigapower Conduit Request shall be defined on each individual Gigapower Conduit Request.

b) The Agreement and any individual approved Gigapower Conduit Request may be terminated by mutual agreement of the Parties, or for uncured material breach as set forth in this Section, or by Gigapower for convenience upon ninety (90) days' prior written notice to the City.

c) Termination for Public Need. The City may terminate any approved Gigapower Conduit Request no sooner than ten years following the Commencement Date, provided the City can show that termination is necessary to satisfy a public need or to accommodate public infrastructure. If requested at the time of application for an individual Gigapower Conduit Request, the City Engineer may, in her sole and absolute discretion, lengthen the ten-year period described above to up to twenty (20) years for that specific Gigapower Conduit Request. Prior to any termination pursuant to this Section 6(c), City and Gigapower shall confer to determine whether commercially reasonable alternatives exist to relocate, modify, or expand the existing conduit in a manner that will satisfy both the public need and permit Gigapower's continued use of the facilities.

d) Termination for Material Breach. In the event that either Party commits a material breach or default under this Agreement or with respect to any individual approved Gigapower Conduit Request, then the other Party shall give the breaching Party written notice of the breach or default (including, but not limited to, a statement of the facts relating to the breach or default, the provisions of the Agreement or the approved Gigapower Conduit Request that are in breach or default, and the action required to cure the breach or default) and indicate in the notice that the Agreement or approved Gigapower Conduit Request will terminate pursuant to this paragraph if the breach or default is not cured within

thirty (30) days after receipt of notice (or such later date as may be specified in the notice). If the breaching Party fails to cure the specified breach or default within thirty (30) days after receipt of such notice (or such later date as may be specified in such notice), then the Agreement or approved Gigapower Conduit Request, as applicable, will terminate without any further notice or action by the terminating Party; provided that if said breach is not susceptible of being cured within said 30-day period, the Agreement or approved Gigapower Conduit Request shall not terminate as long as the breaching Party is exercising all commercially reasonable efforts to pursue implementation of a cure.

e) Termination of any approved Gigapower Conduit Request granted hereunder shall not effect a termination of the Agreement or of any other approved Gigapower Conduit Request. Termination of the Agreement for an uncured, material breach, does not result in the termination of any approved Gigapower Conduit Request unless the reasons giving rise to termination of the Agreement for uncured, material breach, specifically implicate and involve an uncured, material breach of the terms of an approved Gigapower Conduit Request.

7. CONFIDENTIAL INFORMATION

a) "Confidential Information" means Gigapower materials, Gigapower trade secrets, and other Gigapower proprietary or business information provided to City that is clearly labeled, marked or otherwise identified as "confidential" or "proprietary information." Confidential Information shall not include information that was in the public domain at the time of disclosure; becomes generally known or available through no act or omission on the part of Gigapower; is known, or becomes known, to City from a source other than Gigapower or its representatives, provided that disclosure by such source is not in breach of a confidentiality agreement with Gigapower; or is independently developed by City without violating any of its obligations under this Agreement;

b) City agrees to only disclose Confidential Information to employees, elected officials, agents and contractors of the City with a need to know the Confidential Information or as otherwise required by code, statute, rule or regulation.

c) When a third party ("Requestor") not otherwise authorized to access Confidential Information under this Agreement makes a demand or request to City for access to Gigapower Confidential Information ("Request"), City will promptly notify Gigapower of the Request. Gigapower shall then be solely responsible for taking whatever steps Gigapower deems necessary to protect Gigapower Confidential Information in a timely manner. Gigapower shall be responsible for all costs associated with its pursuit of such steps, including the pursuit of any legal remedies. Notwithstanding the foregoing, Gigapower acknowledges that the City is subject to public records requirements set forth in Arizona law.

d) Upon termination or expiration of this Agreement, City shall make reasonable efforts to either return or destroy all Confidential Information; provided, however, any Confidential Information in electronic format as part of City's off-site or on-site data archival process system, will be held by City and kept subject to the terms of this provision or destroyed at City's option. The obligations of this provision will survive termination or expiration of this Agreement.

8. INDEMNITY, LIABILITY AND LIMITED WARRANTY

a) Each Party (an "Indemnifying Party") will defend the other Party, at the Indemnifying Party's expense, against any claim, demand, suit, or proceeding ("Claim") brought against the other Party by a third party arising out of or relating to the Indemnifying Party's negligent acts or omissions under this Agreement that result in personal injury (including death) or damage to tangible property and will indemnify the Party for and hold it harmless from any damages finally awarded to the third party claimant or agreed to in settlement of the Claim, provided that the indemnified Party promptly (a) gives the Indemnifying Party written notice of the Claim; and (b) gives the Indemnifying Party sole

control of the defense and settlement of the Claim (provided that it may not settle any Claim that imposes liability on, or contains any admission of fault by, the indemnified Party without its consent); (c) provides to the Indemnifying Party all available information and reasonable assistance necessary for it to defend or settle the Claim; and (d) has not compromised or settled the Claim without the Indemnifying Party's written approval.

b) Each Party warrants it will comply with all applicable statutes, laws, rules and regulation in the exercise of its rights the performance of its obligations under this Agreement.

c) NEITHER PARTY SHALL BE LIABLE TO THE OTHER UNDER ANY THEORY FOR ANY INCIDENTAL, INDIRECT, PUNITIVE, SPECIAL, OR CONSEQUENTIAL DAMAGES OF ANY KIND, INCLUDING BUT NOT LIMITED TO ANY LOSS OF USE, LOSS OF BUSINESS OR LOSS OF PROFIT. THIS LIMITATION WILL APPLY NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY PROVIDED HEREIN.

d) EXCEPT FOR THE WARRANTIES EXPRESSLY PROVIDED IN THIS AGREEMENT, THE PARTIES MAKE NO WARRANTIES, EXPRESS, IMPLIED OR STATUTORY, TO THE EXTENT PERMITTED BY LAW; AND EACH PARTY DISCLAIMS ALL OTHER WARRANTIES TO THE EXTENT PERMITTED BY LAW, INCLUDING WITHOUT LIMITATION THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, ACCURACY OF INFORMATIONAL CONTENT, TITLE, AND IMPLIED WARRANTIES ARISING FROM CUSTOM OR USAGE OF THE TRADE.

9. GENERAL PROVISIONS

a) This Agreement is limited to placement and construction of underground Facilities in public and private rights-of-way in the City. Placement or construction of Facilities in any other location shall be undertaken only with the advance written consent of both Parties.

b) Any notice under this Agreement shall be given in writing and directed to the applicable Party below. Notice shall be deemed to have been delivered: (i) on the delivery date if delivered personally; or (ii) one (1) business day after deposit with a commercial overnight carrier. Either Party may from time to time change its address for purposes of this paragraph by providing the other Party notice of the change in accordance with this paragraph.

If to the City:

City of Mesa
Attn: Right-of-Way Manager
P.O. Box 1466
Mesa, Arizona 85211-1366

If to Gigapower:

Gigapower, LLC
311 S. Akard Street, 21st Floor
Dallas, TX 75202
ATTN: Steve Davis

with a copy to:

Gigapower, LLC

311 S. Akard Street, 21st Floor
Dallas, TX 75202
ATTN: Legal Department

- c) At all times during the Term of this Agreement and any approved Gigapower Conduit Request, Gigapower, at its sole expense, shall obtain and keep in force the required insurance as set forth in the attached Schedule 3 (Insurance Requirements).
- d) Except for disputes involving confidentiality, if a dispute arises between Gigapower and City pertaining to this Agreement ("Dispute"), prior to the initiation of legal action and within ten (10) days of receipt of a notice of dispute, representatives of the Parties will promptly meet in an attempt to resolve the Dispute. If the Parties are unable to resolve the Dispute after this meeting, then the Parties shall be free to pursue any remedies available to them at law or equity.
- e) This Agreement may not be assigned without the written prior consent of the other Party, provided however that either Party may assign this Agreement; (i) to any successor by way of any merger, consolidation or other corporate reorganization of such Party or sale of all or substantially all of the assets of such Party, provided that such subsidiary or parent or successor assumes or is otherwise fully bound by all of the obligations of the assigning party under this Agreement; (ii) or in whole or in part to an Affiliate.
- f) Neither Party will be responsible for delay of performance due to causes beyond its control. Such delay automatically extends the time for performance in an amount equal to the period of the delay.
- g) If any provision of this Agreement is held to be invalid or unenforceable, then such provision will be construed to reflect the intentions of the invalid or unenforceable provision, with all other provisions remaining in full force and effect.
- h) The failure of either Party to enforce any right or provision in this Agreement will not constitute a waiver of such right or provision unless acknowledged and agreed to in writing by the Party otherwise entitled to exercise and enforce it.
- i) This Agreement and any action related thereto shall be governed, controlled, interpreted and defined by and under the laws of the State of Arizona, without regard to its conflicts of laws provisions. Venue for any action under this Agreement shall be proper only in Maricopa County Superior Court.
- j) The Parties may sign this Agreement in counterparts, each of which will be considered an original, but all of which will constitute the same agreement. Facsimile and portable document format (PDF) signatures shall be binding as if original.
- k) This Agreement is solely for the benefit of City and Gigapower including Gigapower Affiliates. It is not intended to benefit any third parties.
- l) Except as required by law, neither Party shall use the name or logo of the other party in marketing, advertising, promotional materials (e.g., marketing collateral), press releases or other public announcements without receiving the prior written consent of the other Party.
- m) Each Party shall be an independent contractor and not a partner or agent of the other. This Agreement will not be interpreted or construed as creating a joint venture, partnership or agency relationship between the Parties.
- n) In any legal proceeding pursuant to this Agreement, the prevailing Party shall be entitled to recover its costs and reasonable attorney fees incurred during such proceeding.

- o) Nothing contained herein shall preclude Gigapower or its Affiliates from pursuing or bidding on any future City procurement opportunity or opportunities, and nothing in this Agreement is intended to limit future Gigapower-City bids or business opportunities in any way.
- p) Except as otherwise set forth in this Agreement, each Party will remain solely and independently responsible for its own expenses under or arising from this Agreement.
- q) This Agreement, including all Exhibits and Schedules, sets forth the entire agreement between the Parties relating to the subject matter hereof, and supersedes any and all prior or contemporaneous agreements and representations written or oral, of the Parties with respect to the subject matter set forth herein. Additions, variations or modifications to this Agreement may only be made in writing and signed by the Parties.

IN WITNESS WHEREOF, the Parties have executed this Agreement in duplicate as of the day and year first above written.

GIGAPOWER, LLC

By: 

Name: JAMES J BURKE

Title: LEAD-TECHNICAL PM

Date: 8-27-22

CITY OF MESA

By: _____

Name: _____

Title: City Engineer

Date: _____

Schedule 1

Gigapower Conduit Request Number _____

Pursuant to the terms of the Conduit Occupancy Agreement entered into by and between the City and Gigapower, request is made for facilities, as described below:

Type of Request: Request for Conduit Occupancy by Gigapower

Date of Request: _____

Location of Request (street names and/or A-Z locations, etc.):

Approximate footage (distance): _____

Project/Permit/Reference Number: _____

General Description of Request:

Requestor Contact Information: _____

Name

Phone

Email

General Description of In-Kind Request (if applicable):

Location of In-Kind Request:

Approximate In-Kind Quantity (footage):

Rates and Charges:

GIGAPOWER, LLC

By: _____

Name _____

: _____

Title: _____

Date: _____

By: _____

Name _____

: _____

Title: _____

Date: _____

Schedule 2

Work Notification Contact Information

Gigapower: PHONE NUMBER

City:

Schedule 3

Insurance Requirements

Gigapower shall procure and maintain and shall cause any sublicensee to procure and maintain substantially the same coverage with substantially the same limits as required of Gigapower (Gigapower and/or sublicensees shall be referred to hereinafter, as the context dictates, as "Contractor"), for the duration of the Agreement and any applicable sublicense entered into under and/or pursuant to the Agreement, insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the work hereunder by the Gigapower or its employees.

Scope of Insurance

Coverage shall be at least as broad as:

1. Insurance Services Office Commercial General Liability coverage or its substantial equivalent.

Limits of Insurance

Contractor shall maintain limits of:

1. General Liability: \$1,000,000 per occurrence for bodily injury and property damage and \$2,000,000 general aggregate.
2. Commercial Automobile Liability with combined single limit of \$1,000,000 each accident for bodily injury and property damage covering all owned, non-owned and hired vehicles.
3. Workers Compensation and Employers Liability Insurance: \$1,000,000 for each accident and \$1,000,000 disease for each employee.

Other Insurance Provisions

The general liability and automobile liability policies are to contain, the following provisions:

1. City, its officers, employees and volunteers shall be included as additional insureds as their interest may appear under this Agreement as respects: liability arising out of activities performed by Gigapower; products and completed operations of Gigapower; premises owned, occupied or used by Gigapower; or automobiles owned, leased or borrowed by Gigapower. The coverage shall contain no special limitations on the scope of protection afforded to City, its officers, officials, employees or volunteers.
2. For any claims related to this project, Gigapower's insurance coverage shall be primary insurance as respects City, its officers, employees and volunteers. Any insurance or self-insurance maintained by City, its officers, officials, employees or volunteers shall be in excess of Gigapower's insurance and shall not contribute with it.
3. Any failure to comply with reporting or other provisions of the policies including breaches of warranties shall not affect coverage provided to City, its officers, officials, employees or volunteers.

4. Gigapower's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

Insurance is to be placed with insurers with a current A.M. Best's rating of no less than A-:VII, unless otherwise acceptable to City. Upon request, Gigapower shall furnish City a certificate of insurance evidencing coverage required by this clause.

Gigapower shall require any subcontractors to obtain and maintain substantially the same coverage with substantially the same limits as required by this Agreement.