

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

DEPARTMENT: **Engineering**

AGENDA DATE: **May 25, 2010**

CONTACT PERSON NAME AND PHONE NUMBER: **R. Alan Shubert, P. E., City Engineer X4423**

DISTRICT(S) AFFECTED: **8**

SUBJECT:

That the City Manager is authorized to sign the License for Fiber Optic Line with the BNSF Railway Company for the installation of fiber optic lines across railway company right-of-way between mile posts 1147.90 to 1149.40 which is an area parallel to Doniphan between Doniphan Park and Sunset Road, El Paso, Texas. The one time license fee cost to the city is \$2,500.00.

BACKGROUND / DISCUSSION:

This agreement allows the City permission to install fiber optic lines in BNSF Railway Company right-of-way parallel to Doniphan between Doniphan Park and Sunset Road as part of the Fiber Optic Build Out project. The fiber optic cable will serve to connect City facilities – Northwest Municipal Service Center and the Police Department's Westside Regional Command.

PRIOR COUNCIL ACTION:

City Council approved the construction award of this project June 23, 2009.

AMOUNT AND SOURCE OF FUNDING:

2009 Certificates of Obligation

BOARD / COMMISSION ACTION:

N/A

*****REQUIRED AUTHORIZATION*****

DEPARTMENT HEAD:



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

Information copy to appropriate Deputy City Manager

RESOLUTION

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF EL PASO

That the City Manager is authorized to sign the License for Fiber Optic Line with the BNSF Railway Company for the installation of fiber optic lines across railway company right-of-way between mile posts 1147.90 to 1149.40 which is an area parallel to Doniphan between Doniphan Park and Sunset Road, El Paso, Texas. The one time license fee cost to the city is \$2,500.00.

ADOPTED THIS _____ DAY OF _____ 2010.

THE CITY OF EL PASO:

John F. Cook
Mayor

ATTEST:

Richarda Duffy Momsen
City Clerk

APPROVED AS TO FORM:



Mark Shoesmith
Assistant City Attorney

APPROVED AS TO CONTENT:



R. Alan Shubert, P.E.
City Engineer

LICENSE FOR FIBER OPTIC LINE

THIS LICENSE ("License"), made as of the ____ day of _____, 2010 ("Effective Date") by and between **BNSF RAILWAY COMPANY**, a Delaware corporation ("Licensor"), and **CITY OF EL PASO, TEXAS**, a Texas corporation ("Licensee").

NOW THEREFORE, in consideration of the mutual covenants contained herein, the parties agree to the following:

GENERAL

1. Licensor hereby grants Licensee a non-exclusive license, subject to all rights, interests, and estates of third parties, including, without limitation, any leases, use rights, easements, liens, or other encumbrances, and upon the terms and conditions set forth below, to construct, maintain, and use in strict accordance with the drawings and specifications approved by Licensor as part of Licensee's application process (the "Drawings and Specifications"), a fiber optic line containing a maximum of one (1) conductors, ("Fiber Optic Line") across or along the rail corridor of Licensor at or near the station of El Paso, County of El Paso, State of Texas, Line Segment 7300, Mile Post 1147.90 to 1149.40, as shown on the attached Drawing No. 3-47673A, 3-47673B and 3-47673C, dated September 30, 2009 and revised December 2, 2009, attached hereto as Exhibit "A" and made a part hereof ("Premises").

2. Licensee shall not disturb any improvements of Licensor or Licensor's existing lessees, Licensees, easement beneficiaries or lien holders, if any, or interfere with the use of such improvements.

Licensee acknowledges that one or more other parties, including, but not limited to, various American nations, may have, or may have claim to have, ownership rights in certain segments of certain of Licensor's rail corridors, and may claim that Licensee also must obtain rights from it (or them) in order to occupy, or access, the Premises, and that, in some cases such claims may be valid. Licensee acknowledges that Licensor's ownership interest in many of its rail corridors is a determinable fee, a railroad right of way or a rail service easement, which shall terminate when Licensor either: (i) ceases to use those rail corridors for railroad purposes; or (ii) uses such rail corridors for purposes found to be inconsistent with use of the corridors for railroad purposes, and that in such circumstances, Licensor's right to license any such rail corridor, or rights under any license of any such rail corridor, may be subject to termination as of the date the circumstances set forth in either (i) or (ii) above, first arise (unless Licensee improves the quality of title to the Premises by obtaining a patent or deed from the federal government, if appropriate, or acquiring additional property interests from third parties). Licensee also acknowledges that Licensor's ownership rights may terminate for other reasons, such as termination of franchise rights, and that certain segments of Licensor's rail corridors consist only of a trackage rights license to Licensor and enable Licensor to provide rail service, or shared ownership with other railroads, and that Licensor may not have rights to include those segments in any License to Licensee. Licensee further acknowledges that Licensee's rights to enter into a License on any Licensor rail corridor, and its rights under any License of any Licensor rail corridor, are subject and subordinate to all outstanding and/or future rights and encumbrances on Licensor's rail corridor (including liens, security interests, and mortgages), and any and all easements, other leases, licenses, permits or agreements

which now or in the future relate to Licensor's rail corridor, except Licensor in the future shall not place any encumbrance upon any Licensor rail corridor then subject to a License to Licensee or enter into any easement, lease, license, permit or agreement, which would materially disrupt Licensee's ability to exercise rights under this License or to utilize the Fiber Optic Line covered by a License and Licensee acknowledges that its ability to exercise rights under this License or to utilize such Fiber Optic Line would not be materially disrupted if either: (a) Licensee is relocated to another location within the applicable Licensor rail corridor in accordance with the terms of the License, or could be located elsewhere in the rail corridor; or (b) Licensor preserves fiber optic rights and makes those rights available to Licensee at no charge payable by Licensee to the holder of the land interest where such rights are located and changes following any conveyance by Licensor of its ownership interest in such a parcel have not caused a significant physical limitation on constructing Fiber Optic Line through such parcel (and Licensee agrees that any cost of enforcing such rights shall be the responsibility of Licensee). Licensor therefore conveys to Licensee no more right, title and interest in any rail corridor than Licensor holds in such rail corridor at the time of conveyance, and Licensee hereby releases Licensor from any and all liability, cost, loss, damage or expense in connection with any claims that Licensor lacked sufficient legal title to convey the rights described herein.

3. Licensee shall use the Premises solely for construction and maintenance and use of a Fiber Optic Line. Licensee shall not use the Premises for any other purpose. Licensee shall not use or store hazardous substances, as defined by the Comprehensive Environmental Response, Compensation, and Liability Act, as amended ("CERCLA") or petroleum or oil as defined by applicable Environmental Laws on the Premises.
4. In case of the eviction of Licensee by anyone owning or claiming title to or any interest in the Premises, or by the abandonment by Licensor of the affected rail corridor, Licensor shall not be liable to refund Licensee any compensation paid hereunder, except for the pro-rata part of any recurring charge paid in advance, or for any damage Licensee sustains in connection therewith.
5. Any contractors or subcontractors performing work on the Fiber Optic Line or entering the Premises on behalf of Licensee shall be deemed servants and agents of Licensee for purposes of this License.

TERM

6. This License shall commence on the Effective Date and shall continue for a period of twenty (20) years, subject to prior termination as hereinafter described.

COMPENSATION

7. (a) Licensee shall pay Licensor, a one-time administrative fee of Two Thousand Five Hundred and No/100 Dollars (\$2,500.00) payable in advance ("Administrative Fee").
- (b) Licensee agrees to reimburse Licensor (within thirty (30) days after receipt of bills therefor) for all costs and expenses incurred by Licensor in connection with Licensee's use of the Premises or the presence, construction, maintenance, and use of the Fiber Optic Line, including but not limited to the furnishing of Licensor's Flaggers and any vehicle rental costs incurred. The cost of flagger services

provided by the Licensor, when deemed necessary by Licensor's representative, will be borne by Licensee. Flagging costs shall include, but not be limited to, the following: payfor at least an eight (8) hour basic day with time and one-half or double time for overtime, rest days and holidays (as applicable); vacation allowance; paid holidays (as applicable); railway and unemployment insurance; public liability and property damage insurance; health and welfare benefits; transportation; meals; lodging and supervision. Negotiations for railway labor or collective bargaining agreements and rate changes authorized by appropriate Federal authorities may increase flagging rates. The flagging rate in effect at the time of performance by the flaggers hereunder will be used to calculate the actual costs of flagging pursuant to this paragraph.

- (c) All invoices are due thirty (30) days after the date of invoice. In the event that Licensee shall fail to pay any monies due to Licensor within thirty (30) days after the invoice date, then Licensee shall pay interest on such unpaid sum from thirty (30) days after its invoice date to the date of payment by Licensee at an annual rate equal to (i) the greater of (a) for the period January 1 through June 30, the prime rate last published in *The Wall Street Journal* in the preceding December plus two and one-half percent (2 1/2%), and for the period July 1 through December 31, the prime rate last published in *The Wall Street Journal* in the preceding June plus two and one-half percent (2 1/2%), or (b) twelve percent (12%), or (ii) the maximum rate permitted by law, whichever is less.

COMPLIANCE WITH LAWS

8. (a) Licensee shall observe and comply with any and all laws, statutes, regulations, ordinances, orders, covenants, restrictions, or decisions of any court of competent jurisdiction ("Legal Requirements") relating to the construction, maintenance, and use of the Fiber Optic Line and the use of the Premises.
- (b) Prior to entering the Premises, Licensee shall and shall cause its contractor to comply with all Licensor's applicable safety rules and regulations. Prior to commencing any work on the Premises, Licensee shall complete and shall require its contractor to complete the safety-training program at the following Internet Website "<http://www.contractororientation.com>". This training must be completed no more than one year in advance of Licensee's entry on the Premises.

DEFINITION OF COST AND EXPENSE

9. For the purpose of this License, "cost" or "costs" "expense" or "expenses" includes, but is not limited to, actual labor and material costs including all assignable additives, and material and supply costs at current value where used.

RIGHT OF LICENSOR TO USE

10. Licensor excepts and reserves the right, to be exercised by Licensor and any other parties who may obtain written permission or authority from Licensor:

- (a) to maintain, renew, use, operate, change, modify and relocate any existing pipe, power, communication lines and appurtenances and other facilities or structures of like character upon, over, under or across the Premises;
- (b) to construct, maintain, renew, use, operate, change, modify and relocate any tracks or additional facilities or structures upon, over, under or across the Premises; or
- (c) to use the Premises in any manner as the Licensor in its sole discretion deems appropriate, provided Licensor uses all commercially reasonable efforts to avoid material interference with the use of the Premises by Licensee for the purpose specified in Section 3 above.

LICENSEE'S OPERATIONS

- 11. (a) Licensee shall notify Licensor's Roadmaster at 805 S. Santa Fe, El Paso, TX. 79901, telephone (915) 534-2366 or cell phone (406) 670-3161, at least ten (10) business days prior to installation of the Fiber Optic Line and prior to entering the Premises for any subsequent maintenance thereon.
- (b) In performing the work described in Section 3, Licensee shall use only public roadways to cross from one side of Licensor's tracks to the other.
- 12. Licensee shall, at its sole cost and expense, construct and at all times maintain the Fiber Optic Line in accordance with the National Electric Code. The use of a rail mounted cable plow to install Licensee's Fiber Optic Line is strictly prohibited unless advance written approval is granted by Licensor. Unless otherwise specified, all underground line shall be installed at least 48 inches below grade level.
- 13. (a) Under no conditions shall Licensee be permitted to conduct any tests, investigations or any other activity using mechanized equipment and/or machinery, or place or store any mechanized equipment, tools or other materials, within twenty-five (25) feet of the centerline of any railroad track on the Premises unless Licensee has obtained prior written approval from Licensor. Licensee shall, at its sole cost and expense, perform all activities on and about the Premises in such a manner as not at any time to be a source of danger to or interference with the existence or use of present or future tracks, roadbed or property of Licensor, or the safe operation and activities of Licensor. If ordered to cease using the Premises at any time by Licensor's personnel due to any hazardous condition, Licensee shall immediately do so. Notwithstanding the foregoing right of Licensor, the parties agree that Licensor has no duty or obligation to monitor Licensee's use of the Premises to determine the safe nature thereof, it being solely Licensee's responsibility to ensure that Licensee's use of the Premises is safe. Neither the exercise nor the failure by Licensor to exercise any rights granted in this Section will alter the liability allocation provided by this License.
- (b) Licensee shall, at its sole cost and expense and subject to the supervision of Licensor's Roadmaster, locate, construct and maintain Fiber Optic Line in such a manner and of such material that it will not at any time be a source of danger to or interference with the present or future tracks, roadbed and property of Licensor, or

the safe operation of its railroad. Further, the Fiber Optic Line shall be constructed, installed and maintained in conformity with the plans and specifications shown on the print attached hereto as Exhibit A and made a part hereof (which, if present, are to be deemed part of the Drawings and Specifications). Licensor may direct one of its field engineers to observe or inspect the construction and/or maintenance of the Fiber Optic Line at any time for compliance with the Drawings and Specifications. If ordered at any time to halt construction or maintenance of the Fiber Optic Line by Licensor's personnel due to non-compliance with the same or any other hazardous condition, Licensee shall immediately do so. Notwithstanding the foregoing right of Licensor, the parties agree that Licensor has no duty or obligation to observe or inspect, or to halt work on, the Fiber Optic Line, it being solely Licensee's responsibility to ensure that the Fiber Optic Line is constructed in strict accordance with the Drawings and Specifications and in a safe and workmanlike manner in compliance with all terms hereof. Neither the exercise nor the failure by Licensor to exercise any right granted by this Section will alter in any way the liability allocation provided by this License. If at any time Licensee shall, in the judgment of Licensor, fail to perform properly its obligations under this paragraph, Licensor may, at its option, itself perform such work as it deems necessary for the safe operation of its railroad, and in such event Licensee agrees to pay, within fifteen (15) days after bill shall have been rendered therefor, the cost so incurred by Licensor, but failure on the part of Licensor to perform the obligations of Licensee shall not release Licensee from liability hereunder for loss or damage occasioned thereby.

14. Licensee shall, at its sole cost and expense, remove all combustible material from around wooden poles and will at all times keep the space around such poles free of such material, and if removal of such combustible material shall not be attended to with fifteen (15) days after having been requested by Licensor to do so, Licensor shall have the right itself to perform the work and Licensee hereby agrees to reimburse Licensor for the expense so incurred.
15. During the construction and any subsequent maintenance performed on the Fiber Optic Line, Licensee shall perform such work in a manner to preclude damage to the property of Licensor, and preclude interference with the operation of its railroad. The construction of the Fiber Optic Line shall be completed within one (1) year of the Effective Date. Upon completion of the construction of the Fiber Optic Line and after performing any subsequent maintenance thereon, Licensee shall, at Licensee's own cost and expense, restore Licensor's premises to their former state as of the Effective Date of this License.
16. If at any time during the term of this License, Licensor shall desire the use of its rail corridor in such a manner as would, in Licensor's reasonable opinion, be interfered with by the Fiber Optic Line, Licensee shall, at its sole expense, within thirty (30) days after receiving written notice from Licensor to such effect, make such changes in the Fiber Optic Line as in the sole discretion of Licensor may be necessary to avoid interference with the proposed use of Licensor's rail corridor, including, without limitation, the relocation of the existing or the construction of a new Fiber Optic Line.
17. (a) Prior to Licensee conducting any boring work on or about any portion of the Premises, Licensee shall explore the proposed location for such work with hand tools to a depth of at least three (3) feet below the surface of the ground to determine whether pipelines or other structures exist below the surface, provided,

however, that in lieu of the foregoing, the Licensee shall have the right to use suitable detection equipment or other generally accepted industry practice (e.g., consulting with the Underground Services Association) to determine the existence or location of pipelines and other subsurface structures prior to drilling or excavating with mechanized equipment. Licensee may request information from Licensor concerning the existence and approximate location of Licensor's underground lines, utilities, and pipelines at or near the vicinity of the proposed Fiber Optic Line by contacting Licensor at telephone number 1-800-362-9624 (option 1, option 2, and then option 4) at least thirty (30) business days prior to installation of the Fiber Optic Line. Upon receiving Licensee's timely request, Licensor will provide Licensee with the information Licensor has in its possession regarding any existing underground lines, utilities, and pipelines at or near the vicinity of the proposed Fiber Optic Line and, if applicable, identify the location of such lines on the Premises pursuant to Licensor's standard procedures. Licensor does not warrant the accuracy or completeness of information relating to subsurface conditions and Licensee's operations will be subject at all times to the liability provisions herein.

- (b) For all bores greater than 26-inch diameter, and at a depth of less than 10.0 feet below base of rail, a soil investigation will need to be performed by the Licensee and reviewed by Licensor prior to construction. This study is to determine if granular material is present, and to prevent subsidence during the installation process. If the investigation determines in Licensor's reasonable opinion that granular material is present, Licensor may select a new location for Licensee's use, or may require Licensee to furnish for Licensor's review and approval, in its sole discretion a remedial plan to deal with the granular material. Once Licensor has approved any such remedial plan in writing, Licensee shall, at its sole cost and expense, carry out the approved plan in accordance with all terms thereof and hereof.
18. Any open hole, boring or well constructed on the Premises by Licensee shall be safely covered and secured at all times when Licensee is not working in the actual vicinity thereof. Following completion of that portion of the work, all holes or borings constructed on the Premises by Licensee shall be:
- (a) filled in to surrounding ground level with compacted bentonite grout; or
 - (b) otherwise secured or retired in accordance with any applicable Legal Requirement. No excavated materials may remain on Licensor's property for more than ten (10) days, but must be properly disposed of by Licensee in accordance with applicable Legal Requirements.
19. Upon termination of this License, Licensee shall, at its sole cost and expense:
- (a) remove the Fiber Optic Line and all appurtenances thereto at the Licensor's sole discretion;
 - (b) report and restore any damage to the Premises arising from, growing out of, or connected with Licensee's use of the Premises;
 - (c) remedy any unsafe conditions on the Premises created or aggravated by Licensee; and

- (d) leave the Premises in the condition which existed as of the Effective Date of this License.
20. Licensee's on-site supervisors shall retain/maintain a fully-executed copy of this License at all times while on the Premises.

LIABILITY

21. (a) **TO THE FULLEST EXTENT PERMITTED BY LAW, LICENSEE SHALL, AND SHALL CAUSE ITS CONTRACTOR TO, RELEASE, INDEMNIFY, DEFEND AND HOLD HARMLESS LICENSOR AND LICENSOR'S AFFILIATED COMPANIES, PARTNERS, SUCCESSORS, ASSIGNS, LEGAL REPRESENTATIVES, OFFICERS, DIRECTORS, SHAREHOLDERS, EMPLOYEES AND AGENTS (COLLECTIVELY, "INDEMNITEES") FOR, FROM AND AGAINST ANY AND ALL CLAIMS, LIABILITIES, FINES, PENALTIES, COSTS, DAMAGES, LOSSES, LIENS, CAUSES OF ACTION, SUITS, DEMANDS, JUDGMENTS AND EXPENSES (INCLUDING, WITHOUT LIMITATION, COURT COSTS, ATTORNEYS' FEES AND COSTS OF INVESTIGATION, REMOVAL AND REMEDIATION AND GOVERNMENTAL OVERSIGHT COSTS) ENVIRONMENTAL OR OTHERWISE (COLLECTIVELY "LIABILITIES") OF ANY NATURE, KIND OR DESCRIPTION OF ANY PERSON OR ENTITY DIRECTLY OR INDIRECTLY ARISING OUT OF, RESULTING FROM OR RELATED TO (IN WHOLE OR IN PART):**

(i) **THIS LICENSE, INCLUDING, WITHOUT LIMITATION, ITS ENVIRONMENTAL PROVISIONS,**

(ii) **ANY RIGHTS OR INTERESTS GRANTED PURSUANT TO THIS LICENSE,**

(iii) **LICENSEE'S OCCUPATION AND USE OF THE PREMISES,**

(iv) **THE ENVIRONMENTAL CONDITION AND STATUS OF THE PREMISES CAUSED BY OR CONTRIBUTED BY LICENSEE, OR**

(v) **ANY ACT OR OMISSION OF LICENSEE OR LICENSEE'S OFFICERS, AGENTS, INVITEES, EMPLOYEES, OR CONTRACTORS, OR ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY ANY OF THEM, OR ANYONE THEY CONTROL OR EXERCISE CONTROL OVER,**

EVEN IF SUCH LIABILITIES ARISE FROM OR ARE ATTRIBUTED TO, IN WHOLE OR IN PART, ANY NEGLIGENCE OF ANY INDEMNITEE. THE ONLY LIABILITIES WITH RESPECT TO WHICH LICENSEE'S OBLIGATION TO INDEMNIFY THE INDEMNITEES DOES NOT APPLY ARE LIABILITIES TO THE EXTENT PROXIMATELY CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF AN INDEMNITEE.

- (b) FURTHER, TO THE FULLEST EXTENT PERMITTED BY LAW, NOTWITHSTANDING THE LIMITATION IN SECTION 21(a), LICENSEE SHALL, AND SHALL CAUSE ITS CONTRACTOR TO, NOW AND FOREVER WAIVE ANY AND ALL CLAIMS, REGARDLESS WHETHER BASED ON STRICT LIABILITY, NEGLIGENCE OR OTHERWISE, THAT LICENSOR IS AN "OWNER", "OPERATOR", "ARRANGER", OR "TRANSPORTER" WITH RESPECT TO THE FIBER OPTIC LINE FOR THE PURPOSES OF CERCLA OR OTHER ENVIRONMENTAL LAWS. LICENSEE WILL INDEMNIFY, DEFEND AND HOLD THE INDEMNITEES HARMLESS FROM ANY AND ALL SUCH CLAIMS REGARDLESS OF THE NEGLIGENCE OF THE INDEMNITEES. LICENSEE FURTHER AGREES THAT THE USE OF THE PREMISES AS CONTEMPLATED BY THIS LICENSE SHALL NOT IN ANY WAY SUBJECT LICENSOR TO CLAIMS THAT LICENSOR IS OTHER THAN A COMMON CARRIER FOR PURPOSES OF ENVIRONMENTAL LAWS AND EXPRESSLY AGREES TO INDEMNIFY, DEFEND, AND HOLD THE INDEMNITEES HARMLESS FOR ANY AND ALL SUCH CLAIMS. IN NO EVENT SHALL LICENSOR BE RESPONSIBLE FOR THE ENVIRONMENTAL CONDITION OF THE PREMISES.
- (c) TO THE FULLEST EXTENT PERMITTED BY LAW, LICENSEE FURTHER AGREES, AND SHALL CAUSE ITS CONTRACTOR TO AGREE, REGARDLESS OF ANY NEGLIGENCE OR ALLEGED NEGLIGENCE OF ANY INDEMNITEE, TO INDEMNIFY, AND HOLD HARMLESS THE INDEMNITEES AGAINST AND ASSUME THE DEFENSE OF ANY LIABILITIES ASSERTED AGAINST OR SUFFERED BY ANY INDEMNITEE UNDER OR RELATED TO THE FEDERAL EMPLOYERS' LIABILITY ACT ("FELA") WHENEVER EMPLOYEES OF LICENSEE OR ANY OF ITS AGENTS, INVITEES, OR CONTRACTORS CLAIM OR ALLEGE THAT THEY ARE EMPLOYEES OF ANY INDEMNITEE OR OTHERWISE. THIS INDEMNITY SHALL ALSO EXTEND, ON THE SAME BASIS, TO FELA CLAIMS BASED ON ACTUAL OR ALLEGED VIOLATIONS OF ANY FEDERAL, STATE OR LOCAL LAWS OR REGULATIONS, INCLUDING BUT NOT LIMITED TO THE SAFETY APPLIANCE ACT, THE LOCOMOTIVE INSPECTION ACT, THE OCCUPATIONAL SAFETY AND HEALTH ACT, THE RESOURCE CONSERVATION AND RECOVERY ACT, AND ANY SIMILAR STATE OR FEDERAL STATUTE.
- (d) Upon written notice from Licensor, Licensee agrees to assume the defense of any lawsuit or other proceeding brought against any Indemnitee by any entity, relating to any matter covered by this License for which Licensee has an obligation to assume liability for and/or save and hold harmless any Indemnitee. Licensee shall pay all costs incident to such defense, including, but not limited to, attorneys' fees, investigators' fees, litigation and appeal expenses, settlement payments, and amounts paid in satisfaction of judgments.

PERSONAL PROPERTY WAIVER

22. ALL PERSONAL PROPERTY, INCLUDING, BUT NOT LIMITED TO, FIXTURES, EQUIPMENT, OR RELATED MATERIALS UPON THE PREMISES WILL BE AT THE RISK OF LICENSEE ONLY, AND NO INDEMNITEE WILL BE LIABLE FOR ANY

DAMAGE THERETO OR THEFT THEREOF, WHETHER OR NOT DUE IN WHOLE OR IN PART TO THE NEGLIGENCE OF ANY INDEMNITEE.

INSURANCE

23. Licensee shall, at its sole cost and expense, procure and maintain during the life of this License the following insurance coverage:

A. **Commercial General Liability Insurance.** This insurance shall contain broad form contractual liability with a combined single limit of a minimum of \$2,000,000 each occurrence and an aggregate limit of at least \$4,000,000, but in no event less than the amount otherwise carried by Licensee. Coverage must be purchased on a post 1998 ISO occurrence or equivalent and include coverage for, but not limited to, the following:

- ◆ Bodily Injury and Property Damage
- ◆ Personal Injury and Advertising Injury
- ◆ Fire legal liability
- ◆ Products and completed operations

This policy shall also contain the following endorsements, which shall be indicated on the certificate of insurance:

- ◆ The definition of insured contract shall be amended to remove any exclusion or other limitation for any work being done within 50 feet of railroad property.
- ◆ Waiver of subrogation in favor of and acceptable to Licensor.
- ◆ Additional insured endorsement in favor of and acceptable to Licensor and Jones Lang LaSalle Global Services - RR, Inc.
- ◆ Separation of insureds.
- ◆ The policy shall be primary and non-contributing with respect to any insurance carried by Licensor.

It is agreed that the workers' compensation and employers' liability related exclusions in the Commercial General Liability insurance policy(s) required herein are intended to apply to employees of the policy holder and shall not apply to Licensor employees.

No other endorsements limiting coverage may be included on the policy.

B. **Business Automobile Insurance.** This insurance shall contain a combined single limit of at least \$1,000,000 per occurrence, and include coverage for, but not limited to the following:

- ◆ Bodily injury and property damage.
- ◆ Any and all vehicles owned, used or hired.
- ◆ Waiver of subrogation in favor of and acceptable to Licensor.
- ◆ Additional insured endorsement in favor or and acceptable to Licensor.
- ◆ Separation of insureds.
- ◆ The policy shall be primary and non-contributing with respect to any insurance carried by Licensor.

- C. **Workers Compensation and Employers Liability Insurance.** This insurance shall include coverage for, but not limited to:
- ◆ Licensee's statutory liability under the worker's compensation laws of the state(s) in which the work is to be performed. If optional under State law, the insurance must cover all employees anyway.
 - ◆ Employers' Liability (Part B) with limits of at least \$500,000 each accident, \$500,000 by disease policy limit, \$500,000 by disease each employee.

This policy shall also contain the following endorsements or language, which shall be indicated on the certificate of insurance:

- ◆ Waiver of subrogation in favor of and acceptable to Licensor.

- D. **Railroad Protective Liability Insurance.** This insurance shall name only the Licensor as the Insured with coverage of at least \$2,000,000 per occurrence and \$6,000,000 in the aggregate. The coverage obtained under this policy shall only be effective during the initial installation and/or construction of the Fiber Optic Line. **THE CONSTRUCTION OF THE FIBER OPTIC LINE SHALL BE COMPLETED WITHIN ONE (1) YEAR OF THE EFFECTIVE DATE.** If further maintenance of the Fiber Optic Line is needed at a later date, an additional Railroad Protective Liability Insurance Policy shall be required. The policy shall be issued on a standard ISO form CG 00 35 10 93 and include the following:

- ◆ Endorsed to include the Pollution Exclusion Amendment (ISO form CG 28 31 10 93)
- ◆ Endorsed to include the Limited Seepage and Pollution Endorsement.
- ◆ Endorsed to include Evacuation Expense Coverage Endorsement.
- ◆ No other endorsements restricting coverage may be added.
- ◆ The original policy must be provided to the Licensor prior to performing any work or services under this License.

Other Requirements:

Where allowable by law, all policies (applying to coverage listed above) shall contain no exclusion for punitive damages and certificates of insurance shall reflect that no exclusion exists.

Licensee agrees to waive its right of recovery against Licensor for all claims and suits against Licensor. In addition, its insurers, through policy endorsement, waive their right of subrogation against Licensor for all claims and suits. The certificate of insurance must reflect waiver of subrogation endorsement. Licensee further waives its right of recovery, and its insurers also waive their right of subrogation against Licensor for loss of its owned or leased property or property under its care, custody, or control.

Licensee shall be allowed to self-insure as to those insurance requirements in this section that apply to the City of El Paso. Licensee shall provide Licensor with certification that it is self-insured. Insurance requirements that apply to Licensee's contractors shall not be subject to self-insurance. If granted by Licensor, any deductible, self-insured retention or other financial responsibility for claims shall be covered directly by Licensee in lieu of insurance. Any and all Licensor liabilities that would otherwise, in accordance with the provisions of this License, be covered by Licensee's insurance will be covered as if

Licensee elected not to include a deductible, self-insured retention, or other financial responsibility for claims.

Prior to commencing any work, Licensee shall furnish to Licensor an acceptable certificate(s) of insurance including an original signature of the authorized representative evidencing the required coverage, endorsements, and amendments. The policy(ies) shall contain a provision that obligates the insurance company(ies) issuing such policy(ies) to notify Licensor in writing at least 30 days prior to any cancellation, non-renewal, substitution or material alteration. This cancellation provision shall be indicated on the certificate of insurance. In the event of a claim or lawsuit involving Licensor arising out of this License, Licensee will make available any required policy covering such claim or lawsuit.

Any insurance policy shall be written by a reputable insurance company acceptable to Licensor or with a current Best's Guide Rating of A- and Class VII or better, and authorized to do business in the state(s) in which the service is to be provided.

If coverage is purchased on a "claims made" basis, Licensee hereby agrees to maintain coverage in force for a minimum of three years after expiration, cancellation or termination of this contract. Annually, Licensee agrees to provide evidence of such coverage as required hereunder.

Licensee represents that this License has been thoroughly reviewed by Licensee's insurance agent(s)/broker(s), who have been instructed by Licensee to procure the insurance coverage required by this Agreement. Allocated Loss Expense shall be in addition to all policy limits for coverages referenced above.

Not more frequently than once every five years, Licensor may reasonably modify the required insurance coverage to reflect then-current risk management practices in the railroad industry and underwriting practices in the insurance industry.

If any portion of the operation is to be subcontracted by Licensee, Licensee shall require that the subcontractor shall provide and maintain insurance coverages as set forth herein, naming Licensor as an additional insured, and shall require that the subcontractor shall release, defend and indemnify Licensor to the same extent and under the same terms and conditions as Licensee is required to release, defend and indemnify Licensor herein.

Failure to provide evidence as required by this Section 23 shall entitle, but not require, Licensor to terminate this License immediately. Acceptance of a certificate that does not comply with this section shall not operate as a waiver of Licensee's obligations hereunder.

The fact that insurance (including, without limitation, self-insurance) is obtained by Licensee shall not be deemed to release or diminish the liability of Licensee including, without limitation, liability under the indemnity provisions of this License. Damages recoverable by Licensor shall not be limited by the amount of the required insurance coverage.

For purposes of this Section 23, Licensor shall mean "Burlington Northern Santa Fe Corporation", "BNSF Railway Company" and the subsidiaries, successors, assigns and affiliates of each.

ENVIRONMENTAL

24. (a) Licensee shall strictly comply with all federal, state and local environmental laws and regulations in its use of the Premises, including, but not limited to, the Resource Conservation and Recovery Act, as amended (RCRA), the Clean Water Act, the Oil Pollution Act, the Hazardous Materials Transportation Act, CERCLA (collectively referred to as the "Environmental Laws"). Licensee shall not maintain a treatment, storage, transfer or disposal facility, or underground storage tank, as defined by Environmental Laws on the Premises. Licensee shall not release or suffer the release of oil or hazardous substances, as defined by Environmental Laws on or about the Premises.
- (b) Licensee shall give Licensor immediate notice to Licensor's Resource Operations Center at (800) 832-5452 of any release of hazardous substances on or from the Premises, violation of Environmental Laws, or inspection or inquiry by governmental authorities charged with enforcing Environmental Laws with respect to Licensee's use of the Premises. Licensee shall use the best efforts to promptly respond to any release on or from the Premises. Licensee also shall give Licensor immediate notice of all measures undertaken on behalf of Licensee to investigate, remediate, respond to or otherwise cure such release or violation.
- (c) In the event that Licensor has notice from Licensee or otherwise of a release or violation of Environmental Laws arising in any way with respect to the Fiber Optic Line which occurred or may occur during the term of this License, Licensor may require Licensee, at Licensee's sole risk and expense, to take timely measures to investigate, remediate, respond to or otherwise cure such release or violation affecting the Premises or Licensor's right-of-way.
- (d) Licensee shall promptly report to Licensor in writing any conditions or activities upon the Premises known to Licensee which create a risk of harm to persons, property or the environment and shall take whatever action is necessary to prevent injury to persons or property arising out of such conditions or activities; provided, however, that Licensee's reporting to Licensor shall not relieve Licensee of any obligation whatsoever imposed on it by this License. Licensee shall promptly respond to Licensor's request for information regarding said conditions or activities.

ALTERATIONS

25. Licensee may not make any alterations to the Premises or permanently affix anything to the Premises or any buildings or other structures adjacent to the Premises without Licensor's prior written consent.

NO WARRANTIES

26. **LICENSOR'S DUTIES AND WARRANTIES ARE LIMITED TO THOSE EXPRESSLY STATED IN THIS LICENSE AND SHALL NOT INCLUDE ANY IMPLIED DUTIES OR IMPLIED WARRANTIES, NOW OR IN THE FUTURE. NO REPRESENTATIONS OR WARRANTIES HAVE BEEN MADE BY LICENSOR OTHER THAN THOSE CONTAINED IN THIS LICENSE. LICENSEE HEREBY WAIVES ANY AND ALL WARRANTIES,**

EXPRESS OR IMPLIED, WITH RESPECT TO THE PREMISES OR WHICH MAY EXIST BY OPERATION OF LAW OR IN EQUITY, INCLUDING, WITHOUT LIMITATION, ANY WARRANTY OF MERCHANTABILITY, HABITABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

QUIET ENJOYMENT

27. **LICENSOR DOES NOT WARRANT ITS TITLE TO THE PREMISES NOR UNDERTAKE TO DEFEND LICENSEE IN THE PEACEABLE POSSESSION OR USE THEREOF. NO COVENANT OF QUIET ENJOYMENT IS MADE.**

DEFAULT

28. If default shall be made in any of the covenants or agreements of Licensee contained in this document, or in case of any assignment or transfer of this License by operation of law, Licensor may, at its option, terminate this License by serving five (5) days' notice in writing upon Licensee. Any waiver by Licensor of any default or defaults shall not constitute a waiver of the right to terminate this License for any subsequent default or defaults, nor shall any such waiver in any way affect Licensor's ability to enforce any Section of this License. The remedy set forth in this Section 28 shall be in addition to, and not in limitation of, any other remedies that Licensor may have at law or in equity.

LIENS AND CHARGES

29. Licensee shall promptly pay and discharge any and all liens arising out of any construction, alterations or repairs done, suffered or permitted to be done by Licensee on Premises. Licensor is hereby authorized to post any notices or take any other action upon or with respect to Premises that is or may be permitted by law to prevent the attachment of any such liens to Premises; provided, however, that failure of Licensor to take any such action shall not relieve Licensee of any obligation or liability under this Section 29 or any other Section of this License. Licensee shall pay when due any taxes, assessments or other charges (collectively, "Taxes") levied or assessed upon the Fiber Optic Line or any other improvements constructed or installed on the Premises by or for Licensee (collectively, the "Improvements") by any governmental or quasi-governmental body or any Taxes levied or assessed against Licensor or the Premises that are attributable to the Improvements.

TERMINATION

30. This License may be terminated by Licensor, at any time, by serving thirty (30) days' written notice of termination upon Licensee. This License may be terminated by Licensee upon execution of Licensor's Mutual Termination Letter Agreement then in effect. Upon expiration of the time specified in such notice, this License and all rights of Licensee shall absolutely cease.
31. If Licensee fails to surrender to Licensor the Premises, upon any termination of this License, all liabilities and obligations of Licensee hereunder shall continue in effect until the Premises are surrendered. Termination shall not release Licensee from any liability or obligation, whether of indemnity or otherwise, resulting from any events happening prior to the date of termination.

ASSIGNMENT

32. Neither Licensee, nor the heirs, legal representatives, successors, or assigns of Licensee, nor any subsequent assignee, shall assign, transfer, sell, or hypothecate this License or any interest herein, without the prior written consent and approval of Licensor, which may be withheld in Licensor's sole discretion. Any attempted assignment by Licensee in violation of this Section 32 shall be absolutely void. For purposes of this Section 32, the word "assign" shall include without limitation (i) any sale of the equity interests of Licensee following which the equity interest holders of Licensee immediately prior to such sale own, directly or indirectly, less than 50% of the combined voting power of the outstanding voting equity interests of Licensee (ii) any sale of all or substantially all of the assets of (a) Licensee and (b) Licensee's parent and subsidiaries (to the extent such entities exist), taken as a whole, or (iii) any reorganization, recapitalization, merger or consolidation involving Licensee, except for a reorganization, recapitalization, merger or consolidation following which the equity interest holders of Licensee immediately prior to such reorganization, recapitalization, merger or consolidation own, directly or indirectly, at least 50% of the combined voting interests of Licensee or any successor thereto or the entity resulting from such reorganization, recapitalization, merger or consolidation. THIS LICENSE SHALL NOT RUN WITH THE LAND WITHOUT THE EXPRESS WRITTEN CONSENT OF LICENSOR, SUCH CONSENT TO BE IN LICENSOR'S SOLE DISCRETION.

NOTICES

33. Any notice required or permitted to be given hereunder by one party to the other shall be in writing and the same shall be given and shall be deemed to have been served and given if (i) placed in the United States mail, certified, return receipt requested, or (ii) deposited into the custody of a nationally recognized overnight delivery service, addressed to the party to be notified at the address for such party specified below, or to such other address as the party to be notified may designate by giving the other party no less than thirty (30) days' advance written notice of such change in address.

If to Licensor: Jones Lang LaSalle Global Services - RR, Inc.
3017 Lou Menk Drive, Suite 100
Fort Worth, TX 76131-2800
Attn: Licenses/Permits

with a copy to: BNSF Railway Company
2500 Lou Menk Dr. - AOB3
Fort Worth, TX 76131
Attn: Manager - Land Revenue Management

If to Licensee: City of El Paso, Texas
2 Civic Center Plaza
Engineering Department, 4th Floor
El Paso, Texas 79901

SURVIVAL

34. Neither termination nor expiration will release either party from any liability or obligation under this License, whether of indemnity or otherwise, resulting from any acts, omissions or events happening prior to the date of termination or expiration, or, if later, the date when the Fiber Optic Line and any other Improvements are removed and the Premises are restored to its condition as of the Effective Date.

RECORDATION

35. It is understood and agreed that this License shall not be placed on public record.

APPLICABLE LAW

36. All questions concerning the interpretation or application of provisions of this License shall be decided according to the substantive laws of the State of Texas without regard to conflicts of law provisions.

SEVERABILITY

37. To the maximum extent possible, each provision of this License shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this License shall be prohibited by, or held to be invalid under, applicable law, such provision shall be ineffective solely to the extent of such prohibition or invalidity, and this shall not invalidate the remainder of such provision or any other provision of this License.

INTEGRATION

38. This License is the full and complete agreement between Licensor and Licensee with respect to all matters relating to Licensee's use of the Premises, and supersedes any and all other agreements between the parties hereto relating to Licensee's use of the Premises as described herein. However, nothing herein is intended to terminate any surviving obligation of Licensee or Licensee's obligation to defend and hold Licensor harmless in any prior written agreement between the parties.

MISCELLANEOUS

39. In the event that Licensee consists of two or more parties, all the covenants and agreements of Licensee herein contained shall be the joint and several covenants and agreements of such parties.
40. The waiver by Licensor of the breach of any provision herein by Licensee shall in no way impair the right of Licensor to enforce that provision for any subsequent breach thereof.

- 41. All provisions contained in this License shall be binding upon, inure to the benefit of, and be enforceable by the respective successors and assigns of Licensor and Licensee to the same extent as if each such successor and assign was named a party to this License.
- 42. Jones Lang LaSalle Global Services – RR, Inc. is acting as representative for BNSF Railway Company.

IN WITNESS WHEREOF, this License has been duly executed, in duplicate, by the parties hereto as of the day and year first above written.

BNSF RAILWAY COMPANY

Jones Lang LaSalle Global Services - RR, Inc.
3017 Lou Menk Drive, Suite 100
Fort Worth, TX 76131-2800

By: _____
Ed Darter
Title: Vice President - National Accounts

CITY OF EL PASO, TEXAS

2 Civic Center Plaza
Engineering Department, 4th Floor
El Paso, Texas 79901

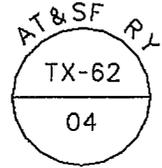
By: _____
Title: _____

EXHIBIT "A"

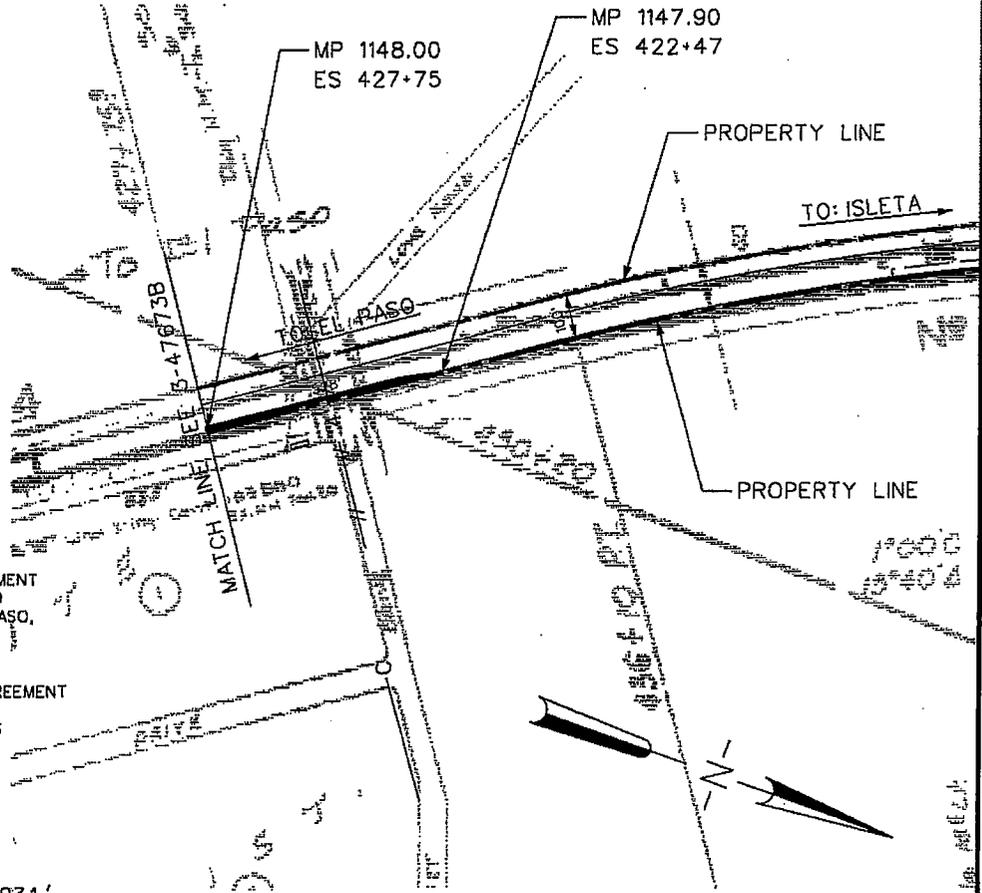
ATTACHED TO CONTRACT BETWEEN
BNSF RAILWAY COMPANY
 AND
CITY OF EL PASO, TEXAS

SCALE: 1 IN. = 400 FT.
 SOUTHWEST DIV.
 EL PASO SUBDIV. L.S. 7300
 DATE 09/30/2009
 REVISION 12/02/2009

SECTION: -
 TOWNSHIP: -
 RANGE: -
 MERIDIAN: -



MAP REF. 133278



NOTE:
 R/W SUBJECT TO FIBER OPTIC AGREEMENT
 NO. AT-188569 TO S.P. TELECOM, DATED
 12/5/1994 FROM DENVER, CO. TO EL PASO,
 TX., AS SHOWN HEREON.

NOTE:
 R/W IS SUBJECT TO FIBER OPTIC AGREEMENT
 BNSF-01523 TO PATHNET, FROM
 ALBUQUERQUE, NM. TO EL PASO, TX., AS
 SHOWN

NOTE:
 TOTAL LENGTH OF LINE = 7.931'

DESCRIPTION OF WIRES UNDER TRACK
 WIRES LOCATED AS SHOWN BOLD

TYPE	<u>FIBER OPTIC</u>	SIZE OF CONDUIT	<u>2"x528'</u>
NUMBER	<u>1</u>	CONDUIT MATERIAL	<u>HDPE</u>
VOLTAGE	<u>N/A</u>	WALL THICKNESS	<u>0.188"</u>
		LENGTH ON R/W	<u>528'</u>
		BASE OF RAIL TO TOP OF CONDUIT	<u>7'</u>

NOTE: CASING TO BE JACKED OR DRY BORED ONLY
 NEAR EL PASO
 COUNTY OF EL PASO

STATE OF TX SLG

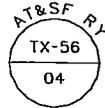
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EXHIBIT "A"

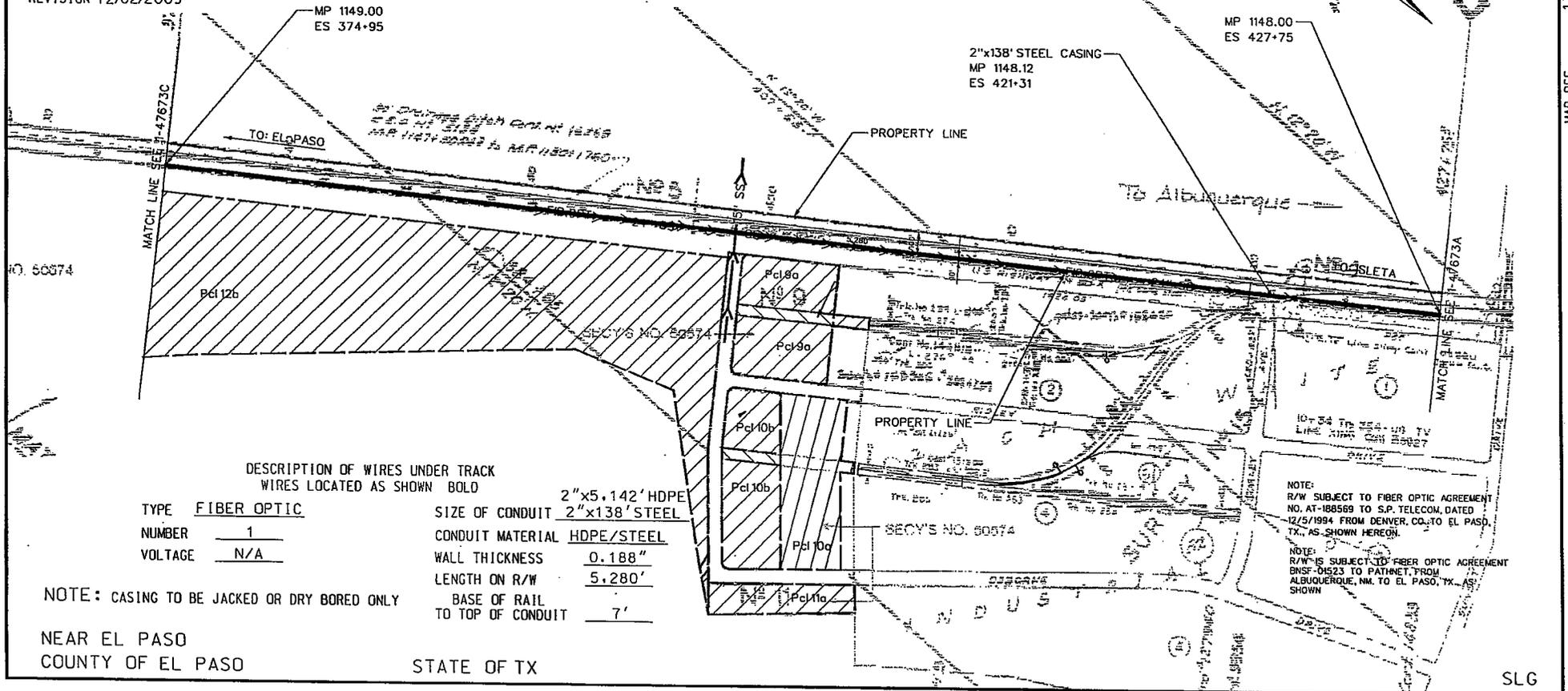
ATTACHED TO CONTRACT BETWEEN
BNSF RAILWAY COMPANY
AND
CITY OF EL PASO, TEXAS

SCALE: 1 IN. = 400 FT.
SOUTHWEST DIV.
EL PASO SUBDIV. L.S. 7300
DATE 09/30/2009
REVISION 12/02/2009

SECTION: -
TOWNSHIP: -
RANGE: -
MERIDIAN: -



TRIM LINE



DESCRIPTION OF WIRES UNDER TRACK
WIRES LOCATED AS SHOWN BOLD

TYPE	FIBER OPTIC	SIZE OF CONDUIT	2" x 5.142' HDPE
NUMBER	1	CONDUIT MATERIAL	2" x 138' STEEL
VOLTAGE	N/A	WALL THICKNESS	0.188"
		LENGTH ON R/W	5.280'
		BASE OF RAIL TO TOP OF CONDUIT	7'

NOTE: CASING TO BE JACKED OR DRY BORED ONLY

NEAR EL PASO
COUNTY OF EL PASO

STATE OF TX

NOTE:
R/W SUBJECT TO FIBER OPTIC AGREEMENT
NO. AT-188569 TO S.P. TELECOM, DATED
12/5/1994 FROM DENVER, CO. TO EL PASO,
TX, AS SHOWN HEREON.

NOTE:
R/W IS SUBJECT TO FIBER OPTIC AGREEMENT
BNSF-0523 TO PATNET, FROM
ALBUQUERQUE, NM. TO EL PASO, TX, AS
SHOWN

MAP REF. 133279

SLG

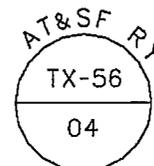
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EXHIBIT "A"

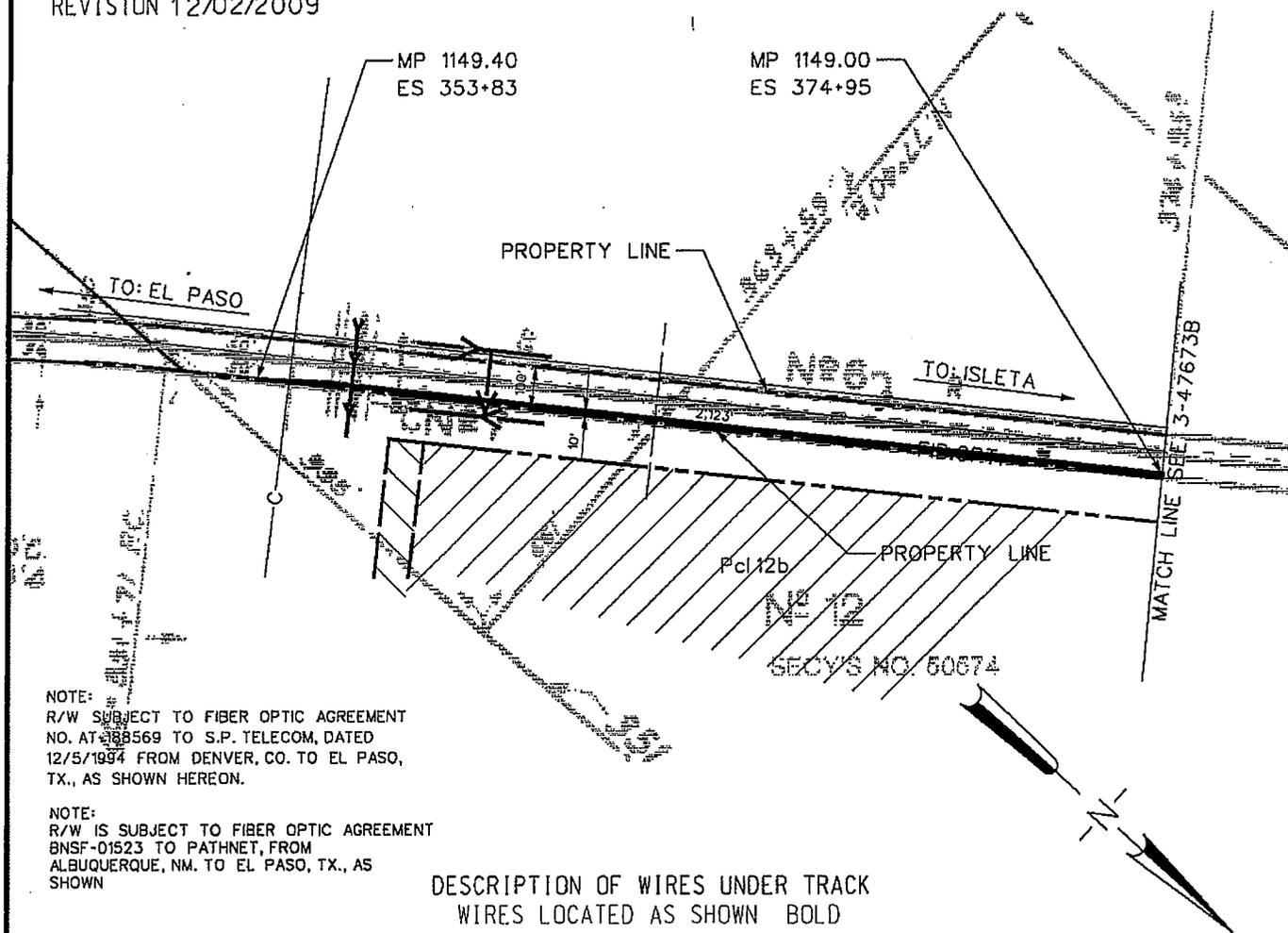
ATTACHED TO CONTRACT BETWEEN
BNSF RAILWAY COMPANY
 AND
CITY OF EL PASO, TEXAS

SCALE: 1 IN. = 400 FT.
 SOUTHWEST DIV.
 EL PASO SUBDIV. L.S. 7300
 DATE 09/30/2009
 REVISION 12/02/2009

SECTION: -
 TOWNSHIP: -
 RANGE: -
 MERIDIAN: -



MAP REF. 133279



NOTE:
 R/W SUBJECT TO FIBER OPTIC AGREEMENT
 NO. AT-88569 TO S.P. TELECOM, DATED
 12/5/1994 FROM DENVER, CO. TO EL PASO,
 TX., AS SHOWN HEREON.

NOTE:
 R/W IS SUBJECT TO FIBER OPTIC AGREEMENT
 BNSF-01523 TO PATHNET, FROM
 ALBUQUERQUE, NM. TO EL PASO, TX., AS
 SHOWN

DESCRIPTION OF WIRES UNDER TRACK
 WIRES LOCATED AS SHOWN BOLD

TYPE	<u>FIBER OPTIC</u>	SIZE OF CONDUIT	<u>2"x2,123'</u>
NUMBER	<u>1</u>	CONDUIT MATERIAL	<u>HDPE</u>
VOLTAGE	<u>N/A</u>	WALL THICKNESS	<u>0.188"</u>
		LENGTH ON R/W	<u>2,123'</u>
		BASE OF RAIL TO TOP OF CONDUIT	<u>7'</u>

NOTE: CASING TO BE JACKED OR DRY BORED ONLY
 NEAR EL PASO
 COUNTY OF EL PASO

STATE OF TX

SLG

AGREED to this _____ day of _____, 2010.

CITY OF EL PASO

Joyce A. Wilson
City Manager

APPROVED AS TO FORM:



Mark Shoosmith
Assistant City Attorney

APPROVED AS TO CONTENT:



R. Alan Shubert, P.E.
City Engineer