CITY OF ENCINITAS DEVELOPMENT SERVICES DEPARTMENT	POLICY NO: DSD 2020-01
Approved by: _____ Lillian Doherty, Development Services Director Date Approved: September 15, 2020	

ENCROACHMENT AND EXCAVATION POLICIES FOR WIRELINE COMMUNICATION FACILITIES

BACKGROUND

Wireline communication services often require underground, surface-mounted and/or overhead facilities in the public rights-of-way. Recently, the City has received inquiries from both incumbent providers and new competitive entrants about significant new deployments, particularly for fiber optic facilities.

These facilities provide important services to the City's residents, businesses and visitors. At the same time, construction and excavation in the public rights-of-way degrades the streets, sidewalks and other facilities within the public rights-of-way and shorten their useful lifespan. The facilities themselves may also detract from neighborhood character, obstruct pedestrian travel and interfere with other authorized uses in the public rights-of-way. Accordingly, the City has important interests in encouraging deployment and at the same time regulating placement, construction and excavation associated with these facilities.

Encinitas Municipal Code ("EMC") Chapter 15.04, titled "Construction on the Public Rights-of-Way," provides the framework for the orderly administration of private work in the public rights-of-way and is intended to protect the public interest and safety. *See* EMC § 15.04.010. The Development Services Director administers this chapter with delegated authority to adopt standards, specifications, conditions and procedures for construction in the City's public rights-of-way. *See* EMC §§ 15.04.030 through 15.04.050. These administrative regulations by the Director may be specific to a proposed project or general to all similarly situated projects.

PURPOSE

This Policy is intended to provide additional clarity and guidance to applicants as to the procedures, standards and conditions on which the Director will issue permits for the installation, construction, excavation or other work performed in connection with wireline communication facilities located or proposed to be located within the public rights-of-way.

This Policy is not intended to, nor shall it be interpreted or applied to: (1) prohibit or effectively prohibit any entity's ability to provide any communications service, subject to any competitively neutral and nondiscriminatory rules, regulations or other legal requirements for rights-of-way management; (2) unreasonably discriminate among functionally equivalent services or service

providers; (3) impose any unreasonable, discriminatory or anticompetitive fees that exceed the reasonable cost to provide the services for which the fee is charged; (4) otherwise authorize the City to preempt any applicable federal or California law; or (5) limit the exercise of the Director's discretion authorized under the Encinitas Municipal Code and other applicable law.

DEFINITIONS

The abbreviations, phrases, terms and words used in this Policy will have the following meanings assigned to them unless context indicates otherwise. Undefined phrases, terms or words in this Policy will have their ordinary meanings.

(a) "**collector road**" means four-lane undivided roadway, with a typical right-of-way width of 70-84 feet and a curb-to-curb pavement width of approximately 64 feet. A collector road's function is to distribute traffic between local streets and major and prime arterials. Although some collector roads serve as through routes, their primary function is to provide access from surrounding land uses. The term "collector road" as used in this Policy is defined in the Encinitas General Plan, Circulation Element, page C-18.

(b) "**CPUC**" means the California Public Utilities Commission established in the California Constitution, Article XII, § 5, or its duly appointed successor agency.

(c) "**Director**" means the Development Services Director or his/her designee.

(d) "**DIVCA**" means the Digital Infrastructure and Video Competition Act of 2006, California Public Utilities Code §§ 5800, *et seq.*

(e) "**DIVCA certificate**" means an authorization issued by the California Public Utilities Commission pursuant California Public Utilities Code § 5840.

(f) "**facility**" includes, without limitation, any and all cables, wires, lines, cabinets, ducts, conduits, converters, equipment, drains, handholds, manholes, pipes, pipelines, splice boxes, surface location markers, tracks, tunnels, utilities, vaults and other appurtenances or tangible things owned, leased, operated or licensed by a person or entity, that are located or are proposed to be located in the public rights-of-way in connection with any wireline communications service.

(g) "**historic resource**" means a historic landmark or district, listed or eligible to be listed on the National Register of Historic Places or California Register of Historical Resources, or any site or location identified as of "historical significance" in the Resource Management Element of the Encinitas General Plan.

(h) "**local street**" means streets designed to provide access to individual parcels in the City. Local streets consist of two lanes with a typical right-of-way width of 50-70 feet and a pavement width of 40 feet. The term "local street" as used in this Policy is defined in the Encinitas General Plan, Circulation Element, page C-18.

(i) "**major arterial**" means a four-lane divided roadway, with a typical right-of-way width of 85-120 feet and a curb-to-curb pavement width of approximately 80 feet. The term "major arterial" as used in this Policy is defined in the Encinitas General Plan, Circulation Element, page C-18.

(j) "**permittee**" means the person granted a permit pursuant to this Policy.

(k) "**prime arterial**" means a six-lane divided roadway, with a typical right-of-way width of 120-130 feet and curb-to-curb pavement width of 100-110 feet. The term "prime arterial" as used in this Policy is defined in the Encinitas General Plan, Circulation Element, page C-16.

(l) "**public right-of-way**" or "**public rights-of-way**" means land or an interest in land which by deed, conveyance, agreement, easement, dedication, usage or process of law is reserved for or dedicated to or open to the use by the general public for road or highway purposes. The term does not include private or public utility easements unless such easement is reserved for or dedicated to or open to the use by the general public for road or highway purposes.

(m) "**surface-mounted facility**" means any facility or physical element or structure associated with a facility that is installed, attached or affixed in the public rights-of-way on a site that is above the surface of the public rights-of-way (except on utility poles or associated overhead appurtenances) and that requires excavation to install the facility.

(n) "**trenchless technology**" means any method, material, equipment, technique or combination thereof used to install, replace, renew or repair underground facilities and improvements with no or minimal surface disturbance. Trenchless technology includes, without limitation, drilling, auguring, boring and tunneling.

(o) "**underground utility district**" means any area in the City within which overhead wires, cables, cabinets and associated overhead equipment, appurtenances and other improvements are either (1) prohibited by ordinance, resolution or other applicable law; (2) scheduled to be relocated underground within 18 months from the time an application is submitted; or (3) primarily located underground at the time an application is submitted.

(p) "**wireline communications service**" includes the transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals by wire, cable, fiber-optic cables or other wireline conveyances to a point, or between or among points, whether or not such information is transmitted through interconnected service with the public switched network.

APPLICATION AND REVIEW PROCEDURES

(a) **Application Requirements.** In addition to any other publicly stated requirements, all permit applications for installation, construction and/or excavation in connection with facilities encroaching within the City's public rights-of-way must include the following information and materials:

(1) **Application Form.** The applicant shall submit a complete, duly executed permit application on the then-current form prepared by the City.

(2) **Application Fee.** The applicant shall submit the applicable permit application fee adopted by City Council resolution.

(3) **Construction Drawings.** The applicant shall submit true and correct construction drawings, prepared, signed and stamped by a California licensed or registered engineer, that depict all the existing and proposed improvements, equipment and conditions

related to the proposed project, which includes without limitation any and all poles, posts, pedestals, traffic signals, towers, streets, sidewalks, pedestrian ramps, driveways, curbs, gutters, drains, handholes, manholes, fire hydrants, equipment cabinets, lines, wires, cables, trees and other landscape features. The construction drawings must: (i) contain cut sheets that contain the technical specifications for all existing and proposed lines, wires, cables and accessory equipment, which includes without limitation the manufacturer, model number, weight and physical dimensions; (ii) identify all the applicant's potential surface mounted facilities and support structures within 15 feet from the proposed project site and call out such structures' overall height above ground level; (iii) depict the applicant's preliminary plan for electric or communications connections, which shall include the anticipated locations for all conduits, lines, wires, cables, handholes, junctions, transformers, meters, disconnect switches, and points of connection; and (iv) demonstrate that proposed project will be in full compliance with all applicable health and safety laws, regulations or other rules, which includes without limitation all building codes, fire codes, electric codes, local street standards and specifications, and public utility regulations and orders.

(4) **Site Survey.** Except as may be provided otherwise in this Policy, the applicant must submit a survey that identifies and depicts all existing boundaries, encroachments and other structures within 15 feet from the proposed project site and any new improvements, which includes without limitation all: (i) traffic lanes; (ii) all private properties and property lines; (iii) above and below-grade utilities and related structures and encroachments; (iv) fire hydrants, roadside call boxes and other public safety infrastructure; (v) streetlights, decorative poles, traffic signals and permanent signage; (vi) sidewalks, driveways, parkways, curbs, gutters and storm drains; (vii) benches, trash cans, mailboxes, kiosks and other street furniture; and (viii) existing trees, planters and other landscaping features. The survey must be prepared, signed and stamped by a California licensed or registered engineer when the proposed facilities involve ground disturbance within 2 feet from the edge of the public rights-of-way. A survey shall not be required for proposed project or portions thereof that only involve installing additional cables or wires through existing conduit or on existing overhead poles.

(5) **Traffic Control Plans.** All plans for temporary traffic control shall comply with the latest edition of the California Manual on Uniform Traffic Control Devices ("CA-MUTCD"). Traffic control plans that match the standard plans in the CA-MUTCD shall not require an engineer's signature and stamp; provided, however, that any traffic control plans that deviate from such standard plans must be prepared, signed and stamped by a California licensed or registered engineer.

(6) **Photo Simulations.** For each surface mounted facility, the applicant shall submit site photographs and photo simulations that show the existing location and proposed surface mounted facility in context from at least one vantage point within the public streets or other publicly accessible spaces, together with a vicinity map that shows the proposed site location and the photo location. The simulation must depict the surface mounted facility from a vantage point approximately 50 feet from the proposed location. The photo simulation and vicinity map shall be incorporated into the construction plans submitted with the application. The photo simulations must show all required elements of the surface mounted facility that will be visible and shall be based on actual site photographs. For clarity, photo simulations shall not be required for: (i) proposed projects that involve like-for-like replacement surface mounted facilities that do not otherwise defeat the design standards or concealment requirements in this Policy; (ii)

underground facilities; or (iii) aerial or overlashed cables or wires on existing utility poles or structures.

(7) **Project Narrative and Justification.** All applications must contain a short, plain statement that describes the scope and purpose of the proposed project. The written statement shall also describe, to the extent feasible, any other planned facilities deployments by the applicant within the City over the next 24-month period from the date of submittal, including the type of service(s) to be provided and purpose of the facilities, their anticipated date of installation, and the location and zoning district of each project area. If the applicant's proposed facilities deviate from any location and/or design standard of this Policy, the written statement shall also explain in plain factual detail how the proposed facilities deviate from any requirements in the Encinitas Municipal Code and this Policy, which includes without limitation any location, design and concealment requirements, and federal and state law, as applicable, the reasons for the deviation and any proposed mitigations to minimize the deviation.

(8) **Regulatory Authorization.** The applicant shall submit evidence of the applicant's regulatory status under federal and California law to provide the services and construct the facilities proposed in the application. The applicant is not required to resubmit such evidence of its regulatory status if the applicant already submitted such evidence with a previous application and there have been no changes to such evidence.

(9) **Property Owner's Authorization.** If any facilities will be installed on or within any existing facilities, utility poles or support structures owned by an entity other than the applicant, the applicant must submit: (i) a written authorization from the entity(ies) that authorizes the applicant to submit and accept a permit in connection with the subject facility or structure; (ii) a copy of an application for the proposed facilities approved by the entity that owns the existing facilities, utility poles or support structures; or (iii) a statement from the applicant attesting, under penalty of perjury, that no such application is required by the entity that owns the existing facilities, utility poles or support structures.

(10) **Acoustic Analysis.** The applicant shall submit either: (i) an acoustic analysis prepared and certified by a licensed engineer for any proposed noise-emitting equipment associated with any surface-mounted and undergrounded facilities including but not limited to all environmental control units, sump pumps, temporary backup power generators and permanent backup power generators demonstrating compliance with the City's noise regulations; or (ii) copies of the manufacturers' acoustic specifications for all noise-emitting equipment associated with any surface-mounted and undergrounded facilities including but not limited to all environmental control units, sump pumps, temporary backup power generators and permanent backup power generators and a depiction of the proposed equipment relative to all adjacent property lines sufficient to demonstrate compliance with the City's noise regulations. The foregoing acoustic analysis requirement shall not apply to: (x) the portions of the facilities and equipment that are not, on their own, noise emitting, including but not limited to equipment enclosures, handholes, vaults, conduit, lines, wires and cables; (y) temporary construction equipment for the installation of such facilities and equipment; or (z) temporary or time-limited emergency equipment.

(11) **Structural Analysis.** For any facilities to be installed on any utility pole or support structure, the applicant shall submit a report prepared and certified by an engineer licensed by the State of California (or other qualified personnel acceptable to the City)

that evaluates whether the underlying pole or support structure has the structural integrity to support all the proposed equipment and attachments. At a minimum, the analysis must be consistent with all applicable requirements in CPUC General Order 95 (including, but not limited to, load and pole overturning calculations), the National Electric Safety Code, the standards and practices required for an ANSI/TIA-222 Maintenance and Conditions Assessment (under the most current revision at the time of submittal) and any safety and construction standards required by law and the utility provider. The report shall contain tolerances including but not limited to guy tensions if applicable, plumb, twist, slip splices and take-up devices. In the alternative, the applicant may submit a structural report or pole loading analysis approved by the entity that owns the utility pole or support structure.

(12) **Environmental Impact Assessment.** The applicant shall submit an environmental impact assessment to determine whether the proposed project is exempt from CEQA, categorically exempt under Article 19 of the CEQA Guidelines or whether the proposed project will require a Negative Declaration, Mitigated Negative Declaration or an Environmental Impact Report. If the proposed project is exempt for any other reason, the applicant must submit evidence of such exemption and a statement of how the proposed project fits within that exemption.

(13) **Landscape Plan.** For projects that impact existing landscape features, a landscape plan shall be submitted with project application submittal indicating all existing vegetation that is to be retained on the project site and any additional vegetation that is needed to satisfactorily screen any surface mounted facilities from adjacent land uses in public view areas. That landscape plan shall conform to all the requirements set forth in this Policy and the City landscape guidelines manual as required by City of Encinitas Municipal Code Section 23.24.190 as they may be amended or superseded. The landscape plan shall also include a tree protection plan prepared by a certified arborist and specify measures to protect trees during project construction and/or improvement.

(14) **Truth and Accuracy Statement.** Any application submitted pursuant to this Policy shall be signed by the applicant, or a person knowledgeable about the proposed facility and authorized to act on the applicant's behalf, attesting, that under penalty of perjury, that all information, representations and disclosures in the application are true, correct and complete.

(b) **Pre-submittal Conferences.** For proposed projects involving new surface mounted facilities, ground disturbance or other excavation, the City requires prospective applicants to schedule and attend a pre-submittal conference with the Director and other City staff. Pre-submittal conferences for other proposed projects shall be voluntary. This pre-submittal conference is intended to streamline the review process through collaborative, informal discussion that includes, without limitation, the appropriate project classification and review process; any latent issues in connection with the proposed project and/or project site, including compliance with generally applicable rules for public health and safety; potential concealment issues or concerns (if applicable); coordination with other City departments implicated by the proposed project; and application completeness issues. To mitigate unnecessary delays due to application incompleteness, prospective applicants are encouraged (but not required) to bring any draft applications, plans, maps or other materials so that City staff may provide informal feedback and guidance about whether such applications or other materials may be incomplete or unacceptable in their then-current form. The prospective applicant may request

in writing to discuss multiple proposed applications at the same pre-submittal conference. The Director will use reasonable efforts to accommodate the requested but retains sole discretion for scheduling the duration of the pre-submittal conference and number of proposed applications to be discussed at a single pre-submittal conference. The Director will use reasonable efforts to provide the prospective applicant with an appointment within approximately five working days after receiving a written request and any applicable fee or deposit to reimburse the City for its actual, reasonable and documented costs to provide the staff and/or consulting time and services rendered in the pre-submittal conference. Any remaining amounts in the deposit following the City's reimbursement for its actual, reasonable and documented costs shall be applied to the applicable permit application fee(s) or refunded to the prospective applicant upon request. The Director may waive some or all of the foregoing requirements in accordance with Section (f) of these Application and Review Procedures (Temporary Requirements and Regulations).

(c) **Submittal Appointments.** Except as may be required or permitted by the Director, applications must be submitted in person to the City at a pre-scheduled appointment with the Director. A prospective applicant must make a request for a pre-scheduled appointment in writing. A prospective applicant may request in writing to submit more than one application at the same pre-scheduled appointment or schedule successive appointments for multiple applications with the Director. The Director, in the Director's sole discretion, may accept multiple applications at the same pre-scheduled appointment or schedule successive appointments for multiple applications whenever feasible and not prejudicial to other applicants for any other development project. The Director shall use reasonable efforts to offer an appointment within five working days after the Director receives a written request from a prospective applicant. Any purported application received without an appointment, whether delivered in-person, by mail or through any other means, will not be considered duly filed, whether the City retains, returns or destroys the materials received. The Director may waive some or all of the foregoing requirements in accordance with Section (f) of these Application and Review Procedures (Temporary Requirements and Regulations).

(d) **Incomplete Applications Deemed Withdrawn.** Any application governed under this Policy shall be automatically deemed withdrawn by the applicant when the applicant fails to submit a substantive response to the Director within 90 calendar days after the Director deems the application incomplete by written notice. The applicant's time to submit a substantive response may be extended, in the Director's sole discretion, upon written request from the applicant for good cause so long as the applicant is actively pursuing completion of its substantive response. As used in this Subsection (d), a "substantive response" must include, at a minimum, the complete materials identified as incomplete in the written incomplete notice or a reasonable explanation why the application is "complete" as submitted.

(e) **Peer and Independent Consultant Review.** The Director may, in the Director's reasonable discretion, select and retain an independent consultant with specialized training, experience and/or expertise in issues relating to facilities reasonably satisfactory to the Director in connection with any permit application. The Director may request an independent consultant review on any issue that involves specialized or expert knowledge in connection with facilities deployment or permit applications for facilities, which include without limitation permit application completeness and/or accuracy and any other issue identified by the Director that requires expert or specialized knowledge. The Director may request that the independent consultant prepare written reports, testify at public meetings, hearings and/or appeals and attend meetings with City staff and/or the applicant. Subject to applicable law, in the event that the Director elects to retain an independent consultant in connection with any permit

application, the Director shall notify the applicant in writing of such election and request that the applicant tender a deposit in an amount equal to the estimated cost for the services to be provided, as determined by the Director until the City adopts the initial required deposit by fee schedule, and the applicant shall be responsible for the actual, reasonable and documented costs in connection with the services provided, which may include without limitation any actual, reasonable and documented costs incurred by the independent consultant to attend and participate in any meetings or hearings. Before the independent consultant performs any services, the applicant shall, within 10 business days of receipt of the Director's notice, either elect to continue to have its application processed by the City by tendering to the City a deposit in the amount specified by the Director in the notice or the applicant shall withdraw its application. If the applicant elects to have its application processed, the Director may request additional deposits as reasonably necessary to ensure sufficient funds are available to cover the actual, reasonable and documented costs in connection with the independent consultant's services. In the event that the deposit exceeds the actual, reasonable and documented total costs for consultant's services, the Director shall promptly return any unused funds to the applicant after the facility has been installed and passes a final inspection by the Director or his or her designee. In the event that the actual, reasonable and documented costs for the independent consultant's services exceed the deposit, the Director shall invoice the applicant for the balance. The City shall not issue any permit to any applicant with any unpaid deposit requests or invoices. Notwithstanding the foregoing, the applicant may withdraw its application by providing written notice at any time after it elects to have the City process it in conjunction with the independent consultant, and applicant shall no longer be liable for the actual, reasonable and documented costs incurred by the consultant following the date of the Director's receipt of such withdrawal notice.

(f) **Temporary Requirements and Regulations.** Notwithstanding anything to the contrary in these Application and Review Procedures, the Director may, in the Director's sole discretion, establish other reasonable temporary rules and regulations for duly filed applications, which may include without limitation telephonic and/or electronic pre-submittal conferences and/or submittal appointments, regular hours for appointments and/or submittals without appointments as the Director deems necessary or appropriate to organize, document and manage the application intake process. Such temporary rules and regulations shall be in written form and publicly stated to provide all interested parties with prior notice.

LOCATION AND DESIGN GUIDELINES

(a) **Trench Cut Moratorium Streets.** All facility deployments shall comply with the City's Trench Cut Moratorium Policy, which includes without limitation all trench cut repair requirements for work performed in a moratorium street.

(b) **Dig Once.** The City strongly prefers joint trenches to reduce the number of excavations within the public right-of-way and preserve its useful life. The Director may require multiple excavators with overlapping projects to joint trench when technically feasible. If a joint trench is not technically feasible or if the applicant refuses to joint trench, the Director may require an applicant to use trenchless technologies and/or perform additional restoration to surfaces subject to multiple street cuts.

(c) **Encroachments Over Private Property.** No facilities may encroach onto or over any private or other property outside the public rights-of-way without the property owner's express written

consent submitted contemporaneously with the application or as otherwise authorized by some other property right such as an easement.

(d) **No Interference with Other Uses.** Facilities shall not be located in any place or manner that would physically obstruct, unreasonably interfere with or unreasonably impede any: (1) pedestrian access to travel over sidewalks or soft shoulders; (2) worker access to any surface mounted or underground infrastructure for traffic control, streetlight or public transportation, including without limitation any curb control sign, parking meter, vehicular traffic sign or signal, pedestrian traffic sign or signal, barricade reflectors; (3) access to any public transportation vehicles, shelters, street furniture or other improvements at any public transportation stop; (4) worker access to surface mounted or underground infrastructure owned or operated by any public or private utility agency; (5) access to any fire hydrant or water valve; (6) access to any doors, gates, sidewalk doors, passage doors, stoops or other ingress and egress points to any building appurtenant to the rights-of-way; (7) access to any fire escape; or (8) access to any public or private property that currently exists or is planned to exist at the time of the permit approval.

(e) **Location Preferences for Surface-Mounted Facilities.** To better assist applicants and decision makers understand and respond to the community's preferences and values, this subsection sets out listed preferences for locations to be used in connection with any facilities in an ordered hierarchy. Within each numbered location, the City most highly prefers surface-mounted facilities to be deployed on streets not subject to the City's Trench Cut Moratorium Policy. If surface-mounted facilities must be deployed on streets subject to the Trench Cut Moratorium Policy, the applicant must also obtain a waiver pursuant to the Trench Cut Moratorium Policy. Applications that involve surface-mounted facilities in lesser-preferred locations, including residential zones, may be approved so long as the applicant demonstrates that more preferred alternative locations would be technically infeasible and, if applicable, the surface-mounted facilities in the proposed locations qualify for a waiver pursuant to the Trench Cut Moratorium Policy. The City requires surface-mounted facilities in the public rights-of-way to be installed in locations, ordered from most preferred to least preferred, as follows:

(1) locations within industrial zones, commercial zones, business parks or office professional zones on or along prime arterials;

(2) locations within industrial zones, commercial zones, business parks or office professional zones on or along major arterials;

(3) locations within industrial zones, commercial zones, business parks or office professional zones on or along collector roads;

(4) locations within industrial zones, commercial zones, business parks or office professional zones on or along local streets;

(5) locations within residential zones on or along prime arterials;

(6) locations within residential zones on or along major arterials;

(7) locations within residential zones on or along collector roads; and

(8) locations within residential zones on or along local streets.

(f) **Additional Requirements for Surface-Mounted Facilities.** Surface-mounted facilities create obstructions and may adversely impact the public's use of the rights-of-way for travel, commercial, recreational and aesthetic purposes. In addition to all other requirements in this Policy, surface mounted facilities shall:

(1) be located off any sidewalk or soft shoulder to the maximum extent technically feasible;

(2) when placement on the sidewalk cannot be avoided, be placed in a manner that maintains the appropriate path of travel for pedestrians, with particular attention to the needs of persons with disabilities in full compliance with the Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12101 *et seq.*), the Fair Housing Act Amendments of 1988 and any other applicable disability/handicap accommodation laws;

(3) not be placed on sidewalks or pedestrian pathways with special paving or design features (such as paving stones or inlayed decorations);

(4) not be placed in underground utility districts, unless the applicant demonstrates that no other option is technically feasible;

(5) not be placed on public rights-of-way adjacent to open space or parks, unless the applicant demonstrates that no other option is technically feasible;

(6) not be placed on public rights-of-way adjacent to public schools;

(7) not be placed on public rights-of-way adjacent to a historic resource, or in a location that would adversely impact the view of a historic resource;

(8) be grouped next to any other nearby pre-existing surface mounted pedestals, cabinets or other equipment to the maximum extent technically feasible;

(9) be concealed from view from the public rights-of-way to the maximum extent technically feasible utilizing landscaping features including but not limited to existing and/or new bushes, retaining walls or other screening methods to blend with the landscape features;

(10) manufactured from materials able to be painted in a color and manner approved by the Director, including but not limited to community painting projects subject to separate agreements addressing permittee's liability and maintenance responsibility, or wrapped in a material with a design and colors approved by the Director;

(11) be placed as close as possible to the property line between two parcels that abuts the public rights-of-way;

(12) not be placed directly in front of any door or ground-floor window;

(13) not be placed within any sight distance triangles at any intersections;

(14) not be placed in any location that obstructs view lines for traveling vehicles, bicycles and pedestrian;

(15) not be placed in any location that obstructs views of any traffic signs or signals;

(16) not be placed in any location that obstructs illumination patterns for existing streetlights;

(17) be placed at least 15 feet away from any driveway or established pedestrian pathway between a residential structure and the public rights-of-way; and

(18) be placed at least 50 feet away from any driveways for police/sheriff's stations, fire stations or other emergency responder facilities.

STANDARD CONDITIONS

The following conditions shall be in addition to any conditions imposed on the temporary construction activities undertaken in connection with the facility(ies) covered by each such permit and remain in effect at all times while the facility(ies) covered by each such permit remain within the City's right-of-way. These conditions shall be attached and incorporated into the permit issued by the City. These conditions shall be effective when the permittee accepts the permit issued by the City. All references to the "Director" shall mean the Development Services Director of the City of Encinitas or the Director's designee.

(a) **No Property Rights Created.** This permit grants the permittee only a non-possessory, non-exclusive and revocable right to enter on to and use the public rights-of-way in accordance with the terms and conditions in the Encinitas Municipal Code, this permit and any other permits or regulatory authorizations issued by the City. The permittee expressly acknowledges and agrees that: (1) this permit neither creates nor will be deemed to create any leasehold, easement, franchise or any other possessory interest (whether present, future, contingent or otherwise) or real property interest whatsoever in the right-of-way or any other City property; (2) this permit is not coupled with an interest; (3) the City retains legal possession and control over all City property for the City's municipal functions, which will be superior to the permittee's rights and interest, if any, in any such City property covered by this permit at all times; (4) subject to the terms and conditions in the Encinitas Municipal Code, this permit and any other applicable laws, the City may terminate this permit, in whole or in part, at any time; (5) the City may enter into any agreement with third parties to use and/or occupy the public rights-of-way and/or any City property, whether in the City's regulatory or proprietary capacity as the case may be; and (6) this permit neither creates nor will be deemed to create any partnership or joint venture between the City and the permittee.

(b) **Unlawful Uses; Nuisances.** The permittee shall not use the facilities authorized by this permit, in whole or in part, in any unlawful manner or for any illegal purpose. In addition, the permittee shall not use the facilities authorized by this permit, in whole or in part, in any manner that constitutes a nuisance as determined by the City in its reasonable discretion. The permittee shall take all precautions to eliminate any nuisances or hazards in connection with its uses and activities on or about the public rights-of-way.

(c) **Safety.** The permittee shall at all times employ reasonable care, within the meaning of applicable laws, and shall install, maintain and use commonly accepted methods and devices for preventing failures and accidents that may cause damage, injury or nuisance to the public. The permittee shall construct, operate and maintain its facilities so as not to endanger or interfere with improvements the City shall deem reasonably appropriate to make, consistent with applicable laws, or to interfere in any manner with the public rights-of-ways or legal rights

of any property owner or to unnecessarily hinder or obstruct pedestrian or vehicular traffic. The permittee shall not place its facilities, equipment or fixtures where they will interfere with any gas, electric, telephone, communications, telecommunications, water, sewer or other utility facilities or obstruct or hinder in any manner such entity's use of any public rights-of-way.

(d) **USA 811.** The permittee warrants and represents to City that permittee is presently a member in good standing with the Underground Service Alert ("USA 811"). The permittee shall maintain current membership in USA 811 at all times while the facilities remain within the right-of-way. Prior to any excavation performed in the right-of-way, permittee shall observe and perform all notice and other obligations required under applicable Laws, which includes, without limitation, California Government Code §§ 4216 *et seq.*, as may be amended or superseded.

(e) **City Fees; Cost Reimbursement.**

(1) **Standard Fees.** The permittee shall pay all required City fees including, without limitation, processing, field marking, engineering and inspection fees in accordance with the published rates in effect at the time of permit issuance.

(2) **Right to Cost Reimbursement.** The City shall be entitled to recover from the permittee the actual, reasonable and documented costs to provide or perform any services in connection with this permit, which includes without limitation any costs incurred by City staff or the City's contractors, consultants and experts to review permit applications, issue permits or supervise or inspect any construction, installation or other work in connection with this permit. The permittee's payment of any fees in connection with any permit shall not relieve the permittee's obligation to reimburse the City for any and all actual, reasonable and documented costs incurred by the City in the future.

(3) **Nonpayment.** The City shall be entitled to withhold issuance of any permits or approvals based on the permittee's nonpayment of any required fee or accrued costs. The City's acceptance of any payment less than the full amount due shall not be construed as an accord and satisfaction.

(4) **Revenue Generating Fees.** Subject to the representations by the permittee as to its status as a telephone corporation, and in accordance with California Public Utilities Code § 7901, in its current form and as currently interpreted by California courts with competent jurisdiction, the City shall not impose, and the permittee shall not be required to pay, any revenue-generating fees in connection with its use or occupancy of the public rights-of-way for the provision of telephone services. The permittee's rights to use the City's right-of-way free from any revenue-generating fee imposed by the City is based on the permittee's certificate of public convenience and necessity ("CPCN") and the permittee's representations to the City that it will use the City's right-of-way solely to provide telephone service to the public (or other such users as to be effectively available to the public) in accordance with the permittee's CPCN. The City expressly reserves the right, in addition to all other rights the City has now or may have in the future, to revoke or amend this permit, in whole or in part, and require the permittee to comply with any lawful requirements, which may include full fair and reasonable compensation to the City for the permittee's use and occupancy on, over, under or in the City's right-of-way if: (i) the permittee uses the facilities for any purposes other than to provide telephone services or any other purposes not sanctioned by the permittee's CPCN; or (ii) the City

determines that applicable laws, which includes without limitation California Public Utilities Code § 7901 as may be amended or superseded in the future, do not preclude the City's right to impose any other lawful requirements not contained in this permit or these standard conditions. The foregoing condition is not applicable to a permittee subject to DIVCA that represents its status as a DIVCA certificate holder to use the City's right-of-way.

(f) **Installation, Construction, Excavation and Other Work.**

(1) **General Work Standards.** The permittee shall perform all installation, construction, excavation and other work in connection with the facilities (i) in accordance with the terms and conditions in the Encinitas Municipal Code, this permit and any other applicable laws; (ii) at the permittee's sole cost and expense, and at no cost to the City; (iii) in strict compliance with the approved plans, specifications and conditions associated with this permit; (iv) in a safe, diligent, skillful and workmanlike manner; and (v) to the Director's reasonable satisfaction.

(2) **Contractors and Subcontractors.** The permittee shall use only qualified and trained persons and appropriately licensed contractors for all installation, construction, excavation or other work performed on or about the public rights-of-way. At least five business days before any installation, construction or other work commences on or about the public rights-of-way, permittee shall provide the City with a list with all the names, license numbers and contact information for all contractors or subcontractors who will perform the installation, construction, excavation or other work.

(3) **Excavation Monitoring and Protection.** Any excavation performed in the public rights-of-way must be monitored by the permittee for any lateral movement, trench failures and other similar hazards. The permittee shall, at the permittee's sole cost and expense, repair any damage (which includes without limitation any subsidence, cracking, erosion, collapse, weakening and/or any loss or reduction in lateral or subjacent support) to the public rights-of-way, any adjacent private property, any utility lines or systems (whether overhead or underground) and any sewer and/or water lines or systems resulting from or in connection with any excavation by the permittee or its agents. All repair or restoration work performed pursuant to this condition shall be performed under the Director's supervision and to the Director's reasonable satisfaction.

(4) **Inspections.** The City shall have the right to inspect the permittee's facilities at any time during any construction, installation or other work in connection with any permit. Within 5 business days after the permittee completes any installation, construction, excavation or other work, the permittee shall provide the City with a written notice that confirms the precise locations and dates on which the permittee completed the work. Additionally, if the permittee is not a utility provider holding a CPCN or DIVCA certificate registered with the CPUC, within 5 days after the permittee completes any electrical work, the permittee shall, at the permittee's sole cost and expense, have a licensed electrician, selected by the permittee from the City's list of pre-approved contractors, provide the City with a written report verifying that the permittee's electrical work associated with the facilities was done in strict compliance with all applicable electrical regulations, which may include, without limitation, the utility service provider's standards, specifications and/or other requirements; the Encinitas Municipal Code; the National Electric Safety Code; the California Building Code and the California Electric Code, as either may be adopted by the City with any legally permitted amendments. The City shall have the right to inspect

the permittee's facilities at any time after the permittee completes any construction, installation or other work in connection with any permit. If the City discovers any defects or non-compliant conditions in connection with the facilities, the permittee shall, at the permittee's sole cost and expense, correct any such defects and conditions within the time period specified in the written notice from the City. If no time period is specified in the written notice, the default time for such corrections shall be 30 days from the date of the written notice; provided, however, that defects or non-compliant conditions that threaten public health and safety or threaten to cause imminent property damage shall be immediately corrected by the permittee. Such period may be extended by the City at its discretion upon written request from the permittee where the permittee shows good cause as to why additional time is reasonably required to complete the necessary work. The permittee shall promptly reimburse the City for all actual, reasonable and documented costs incurred in connection with any inspections or re-inspections by the City. The City's final inspection will occur after: (i) all surface improvements have been restored; (ii) all construction debris, excess materials, traffic control devices, and equipment have been removed; and (iii) the site has been cleaned and rendered safe for pedestrian and vehicular traffic by the Director. Any work performed by the permittee without an inspection is subject to rejection and removal by the City in accordance with applicable laws.

(5) **As-Built Plans and Maps.** Within 60 days after the permittee notifies the City that the work has been completed (or such other time as may be specified by the Director in writing), the permittee shall file as-built plans and maps in a format specified by the Director. In addition to any format required by the Director, all as-built plans and maps shall include digital copies in a native format compatible with the City's document management, GIS and/or other digital information management systems. The permittee's as-built plans and maps must show the accurate location and dimensions for all facilities. The City shall have the right to reject any as-built plans or maps for cause, in which case the permittee shall file revised as-built plans and/or maps within 30 days after notice from the City (or such other time as may be specified by the Director in writing). The City shall not close the permit until the as-built plans and maps required in this condition have been provided by the permittee.

(g) **Ongoing Maintenance and Repairs.**

(1) **General.** The permittee shall be solely responsible for any repairs or maintenance required to keep its facilities in a clean, safe and code-compliant condition. The permittee, at its sole cost and expenses, shall complete any repair damage to its facility within: (i) 30 days after the permittee discovers or receives notice (written or verbal) that such damage exists or (ii) immediately if such repairs are necessary to preserve life or property. All repair or restoration work performed pursuant to this condition shall be performed under the Director's supervision and to the Director's satisfaction.

(2) **Graffiti.** The permittee shall be solely responsible for graffiti removal on its facilities within the public rights-of-way. The permittee, at its sole cost and expenses, shall remove any graffiti from its facilities within 10 days after the permittee discovers or receives notice (written or verbal) that such graffiti exists on its facilities.

(3) **Routine Inspections.** The permittee shall regularly inspect its facilities at least once per calendar year to assess its compliance with the requirements in the Encinitas Municipal

Code, this permit and other applicable laws and determine the need for maintenance and/or graffiti abatement.

(4) **Damage to Landscape Features.** The permittee shall replace any public or private landscape features damaged or displaced by the construction, installation, excavation operation, maintenance or other work performed by the permittee or at the permittee's direction in connection with this permit and/or the facilities. If any trees are damaged or displaced, the permittee shall hire and pay for a licensed arborist to select plant and maintain replacement landscaping in an appropriate location for the species. Only International Society of Arboriculture certified workers under the supervision of a licensed arborist shall be used to install the replacement tree(s). Any replacement tree must be substantially the same size as the damaged tree or as otherwise approved by the City. If the permittee does not replace such damaged or displaced landscape features, including frees, the permittee shall pay in-lieu fee to the City for such replacement required by this condition, and such in-lieu fee shall be based on the City's actual, reasonable and documented costs for such landscape replacement.

(h) **Facility Identification.** The permittee shall permanently affix a sign on each surface-mounted and above-ground facility within the City's right-of-way that contains the permittee's (1) name; (2) facility-specific identification information; and (3) telephone number to be used to report damage, required maintenance, graffiti or other similar matters to the permittee about the facility. Such signage must be displayed in a conspicuous manner and maintained and/or replaced as may be necessary.

(i) **Liability.**

(1) **Generally.** Each owner shall be responsible for the work performed and completed operations in connection with the permit and shall be liable for any consequences that result from the installation, construction, excavation or other work and any condition thereof. The permittee shall not be excused from such responsibility and liability based on any permit issuance, inspection, repair, suggestion, approval or acquiescence by any person affiliated with the City.

(2) **Consequential, Indirect or Punitive Damages.** Without limiting any indemnification obligation placed on the permittee or other waivers contained in the Encinitas Municipal Code or this permit, the permittee fully releases, waives and discharges forever any and all claims against the City for consequential and incidental damages that may arise from or in connection with any permit or the permittee's use on or about the City's right-of-way, which includes without limitation any lost profits related to any disruption to the permittee's facilities, any interference with uses or operations conducted by the permittee, from any cause whatsoever, and each party covenants not to sue for such damages the City, the City's departments and each other's agencies, officers, directors and employees, and all persons acting by, through or under them. Notwithstanding the foregoing, the foregoing waiver by the permittee shall not apply to consequential or indirect damages that may arise from the City's sole active negligence or willful misconduct.

(3) **No Personal Liability for City Personnel.** In no event will any City council, commission, board, agency, member, officer, employee or other agent be personally liable to the permittee, its successors or assigns, for any default, breach, other nonperformance or

sum unpaid sum by the City. The provisions in this condition shall survive this permit's revocation, termination or expiration.

(j) **Indemnification.**

(1) **Permittee's Indemnification Obligations.** The permittee, for itself and its successors and assigns, shall indemnify, defend and hold the indemnified City parties harmless from and against any and all claims, incurred in connection with or arising in whole or in part from any act or omission by the permittee or its agents, licensees, customers or invitees in connection with any permit or any regulatory approvals, but except to the extent that that such claim is caused by the City's sole active negligence or willful misconduct. Licensee's obligations under this condition include, without limitation, all reasonable fees, costs and expenses for attorneys, consultants and experts, and the City's actual and reasonable costs to investigate and defend against any claim. The permittee expressly acknowledges and agrees that: (a) the permittee has an immediate and independent obligation to defend any indemnified City parties from any claim that actually or potentially falls within this condition, even when the allegations in the claim are or appear to be groundless, fraudulent or false; and (b) the permittee obligations arise at the time any indemnified City parties tender a claim to the permittee and, to the extent that such claim actually falls within this condition, continue until such claim's final, non-appealable resolution. The permittee obligations under this condition shall survive any permit's revocation, termination or expiration.

(2) **Permittee's Defense of the City.** In the event that any claim is brought against any indemnified City parties in connection with any subject matter for which any indemnified City parties are indemnified by the permittee under any permit, the permittee shall, upon written notice and at the permittee's sole cost and expense, resist and defend against such claim with competent and experienced legal counsel reasonably acceptable to the City. The City shall not unreasonably withhold or delay its consent to legal counsel selected by the permittee; provided, however, that the City may reject any proposed legal counsel that: (a) is not duly licensed to practice law in the State of California by the State Bar of California; (b) has any past or pending disciplinary actions by any United States tribunal or state bar association; or (c) has any actual or potential conflicts of interest with any indemnified City parties who would be represented by such proposed legal counsel. The permittee shall not, without the City's written consent, enter into any compromise or settlement agreement on any indemnified City parties' behalf that: (x) admits any liability, culpability or fault whatsoever on any indemnified City parties' part; or (y) requires any indemnified City party to take or refrain from any action, which includes without limitation any change in the City's policies or any monetary payments. Nothing in these conditions shall be construed to limit or preclude any indemnified City parties or their respective legal counsel from cooperating with the permittee and/or participating in any judicial, administrative, alternative dispute resolution or other litigation or proceeding. The permittee's obligations under this condition shall survive any permit's revocation, termination or expiration.

(k) **Insurance.**

(1) **Types; Amounts.** The permittee shall maintain insurance of the types and amounts described below for the term of this permit or as long as the permittee's facilities remain in the public rights-of-ways subject to the completion of any removal or restoration requirements, whichever is longer. Additionally, the permittee shall require its contractors

to procure and maintain insurance of the types and in the amounts described below for the duration that such contractors and subcontractors perform any work in the public rights-of-way and such insurance must cover both the contractors and their subcontractors unless the subcontractors procure and maintain insurance of the types and in the amounts described below. If any of the required insurance contains a general aggregate limit, such insurance shall apply separately or be no less than two times the specified occurrence limit unless an aggregate limit is specified below.

(A) **Commercial General Liability Insurance.** Insurance Services Office Form CG 00 01 covering Commercial General Liability ("CGL") on an "occurrence" basis, with limits not less than $2,000,000 per occurrence or $5,000,000 in the aggregate. If a general aggregate limit applies, the general aggregate limit shall apply separately to this project/location. CGL insurance must include coverage for the following: Bodily Injury and Property Damage; Personal Injury/Advertising Injury; Premises/Operations Liability; Products/Completed Operations Liability; Aggregate Limits that Apply per Project; Explosion, Collapse and Underground ("UCX") exclusion deleted; Contractual Liability with respect to the permit; Broad Form Property Damage; and Independent Contractors Coverage. The policy shall contain no endorsements or provisions limiting coverage for (i) contractual liability; (ii) cross liability exclusion for claims or suits by one insured against another; (iii) products/completed operations liability; or (iv) contain any other exclusion contrary to the conditions in this permit.

(B) **Business Automobile Liability Insurance.** Insurance Services Office Form Number CA 00 01 covering, Code 1 (any auto), or if permittee has no owned autos, Code 8 (hired) and 9 (non-owned), with a limit no less than $2,000,000 per accident for bodily injury and property damage.

(C) **Workers' Compensation and Employers' Liability Insurance.** The permittee shall certify that it is aware of the provisions of California Labor Code § 3700, which requires every employer to be insured against liability for workers' compensation or to undertake self-insurance in accordance with the provisions of that code, and further certifies that the permittee will comply with such provisions before commencing work under this permit. To the extent the permittee has employees at any time during the term of this permit, at all times during the performance of the work under this permit the permittee shall maintain insurance as required by the State of California, with Statutory Limits, and Employer's Liability Insurance with a limit no less than $1,000,000 per accident for bodily injury or disease.

(D) **Professional Liability (Errors and Omissions) Insurance.** The permittee shall maintain Professional Liability (Errors and Omissions) Insurance appropriate to the permittee's profession, with a limit no less than $2,000,000 per occurrence or claim. This insurance shall be endorsed to include contractual liability applicable to this permit and shall be written on a policy form coverage specifically designed to protect against acts, errors or omissions of the permittee. "Covered Professional Services" as designed in the policy must specifically include work performed under this permit. If approved by the City's Risk Manager, the permittee may satisfy this requirement with evidence that its contractor's or contractors' insurance policies meet the requirements in this condition and include the City as an additional insured.

(E) **Contractors Pollution Liability Insurance.** The permittee shall procure and maintain at its expense Contractors Pollution Liability Insurance including contractual

liability coverage to cover liability and legal expenses arising out of cleanup, removal, storage, or handling of hazardous or toxic chemicals, materials, substances, or any other pollutants by the permittee or any subcontractor resulting from pollution conditions associated with the facility with a limit no less than $2,000,000 each occurrence combined single limit for bodily injury and property damage.

(2) **Claims-Made Policies.** If the permittee maintains any required insurance under a claims-made form, the permittee shall maintain such coverage continuously throughout the permit term and, without lapse, for at least three years after the permit term expires so that any claims that arise after the expiration in connection with events that occurred during the permit term are covered by such claims-made policies.

(3) **Umbrella or Excess Liability Policy.** If an umbrella or excess liability insurance policy is used to satisfy the minimum requirements for Commercial General Liability Insurance or Business Automobile Liability Insurance coverage listed above, the umbrella or excess liability policies shall provide coverage at least as broad as specified for the underlying coverages and covering those insured in the underlying policies. Coverage shall be "pay on behalf," with defense costs payable in addition to policy limits. The permittee shall provide a "follow form" endorsement or schedule of underlying coverage satisfactory to the City indicating that such coverage is subject to the same terms and conditions as the underlying liability policy.

(4) **Additional Insured; Separation of Insureds.** The required commercial general liability and business automobile liability insurance shall name City, its elected officials, officers, employees, agents, and volunteers as additional insureds with respect to work performed by or on behalf of the permittee or its contractors, including materials, parts, or equipment furnished in connection therewith. The required insurance shall contain standard separation of insureds provisions and shall contain no special limitations on the scope of its protection to the City, its elected officials, officers, employees, agents, and volunteers.

(5) **Primary Insurance; Waiver of Subrogation.** The required insurance shall be primary with respect to any insurance or self-insurance programs covering the City, its elected officials, officers, employees, agents, and volunteers. All policies for the required commercial general liability, business automobile liability and workers' compensation insurance shall provide that the insurance company waives all right of recovery by way of subrogation against the City in connection with any damage or harm covered by such policies.

(6) **Certificates.** Before the City issues any permit, the permittee shall make available to the Director insurance certificates, in a form satisfactory to the Director, that evidence all the coverage required above if a current and valid insurance certificate is not already on file with the Development Services Department. In addition, the permittee shall promptly make available in the presence of the permittee's representative complete copies of all insurance policies upon a written request by the Director.

(7) **Term; Cancellation Notice.** The permittee shall maintain the required insurance throughout the permit term and shall replace any certificate, policy, or endorsement which will expire prior to that date. The permittee shall ensure any contractors who perform work for the permittee in the public rights-of-way also maintain the required insurance. The permittee shall provide the City 30 days prior written notice of

cancellation except for non-payment of premium for which a 10-day notice will be provided for all applicable policies. The permittee shall promptly take action to prevent cancellation or suspension, reinstate cancelled coverage or obtain coverage from a different qualified insurer.

(8) **Insurer Rating.** Unless approved in writing by the City, all required insurance shall be placed with insurers authorized to do business in the State of California and with a current A.M. Best rating of at least A-:VIII.

(9) **Self-Insurance.** The City may accept self-insurance only when the permittee provides the Director with a bond or other surety in a form acceptable to the Director and at least as broad as the requirements specified above.

(10) **Alternative Insurance Policies.** The City recognizes that a permittee may carry one or more insurance policies that may provide equivalent or superior coverage as compared to the policies described above. Notwithstanding anything in these conditions to the contrary, the City may accept alternative insurance policies carried by the permittee so long as the policy(ies) are in a form acceptable to the Director and at least as broad as the requirements specified above as determined by the Director.

(l) **Hazardous Materials.**

(1) **Compliance with Environmental Laws.** The permittee covenants and agrees that neither the permittee nor its agents or invitees will cause or permit any hazardous material to be transported to or from or be brought upon, kept, used, stored, generated, disposed of or released in, on, under or about the public rights-of-way or any other City property, in whole or part, or transported to or from any City property in violation of any law in relation or connection to industrial hygiene, environmental conditions or hazardous materials ("environmental laws"), except that the permittee may use small quantities of hazardous materials as needed for routine operation, cleaning and maintenance of the permittee's facilities that are customarily used for routine operation, cleaning and maintenance of such facilities and so long as all such hazardous materials are contained, handled and used in compliance with all environmental laws. As used in these conditions, "hazardous material" means any material that, due to its quantity, concentration or physical or chemical characteristics, is at any time now or hereafter deemed by any local, regional, state or federal body with jurisdiction and responsibility for issuing regulatory approvals in accordance with applicable laws to pose a present or potential hazard to human health, welfare or safety, or to the environment. The term "hazardous material" as used in these conditions will be broadly construed, and includes, without limitation, the following: (i) any material or substance defined as a "hazardous substance", or "pollutant"' or "contaminant" in the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (codified as 42 U.S.C. §§ 9601 *et seq.*) or California Health & Safety Code § 25316; (ii) any "hazardous waste" listed California Health & Safety Code § 25140; or (iii) any petroleum, including crude oil or any fraction thereof, natural gas or natural gas liquids.

(2) **Hazardous Materials Release Notice.** The permittee shall promptly notify the City if and when the permittee learns or has reason to believe any actual or imminent spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing of hazardous materials (each such event, a "release") has occurred in, on, under or about the public rights-of-way or other City property caused

by the permittee, its agents or its invitees, however, no violation may be declared by the City pursuant to this condition unless the permittee has actively concealed the hazardous material release from the City after the permittee learns or has reason to believe that the hazardous material release has occurred. The permittee will not be deemed to have assumed liability for any such release by giving such notice, except that the permittee may be liable to the extent that such release was caused by or arose in connection with the permittee's or its agent's or invitee's acts, omissions, or negligence.

(3) **Permittee's Hazardous Material Indemnification Obligations.** If the permittee breaches any obligations contained in this condition, or if any act, omission or negligence by the permittee or its agents or invitees results in any contamination on or about the public rights-of-way or other City property, or in a hazardous material release from, on, about, in or beneath the public rights-of-way or any other City property, in whole or in part, or any environmental law violation, then the permittee, for itself and its successors and assigns, shall indemnify, defend and hold the City and any indemnified City parties harmless, from and against any and all claims (including damages for decrease in value of the public rights-of-way or other City property, the loss or restriction of the use of usable space in the public rights-of-way or other City property and sums paid in settlement of claims, reasonable attorneys' fees, consultants' fees, and experts' fees and related costs) that arises during or after the term of any permit related to or in connection with such release or violation; provided, however, the permittee shall not be liable for any claims to the extent such release or violation was caused by the City's sole active negligence or willful misconduct. The permittee's indemnification obligation includes all costs incurred in connection with any activities required to investigate and remediate any hazardous material brought or released onto the pubic rights-of-way or other City property by the permittee or its agents or invitees and to restore the public rights-of-way or other City property to its condition prior to such introduction or release, or to correct any environmental law violation. The permittee specifically acknowledges and agrees that it has an immediate and independent obligation to defend the City and the other indemnified City parties from any claim that actually or potentially falls within this indemnity provision even if the allegations supporting the Claim are or may be groundless, fraudulent or false, and that said obligation arises at the time such claim is tendered to the permittee by the indemnified City party and, to the extent the claim falls within this provision, continues until the claim is finally resolved. Without limiting the foregoing, if the permittee or any of its agents or invitees causes any hazardous material release on, about, in or beneath the public rights-of-way or other City property, then in any such event the permittee shall, promptly, at no expense to any indemnified City party, take any and all necessary actions to return the public rights-of-way and/or other City property, as applicable, to substantially the same condition existing prior to such hazardous material release on the public rights-of-way or other City property or otherwise abate the release in accordance with all environmental laws, except to the extent such release was caused directly by the City's gross negligence or willful misconduct. The permittee shall afford the City a full opportunity to participate in any discussions with regulatory agencies regarding any settlement agreement, cleanup or abatement agreement, consent decree or other compromise or proceeding that involves hazardous material release covered under this condition. Notwithstanding the foregoing or any other provision in the Encinitas Municipal Code or this permit, the permittee shall not be liable or responsible for environmental or industrial hygiene conditions that existed before the issuance of the applicable permit, or that otherwise did not result from the activities of the permittee.

(m) **Taxable Possessory Interest.** The permittee agrees to pay when due (and prior to delinquency) any and all taxes, assessments, charges, excises and exactions whatsoever, including without limitation any possessory interest taxes, that arise from or in connection with the permittee's use within the public rights-of-way or the permittee's facilities that may be imposed on the permittee under applicable laws. The permittee shall not allow or suffer any lien for any taxes, assessments, charges, excises or exactions whatsoever to be imposed on the public rights-of-way or the permittee's facilities. In the event that the City receives any tax or assessment notices on or in connection with the public rights-of-way or the permittee's facilities, the City shall promptly (but in no event later than 30 calendar days after receipt) forward the same, together with reasonably sufficient written documentation that details any increases in the taxable or assessable amount directly attributable to the permittee's facilities. The permittee understands and acknowledges that any permit may create a possessory interest subject to taxation and that the permittee will be required to pay any such possessory interest taxes. The permittee further understands and acknowledges that any sublicense or assignment under any permit and any options, extensions or renewals in connection with any permit may constitute a change in ownership for taxation purposes and therefore result in a revaluation for any possessory interest created under the permit.

(n) **Records.** The permittee shall maintain throughout the term of any permit, and for at least four years after any permit expires or terminates, the following records in an electronic format: (1) identification information and physical location including but not limited to a physical address and GPS coordinates for all facilities within the City's territorial and/or jurisdictional boundaries; (2) a ledger or other similar document that contains the amount, payment date and reason for all sums paid to the City in connection with this permit and the facilities covered by this permit; (3) true and correct copies of all as-built plans, maps and regulatory approvals in connection with the facilities; and (4) proof of insurance and other related documents required to be carried and maintained under this permit; and (5) all correspondence with the City in connection with any matter related to any permit. To determine whether the permittee has fully and accurately paid all sums payable to the City in connection with this permit and the facilities covered by this permit, if any, and to determine whether the permittee has complied with its other obligations, the City, or its designee, will have the right (but not the obligation) to inspect and audit the permittee's records pertaining to any permit during regular business hours on 10 days' notice to the permittee and/or the permittee shall provide the City, or its designee, electronic copies of documentation reasonably required by the City to confirm the permittee's compliance hereunder.

(o) **Rearrangement and Relocation.**

(1) **Rearrangement and Relocation for City Work.** The permittee acknowledges that the City for a valid governmental purpose, in its sole discretion and at any time, may: (i) change any street grade, width or location; (ii) add, remove or otherwise change any improvements owned by the City or any other public agency located in, on, under or along any public rights-of-way, which includes without limitation any sewers, storm drains, conduits, pipes, vaults, boxes, cabinets, poles and utility systems for gas, water, electric, communications or telecommunications; and/or (iii) perform any other work deemed necessary, useful or desirable by the City (collectively, "City work"). In the event that the Director reasonably determines that any City work will require the facilities to be rearranged and/or relocated the permittee shall, at its sole cost and expense, do or cause to be done all things necessary to accomplish such rearrangement and/or relocation. If the permittee fails or refuses to either permanently or temporarily rearrange and/or relocate the facilities within a reasonable time after the Director's notice, the City

may (but will not be obligated to) cause the rearrangement or relocation to be performed at the permittee's sole cost and expense. The City may exercise its rights to rearrange or relocate the facilities without prior notice to the permittee when the Director determines that the City work is immediately necessary to protect public health or safety. The permittee shall reimburse the City for all actual, reasonable and documented costs and expenses in connection with such work within 30 days after a written demand for reimbursement and reasonable documentation to support such costs. In addition, the permittee shall indemnify, defend and hold any and all indemnified City parties harmless from and against any claims in connection with rearranging or relocating the facilities, or turning on or off any water, oil, gas, electricity or other utility service in connection with the facilities. Within 90 days after any facilities have been rearranged or relocated (or such other time as may be specified by the Director in writing), the permittee shall file as-built plans and maps with the Director in the same manner and subject to the same requirements as provided in condition (f)(5).

(2) **Rearrangement and Relocation for Emergencies.** In the event of an emergency, or where the permittee's facilities create or are contributing to an imminent danger to health, safety or property, the City may remove, relay or relocate any or all parts of those facilities without prior notice; however, the City shall make reasonable efforts to provide prior notice. Notwithstanding the foregoing, if the City has not provided notice in advance of taking such action, the City shall provide such notice within 2 days after taking such action.

(3) **Rearrangement and Relocation to Accommodate Permittee.** If the public rights-of-way to be used by the permittee have preexisting installations placed in the said public rights-of-way, the permittee shall assume the responsibility to verify the location of the preexisting installations and notify, consistent with applicable laws, the City and any third-party owner of such preexisting installations. The cost of any work required of such third-party owner or the City to provide adequate space or required clearance to accommodate the permittee's installation shall, consistent with applicable laws, be borne solely by the permittee. Except as required by applicable laws, the City is under no obligation to move its existing installations out of the way to accommodate or make room for the permittee's facilities.

(4) **Rearrangement and Relocation to Accommodate Third Parties.** The permittee shall reasonably cooperate with and promptly respond to requests to rearrange or relocate the facilities to accommodate third parties authorized to use the public rights-of-way ("third-party accommodations") within 30 days of such request. All reasonable costs to perform any third-party accommodations shall be borne by the person or entity to be accommodated; provided, however, that the permittee shall be solely responsible to collect any costs incurred by the permittee from such third party and the City shall have no liability to the permittee for any such costs. Prior to any third-party accommodations performed by the permittee, the permittee shall be permitted to require a written agreement signed by the person or entity to be accommodated to indemnify, defend and hold the permittee and its agents harmless from and against any and all claims that arise in connection with the proposed third-party accommodations, except to the extent any claims are directly caused by the permittee's or its agent's negligence or willful misconduct. Nothing in this permit shall be construed to require the permittee to perform any third-party accommodations that would materially reduce, impair or otherwise diminish the permittee's facilities or the permittee operations on the encroachment area. Within 90 days after any third-party accommodations, the permittee shall file as-built

plans and maps with the Director in the same manner and subject to the same requirements as provided in condition (f)(5).

(5) **No Right to Relocate City Property.** Nothing in this permit will be construed to require the City or authorize the permittee to change any street grade, width or location, or add, remove or otherwise change any improvements owned by the City or any other public agency located in, on, under or along any public rights-of-way, which includes without limitation any sewers, storm drains, conduits, pipes, vaults, boxes, cabinets, poles and utility systems for gas, water, electric, communications or telecommunications, for the permittee's or any third party's convenience or necessity.

(p) **Removal; Restoration.** No later than 60 days after a permit expires or terminates, as the case may be, the permittee shall (1) peaceably remove its facilities from the public rights-of-way affected by the expiration or termination; (2) restore any such public rights-of-way and other City property affected by the removal to the condition that existed immediately before the permittee installed its facilities, reasonable wear and tear and loss by casualty or other causes beyond the permittee's control excepted; and (3) surrender such public rights-of-way to the City free and clear from any debris, hazards, liens and encumbrances caused by the permittee. If the permittee fails to timely perform its removal and restoration obligations under this permit, then: (i) the permittee shall remain responsible for all its obligations under same and liable for all claims that may arise in connection with the facilities through and until such facilities are completely removed and the affected areas are completely restored; (ii) the City shall have the right (but not the obligation) to perform such obligations; (iii) the City shall have the right to store, sell or destroy any facilities, improvements, personal property or other things installed by the permittee in connection with the applicable permit; and (iv) the permittee shall reimburse the City for all actual, reasonable and documented costs incurred by the City in connection with such removal and restoration work within 30 days after a written demand for reimbursement and reasonable documentation to support such costs. Within 90 days after any facilities have been removed, upon the City's request, the permittee shall file as-built plans and maps with the Director in the same manner and subject to the same requirements as provided in condition (f)(5). The obligations under this condition shall survive any permit's expiration or termination.

(q) **Abandonment.** If any portions of the facilities covered under any permit are no longer used by the permittee, or are abandoned for a period of at least 12 months, the permittee shall notify City and shall either promptly vacate and remove the facilities at its own expense in accordance with the Encinitas Municipal Code and this permit or, at the discretion of the Director, may abandon some or all of the facilities in place. The City may require the permittee to remove at its expense, or at the discretion of the Director, abandon in place, any portion of the facilities that the permittee has not used for a period of at least 12 months. Notwithstanding the foregoing, this condition shall not apply to facilities installed to meet future demand or needs for capacity and identified as such to the City on the most recent annual capital improvement forecast report. If the permittee fails to remove the unused or abandoned facilities and restore the public rights-of-way as provided in condition (p) within 120 days of receiving notice from the City and the Director has not approved abandonment in place, the City may, but shall not be obligated to, remove the facilities at the sole expense of the permittee, and the permittee shall promptly reimburse the City for any and all actual, reasonable and documented expenses, including but not limited to administrative, legal and consultant costs, within 30 days after receiving an invoice from the City.

(r) **Surety.** Before the City issues any permit required to commence construction in connection with any surface mounted facilities, the permittee shall post a performance bond from a surety and in a form acceptable to the Director in an amount reasonably necessary to cover the cost to remove the surface mounted facilities and improvements and restore all public rights-of-way and affected areas based on a written estimate from a qualified contractor with experience in infrastructure removal. The written estimate must include the cost to remove all surface mounted facilities and other improvements constructed or installed in connection with the facilities, plus the cost to completely restore any public rights-of-way and areas affected by the removal work to a standard compliant with applicable laws. In establishing or adjusting the bond amount required under this condition, the Director shall take into consideration any information provided by the permittee regarding the cost to remove the above ground facilities to a standard compliant with applicable laws. The Director, in the Director's sole discretion, may authorize the permittee to post a single performance bond to cover multiple permits subject to this Policy if the amount for additional permits is increased in accordance with the terms of this condition. The performance bond required by this condition shall expressly survive the duration of the permit term to the extent required to effectuate a complete removal of the surface mounted facilities as required by this Policy.

(s) **Annual Capital Improvement Forecasts.** Upon at least 60 days' prior written notice from the City, but in no event more than once per year, the permittee shall submit a projected capital improvement forecast for its operations within the City's territorial and jurisdictional boundaries. The capital improvement forecast must include anticipated schedules for all new facilities and repairs, replacements and modifications to existing facilities to the extent feasible and with sufficient detail to allow the City to coordinate its own public improvements and other capital improvement projects by third parties. The permittee shall also participate in any periodic capital improvement meetings held between the City and other utility or communications providers that deploy facilities in the public rights-of-way.

(t) **Cooperation with Other Utilities.** Upon written notice by the City, the permittee agrees to reasonably cooperate in the planning, locating and constructing of its facilities in utility joint trenches or common duct banks with other similar utilities providers and/or City projects, and to participate in cost-sharing for the joint trench and ducts, when other entities are proposing excavation in the same public rights-of-way or when an underground project is being planned by the City. The foregoing shall not apply when the permittee's excavation work is due to an emergency or other maintenance or repair event that requires urgent action, or when excused by the Director for good cause.

(u) **Potholing.** Within a time specified by the Director (but not less than 21 business days after the permittee's receipt of a written request from the City), the permittee shall, at its sole cost and expense, expose its subsurface facilities by potholing (digging a test hole) to a depth of one foot (1') below the bottom of such facility. If the permittee fails to perform the potholing, the City may (but shall not have the obligation to) proceed on the permittee's account and the permittee shall promptly reimburse the City for the actual, reasonable and documented cost of same, including without limitation administrative and actual legal costs, and the City is hereby held harmless and indemnified by the permittee for any loss and/or damages resulting from the City's performance of the required work, except to the extent that that such loss and/or damages are caused by the City's sole active negligence or willful misconduct. The provisions of this condition shall be applicable only to potholes required in connection with a public works project by the City. All work performed by the permittee pursuant to this condition shall be subject to the standard permit and restoration requirements applicable to

potholing. The Director shall use best efforts to expedite review and approval for any permit applications for potholing under this condition. Provided that the permittee submits an application within 21 business days after the City's written request for potholing, the timeframes in this condition shall be automatically extended by the number of days between the permittee's submittal of an application and the City's approval of the application. Notwithstanding anything in this condition to the contrary, if the City's project requires more than 10 potholes in a 30-day period, the Director shall first confer with the permittee and establish a reasonable timeframe for performance of the work, which may include, without limitation an agreement in advance for the City to perform the work at the permittee's cost.

(v) **Truthful and Accurate Statements.** The permittee acknowledges that the City's approval relies on the written and/or oral statements by the permittee and/or persons authorized to act on the permittee's behalf. In any matter before the City in connection with the permit or the facilities approved under the permit, neither the permittee nor any person authorized to act on the permittee's behalf shall, in any written or oral statement, intentionally provide material factual information that is incorrect or misleading or intentionally omit any material information necessary to prevent any material factual statement from being incorrect or misleading.

(w) **Successors and Assigns.** The conditions, covenants, promises and terms contained in this permit will bind and inure to the benefit of the City and the permittee and their respective successors and assigns.

(x) **Severability of Conditions.** If any provision in these conditions or such provision's application to any person, entity or circumstances is or held by any court with competent jurisdiction to be invalid or unenforceable: (1) such provision or its application to such person, entity or circumstance will be deemed severed from this permit; (2) all other provisions in this use permit or their application to any person, entity or circumstance will not be affected; and (3) all other provisions in this permit or their application to any person, entity or circumstance will be valid and enforceable to the fullest extent permitted by law.