

UTILITY RELOCATION AGREEMENT

STATE OF TEXAS           §  
                                  §           KNOW ALL PERSONS BY THESE PRESENTS:  
COUNTY OF TRAVIS       §

THIS AGREEMENT is made and entered into by and between the City of Austin, Texas, hereinafter referred to as the "City", and AboveNet Communications, Inc., hereinafter referred to as the "Company".

WHEREAS, the Texas Department of Transportation ("TxDOT") is presently planning to construct improvements to State Highway 71 at Riverside Drive in the City of Austin, hereinafter referred to as the "Project"; and

WHEREAS, the City is responsible for the relocation of its 24-inch waterline on the Project (the "Waterline"); and

WHEREAS, the relocation of the Waterline will require the relocation of a section of the existing fiber optic line of the Company, which is also legally located within the TxDOT State Highway 71 right-of-way, in order to accommodate the construction and maintenance of the Waterline; and

WHEREAS, the relocation or adjustment of the existing fiber optic line, hereinafter referred to as the "Work", must occur in advance of road construction for the Project and the relocation of the Waterline; and

WHEREAS, the costs of the relocation of the fiber optic line in order to accommodate the City's Waterline construction and maintenance is the City's financial responsibility; and

WHEREAS, the City has requested the Company to construct or have constructed the Work;

NOW, THEREFORE, the City and the Company agree as follows:

1. The Company will construct or have constructed the Work for and on behalf of the City at the City's sole expense. The Company will construct only those items for the City as requested and required by the City. The Work and the cost estimate for such Work are described on Exhibit "A", which is attached hereto and made a part hereof. The estimated cost of the Work, including contingencies, preliminary engineering, construction engineering and construction, is the total contract amount of ONE HUNDRED and THIRTEEN THOUSAND, EIGHT HUNDRED and SEVENTY TWO AND 27/100 DOLLARS (\$113,872.27).

2. The Company shall perform the Work and submit detailed invoices for the actual cost of the Work to the City. The City will reimburse the Company, within forty-five (45) days of receipt

of an acceptable invoice, for 100% of the cost of the Work, now estimated to be the sum of **\$94,893.56**. Any cost above the amount of **\$113,872.27** must be separately approved by the City's City Council. The City agrees to reimburse the eligible items of any such approved additional cost within forty-five (45) days of presentment of an invoice by the Company or within fifteen (15) days of approval of such excess amount by the City Council, whichever occurs last.

3. It is contemplated that the Company shall act as the Project Manager for the relocation of the fiber optic lines. The Company shall contract with a qualified construction contractor or use the workforce of the Company to perform the construction activities necessary to relocate the fiber optic lines. The Company shall coordinate and communicate with the City to facilitate the completion of the Work.

4. The Company also agrees to cooperate with and coordinate with the City and the Texas Department of Transportation in all phases of the Work to be performed under this Agreement, including the scheduling of the Work. The Company shall procure all necessary licenses and permits and shall conform to all laws, regulations, and ordinances applicable to the performance of this Agreement.

5. The Company agrees to and shall assume full responsibility in connection with the Work to be performed by the Company under this Agreement. The Company will have the City named as an additional insured on any insurance policy provided by the Company's contractor for the Work. The Company and the City agree that, to the extent allowed by Texas law, they are each responsible for their own proportionate shares of legal liability for damage, personal injury or death arising out of or connected to the Work as determined by a court of competent jurisdiction.

6. This Agreement shall be construed under and in accordance with the laws of the State of Texas and all obligations of the parties hereunder are performable in Travis City, Texas.

7. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective legal representatives, successors, and assigns.

8. In the event of one or more of the provisions in this Agreement shall for any reason be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provisions hereof, and this Agreement shall be construed as if such invalid, illegal, or unenforceable provision had never been contained herein.

9. This is the entire Agreement between the City and the Company and supersedes all prior negotiations, representations, or agreements, either oral or written, and may be amended only by written instrument signed by an authorized representative of both

the City and the Company.

EFFECTIVE as of the later date set forth below.

CITY OF AUSTIN, TEXAS

By: \_\_\_\_\_  
Assistant City Manager

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

ABOVENET COMMUNICATIONS, INC.

By: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_  
Authorized Representative

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