

**CITY OF EL PASO, TEXAS  
AGENDA ITEM  
DEPARTMENT HEAD'S SUMMARY FORM**

**DEPARTMENT:** IT and Special Projects

**AGENDA DATE:** March 23, 2010

**CONTACT PERSON NAME AND PHONE NUMBER:** John Neal (915) 541-4285

**DISTRICT(S) AFFECTED:** All

**SUBJECT:**

Approve a Resolution authorizing the City Manager to sign the Multiple Use Agreement for Sharing Fiber Optic Cable Related Infrastructure with the Texas Department of Transportation.

**BACKGROUND / DISCUSSION:**

The City wants to use space in existing TxDOT conduit to extend its fiber optic infrastructure to the Northeast and Pebble Hills Police Regional Command facilities. This will save the City hundreds of thousands of dollars in construction costs. Other locations may have similar savings as a result of entering into the Agreement in the future.

**PRIOR COUNCIL ACTION:**

The City Council authorized acquisition of the fiber back bone and initiation of the fiber build out to City facilities on December 18, 2007. On September 1, 2009 the City Council authorized an additional \$4 million in reprogrammed capital to continue the fiber build out.

**AMOUNT AND SOURCE OF FUNDING:**

N/A

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**BOARD / COMMISSION ACTION:**

Enter appropriate comments or N/A

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\*\*\*\*\*REQUIRED AUTHORIZATION\*\*\*\*\*

**DEPARTMENT HEAD:**

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(If Department Head Summary Form is initiated by Purchasing, client department should sign also)

*Information copy to appropriate Deputy City Manager*

**RESOLUTION**

**WHEREAS**, there is existing Fiber Optic Cable Related Infrastructure along roadways and right-of-way within the control of Texas Department of Transportation (TxDOT); and

**WHEREAS**, the City wants to use the Fiber Optic Cable Related Infrastructure to connect certain city facilities to the City’s infrastructure backbone; and

**WHEREAS**, the City and TxDOT desire to enter into an agreement to allow the City of El Paso to connect to and/or use the Fiber Optic Cable Related Infrastructure for the purpose of transmitting traffic safety and transportation-related data.

**NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF EL PASO:**

That the City Manager is authorized to sign the Multiple Use Agreement for Sharing Fiber Optic Cable Related Infrastructure with the Texas Department of Transportation, substantially in the form submitted, for the purpose of transmitting traffic safety and transportation-related data.

**PASSED AND APPROVED** this \_\_\_\_\_ day of \_\_\_\_\_, 2010.

**THE CITY OF EL PASO**

\_\_\_\_\_  
John Cook  
Mayor

**ATTEST:**

\_\_\_\_\_  
Richarda D. Momsen  
Municipal Clerk

**APPROVED AS TO FORM:**

**APPROVED AS TO CONTENT:**

\_\_\_\_\_  
Bertha A. Ontiveros  
Assistant City Attorney

\_\_\_\_\_  
John Neal  
Special Projects Manager

STATE OF TEXAS §

COUNTY OF TRAVIS §

**MULTIPLE USE AGREEMENT**  
for  
**SHARING FIBER OPTIC CABLE RELATED INFRASTRUCTURE**

with  
**City of El Paso**  
and the  
**Texas Department of Transportation**

This agreement is made by and between the State of Texas, acting by and through the Texas Department of Transportation, hereinafter called the "Department," and City of El Paso, hereinafter called the "Local Government", and collectively known as the "parties."

The parties desire to connect to and/or use existing Fiber Optic Cable Related Infrastructure for the purpose of transmitting traffic safety and transportation-related data only. Related Infrastructure includes but is not limited to fiber optic facilities such as conduit, ducts, control cabinets, poles, structures, etc. along TxDOT roadways and right-of-way, as well as offices, operations and control centers, substations, etc. within the TxDOT operations network. The desired connection and use must not cause damage to or adversely effect data, interconnections, systems, facilities, infrastructure or operations as determined by the Department.

The governing body of the Local Government has authorized entering into this agreement by resolution or ordinance dated March 23, 2010, which is attached to and incorporated by reference in this agreement as Attachment A.

This contract incorporates the provisions of **Attachment A**, Local Government's Resolution or Ordinance; **Attachment B**, Descriptions and Specifications of Rights Granted in Article 2; **Attachment C**, Request for Authorization of Fiber Optic Cable Connection; **Attachment D**, Request for Authorization of [Fiber Optic Cable-Related] Infrastructure Connection; **Attachment E**, Map of Mutually Agreed-Upon Fiber Optic Cable and/or Related Infrastructure.

In consideration of the mutual promises contained in this agreement, the Department and the Local Government now agree as follows:

**A G R E E M E N T**

**ARTICLE 1. CONTRACT PERIOD**

This agreement becomes effective when signed by the last party whose signing makes the agreement fully executed, and shall terminate five (5) years from that date, or when otherwise modified or terminated, as hereinafter provided.

**ARTICLE 2. RIGHTS GRANTED**

- A. The Department agrees to allow the connection to the Department's Fiber Optic Cable Related Infrastructure by the Local Government.
- B. The Local Government shall be allowed to use only the mutually agreed upon Department Fiber Optic Cable Related Infrastructure as listed in Attachments B, C, D, and further illustrated in Attachment E.
- C. The unit of capacity exchange by either shared method shall be mutually agreed upon on a

case-by-case basis. Capacity exchanges need not be on an equal basis.

- D. The Department permits the Local Government to enter upon its right-of-way and to attach, install, operate, maintain, remove, reattach, reinstall, relocate, and replace such connections of the Local Government's Fiber Optic Related Infrastructure to the Department's Fiber Optic Cable Related Infrastructure.
- E. Any and all rights expressly granted to Local Government to use the Fiber Optic Cable Related Infrastructure of the Department shall be subject to the prior and continuing right of the Department to use its Fiber Optic Cable Related Infrastructure for its own purposes under applicable laws. The rights granted shall be further subject to all deeds, easements, dedications, conditions, covenants, restrictions, encumbrances, and claims of title of record which may affect the rights to use the Fiber Optic Cable Related Infrastructure.
- F. Nothing in this agreement shall be deemed to grant, convey, create, or vest in either party a real property interest in land, including any fee, leasehold interest, or easement.

### **ARTICLE 3. OPERATION AND MAINTENANCE RESPONSIBILITIES**

- A. Each party will be responsible for the design, engineering, installation, operation and maintenance of their respective Fiber Optic Cable Related Infrastructure system and components, to include the connections, within their respective right-of-ways.
- B. Each party is responsible for providing and maintaining any hardware, software, and additional infrastructure that are necessary to obtain the rights in Article 2. The Department may provide unused Intelligent Transportation Systems infrastructure and Department facilities to support the additional infrastructure when possible and when deemed to be in the best interest of the Department.
- C. Because of unforeseen circumstances that may arise from the operation of the Department hardware or software, or other difficulties in telecommunications transmission over which the Department has no control, no guarantee is made that use of facilities will be available to the Local Government at all times during the term of this agreement. The Department is not responsible for any loss of revenue to the Local Government due to any interruption in the facilities. The Department does not guarantee a minimum response time to re-establish the facilities due to Department network or system failures or any other circumstance.
- D. The Local Government will pay its predetermined share (based on fibers in use) of any routine maintenance required for the applicable Fiber Optic Cable Related Infrastructure, and fully 50% of any emergency repair of shared Fiber Optic Cable Related Infrastructure, including excavation costs.

### **ARTICLE 4. INSTALLATION STANDARDS**

- A. Any installation, repairs, or removal of equipment shall be performed in accordance with industry standards.
- B. At the Local Government's sole cost and expense, all such work shall be done in compliance with all applicable building codes, ordinances, and other laws, rules, or regulations of governmental authorities having jurisdiction over such work, including, but not limited to, the Americans with Disabilities Act and the Texas Architectural Barriers Act.
- C. The Local Government must obtain all required governmental agreements, permits, and authorizations prior to beginning any such work and shall provide copies of the same to the Department upon request.
- D. After commencement of the installation of the equipment, the Local Government shall perform such work with due diligence to its completion.
- E. The Local Government is solely responsible for meeting and adhering to the above listed standards notwithstanding the Department's approval of plans and specifications.

### **ARTICLE 5. INSTALLATION OF EQUIPMENT**

- A. The Local Government shall install any necessary hardware, software, or other infrastructure at its sole cost and risk.
- B. Any equipment installation, engineering design, or operations and maintenance plan provided by the Local Government shall be subject to the Department's review and approval to ensure compatibility with existing equipment and software.

- C. All equipment shall be clearly labeled to identify it as equipment installed by the Local Government.
- D. The Local Government shall provide all interface items required to maintain the equipment.
- E. Access by the Local Government's employees or contractors to the equipment located at the Department's facility will be by appointment only and must have designated Department personnel present.

#### **ARTICLE 6. NOTICE TO PROCEED**

A properly completed Request for Authorization of Fiber Optic Cable Related Infrastructure Connection form, attached to this agreement as Attachments C and D, shall be submitted to the Department for approval prior to any work being done. The Department shall review and approve or disapprove the connection, in writing, within sixty (60) days. During the course of the work, any substantial changes or alterations must also be submitted to the Department for prior written approval. All work shall be done in conformity with the approved Attachment B and/or C. Upon completion of the work, the Local Government shall promptly furnish suitable documentation showing the exact nature of the connection.

#### **ARTICLE 7. FEES**

The Department may require consideration for the agreement in the form of a payment; shared use of a telecommunication facility; or equipment, facilities, or services. The Department requires a tape of any stories related to the Department or those that involve any input from Department employees that are aired by the Local Government.

#### **ARTICLE 8. INSPECTION**

Ingress and egress shall be allowed at all times to the Local Government's facility for Federal Highway Administration and Department personnel and equipment when highway maintenance operations are necessary, and for inspection purposes; and upon request, all Local Government activities shall be prohibited until further notice from the Department.

#### **ARTICLE 9. INSURANCE**

To the extent that this agreement authorizes the Local Government or its contractor to perform any work on State right-of-way, before beginning work the entity performing the work shall provide the Department with a fully executed copy of the Department's Form 1560 Certificate of Insurance verifying the existence of coverage in the amounts and types specified on the Certificate of Insurance for all persons and entities working on State right-of-way. This coverage shall be maintained until all work on the State right-of-way is complete. If coverage is not maintained, all work on State right-of-way shall cease immediately, and the Department may recover damages and all costs of completing the work.

#### **ARTICLE 10. AMENDMENTS**

Amendments to this agreement must be in writing and executed by both parties. Any amendments must be executed during the contract period established in Article 1, Contract Period.

#### **ARTICLE 11. TERMINATION**

- A. Including the provisions established herein, this agreement may be terminated by either of the following conditions:
  - (1) By mutual written agreement, or 30 days after either party gives notice to the other party, whichever occurs first; or
  - (2) By the Department at any time if it is found that traffic conditions have so changed that the existence or use of the respective Fiber Optic Cable Related Infrastructure is impeding maintenance, damaging the highway facility, impairing safety or that the facility is not being properly operated or maintained or that it is not in the public interest; or
  - (3) By the Department, upon written notice to the Local Government as consequence of the Local Government's failure to comply with the requirements of this agreement,

unless the Local Government's failure to comply with the agreement is due to no fault of its own.

- B. If the termination is due to the failure of the Local Government to fulfill its contractual obligations, the Department will notify the Local Government that a possible breach of contract has occurred. The Local Government must remedy the breach as outlined by the Department to the Department's satisfaction within thirty (30) days from receipt of the Department's notification. The Department will declare this agreement terminated upon the Local Government's failure to remedy the breach within the 30-day period.
- C. Termination of the agreement shall extinguish all rights, duties, obligations and liabilities of the Department and the Local Government under this agreement.
- D. Termination or expiration of this agreement shall not extinguish any of the Local Government's or the Department's obligations under this agreement that by their terms continue after the date of termination or expiration.

#### **ARTICLE 12. REMEDIES**

Violation or breach of contract by the Local Government shall be grounds for termination of the agreement and any increased costs arising from the Local Government's default, breach of contract or violation of agreement terms shall be paid by the Local Government. This agreement shall not be considered as specifying the exclusive remedy for any default, but either party may avail itself of any remedy existing at law or in equity, and all remedies shall be cumulative.

#### **ARTICLE 13. RELATIONSHIP BETWEEN THE PARTIES**

Each party acknowledges that it is not an agent, servant, or employee of the other party. Each party is responsible for its own acts and deeds and for those of its agents, servants, or employees.

#### **ARTICLE 14. ASSIGNMENT PROHIBITION**

The Local Government is prohibited from assigning any of the rights conferred by this agreement, to any third party without the advance written approval of the Department. Any attempted transfer of the rights or obligations of this agreement without the Department's consent shall be void and shall be grounds for termination of this agreement.

#### **ARTICLE 15. HOLD HARMLESS**

The Local Government shall indemnify and save harmless the Department and its officers and employees from all claims and liability due to its materials or activities of itself, its agents, or employees, performed under this agreement and that are caused by or result from error, omission, or negligent act of the Local Government or of any person employed by the Local Government. The Local Government shall also indemnify and save harmless the Department from any and all expense, including but not limited to attorney fees that may be incurred by the Department in litigation or otherwise resisting the claim or liabilities that may be imposed on the Department as a result of such activities by the Local Government, its agents, or employees. The Local Government agrees to indemnify and save harmless the Department and its officers, agents, and employees from any and all claims, damages, and attorneys' fees arising from the use of outdated data or information. The Local Government's indemnification of the Department shall extend for a period of three (3) years beyond the date of termination of this agreement.

#### **ARTICLE 16. GRATUITIES**

Any person who is doing business with or who reasonably speaking may do business with the Department under this agreement may not make any offer of benefits, gifts, or favors to employees of the Department. The only exceptions allowed are ordinary business lunches and items that have received the advanced written approval of the Department's executive director.

#### **ARTICLE 17. CONFLICT OF INTEREST**

The Local Government shall not assign an employee to activities relating to this agreement if the employee:

- a. owns an interest in or is an officer or employee of a business entity that has or may have

- a contract with the Department relating to this agreement;
- b. has a direct or indirect financial interest in the outcome of this agreement;
- c. has performed services regarding the subject matter of the agreement for an entity that has a direct or indirect financial interest in the outcome of this agreement or that has or may have a contract with the Department; or
- d. is a current part-time or full-time employee of the Department.

**ARTICLE 18. COMPLIANCE WITH LAWS**

The Local Government shall comply with all applicable federal, state, and local laws, statutes, ordinances, rules and regulations, and with the orders and decrees of any court or administrative bodies or tribunals in any manner affecting the performance of this agreement. When requested, the Local Government shall furnish the Department with satisfactory proof of this compliance. The Local Government shall provide or obtain all applicable permits, plans, or other documentation required by a federal or state entity.

**ARTICLE 19. INFORMATION EXCHANGE**

- A. Each party agrees to meet on, at a minimum, an annual basis for the purpose of reviewing future plans and current status of their respective Fiber Optic Cable Related Infrastructure.
- B. The Local Government shall provide quarterly evaluation reports during the first calendar year of the agreement and annually thereafter detailing how and when the rights and infrastructure granted have been used.
- C. The Local Government shall not disclose information obtained from the Department under this agreement without the express written consent of the Department.

**ARTICLE 20. STATE AUDITOR'S PROVISION**

The State Auditor may conduct an audit or investigation of any entity receiving funds from the Department directly under the contract or indirectly through a subcontract under the contract. Acceptance of funds directly under the contract or indirectly through a subcontract under this contract acts as acceptance of the authority of the State Auditor, under the direction of the legislative audit committee, to conduct an audit or investigation in connection with those funds. An entity that is the subject of an audit or investigation must provide the State Auditor with access to any information the State Auditor considers relevant to the investigation or audit.

**ARTICLE 21. NOTICES**

All notices to either party by the other party required under this agreement shall be delivered personally or sent by U.S. Mail, postage prepaid, addressed to such party at the following respective addresses:

<b>Local Government:</b>	<b>Department:</b>
City of El Paso 2 Civic Center Plaza El Paso, Texas 79901	Texas Department of Transportation ATTN: Director, Maintenance Division 125 East 11 <sup>th</sup> Street Austin, Texas 78701

All notices shall be deemed to be received by the addressee on the date so delivered or so deposited in the mail, unless otherwise provided herein. Either party hereto may change the above address by sending written notice of such change to the other in the manner provided herein.

**ARTICLE 22. SIGNATORY AUTHORITY**

Each signatory warrants that the signatory has the necessary authority to execute this agreement on behalf of the entity represented.

**IN TESTIMONY WHEREOF**, the Department and the Local Government have executed duplicate counterparts of this agreement.

**CITY OF EL PASO**

By: \_\_\_\_\_  
Joyce Wilson, City Manager

Date: \_\_\_\_\_

**THE STATE OF TEXAS**

Executed for the Executive Director and approved for the Texas Transportation Commission for the purpose and effect of activating and/or carrying out the orders, established policies or work programs heretofore approved and authorized by the Texas Transportation Commission.

By: \_\_\_\_\_  
Toribio Garza Jr., P.E., Director, Maintenance Division

Date: \_\_\_\_\_

**Attachment A:  
LOCAL GOVERNMENT'S RESOLUTION or ORDINANCE**

**Attachment B:  
 DESCRIPTIONS and SPECIFICATIONS of RIGHTS GRANTED in ARTICLE 2**

<b>PROVISION OF INFRASTRUCTURE</b>	
By Department	By Local Government
1. The Department agrees to allow the connection to the Department's Fiber Optic Cable Related Infrastructure.	1. The Fiber Optic Cable Related Infrastructure will be used solely for traffic safety and transportation related purposes. 2. The Local Government will submit a Notice of Proposed Installation, TxDOT Form 1082, prior to installing any fiber optic cable in the Fiber Optic Cable Related Infrastructure.

<b>NON-MONETARY COMPENSATION</b>	
By Department	By Local Government
1.	1.

**Attachment C:  
REQUEST FOR AUTHORIZATION of FIBER OPTIC CABLE CONNECTION**

Requested by: City of El Paso

**Section A – Ingress Fiber Access Location Information**

Ingress Location Identification	--NOT APPLICABLE--
Ingress Location Address	--NOT APPLICABLE --
Fiber Interface Method	<input type="checkbox"/> Dark Fiber Splice <input type="checkbox"/> Wave Division Multiplexer Connection
Interface Quantity	--NOT APPLICABLE--
Interface Optical Wavelength	<input type="checkbox"/> 850 nm <input type="checkbox"/> 1310 nm <input type="checkbox"/> 1550 nm <input type="checkbox"/> -- Other: please specify --
Maximum Interface Bandwidth	<input type="checkbox"/> T-1 <input type="checkbox"/> NTSC <input type="checkbox"/> 10Mbps <input type="checkbox"/> 100 Mbps <input type="checkbox"/> 1Gbps <input type="checkbox"/> DS-3 <input type="checkbox"/> OC-3 <input type="checkbox"/> OC-12 <input type="checkbox"/> OC-48 <input type="checkbox"/> -- Other: please specify --
Special Ingress Requirements and Comments	--NOT APPLICABLE--

**Section B – Egress Fiber Access Location Information**

Egress Location Identification	--NOT APPLICABLE--
Egress Location Address	--NOT APPLICABLE--
Special Egress Requirements and Comments	--NOT APPLICABLE--

Technical Contact Person: -- print name --

Phone Number: \_\_\_\_\_

Activation Date Requested: \_\_\_\_\_

Requested By: -- print name --

Date: \_\_\_\_\_

**Section C – Provider Agency (-- enter agency name --) Review and Response**

Engineering Comments:

Engineering Recommendation:  Approve  
 Do Not Approve

Engineering Reviewed By: -- print name --

Date: \_\_\_\_\_

Approved by: \_\_\_\_\_

Date: \_\_\_\_\_

-- print name here; signature above --