

RIGHT OF WAY OCCUPANCY AGREEMENT

BETWEEN

THE COUNTY OF MORRIS

AND

(Applicant)

Dated:

RIGHT OF WAY OCCUPANCY AGREEMENT

This **AGREEMENT** (“Agreement”), made as of the ___ of _____, _____ (the “Effective Date”) by and between The County of Morris, having mailing address of Court Street, P.O. Box 900, Morristown, State of New Jersey, 07963-0900 (hereinafter designated as the “County”); and _____, with a principal place of business located at _____ (hereinafter designated as “Developer”). County and Developer from time to time shall each be referred to individually as a “Party” and collectively as the “Parties.”

WITNESSETH:

WHEREAS, Developer wishes to attach and/or install antenna, small cell, or other device for wireless communication and/or a pole for the purposes of supporting an antenna in a Right of Way; and

WHEREAS, the County is willing to consent to Developer installing and maintaining an antenna(s) and/or antenna pole(s) in a Right of Way to the extent the County is lawfully permitted to do so.

NOW, THEREFORE, in consideration of the mutual covenants, terms and conditions herein contained, the parties do hereby mutually covenant and agree as follows:

ARTICLE I DEFINITIONS

As used herein, the following terms, when capitalized, shall have the following meanings:

(a) “Antenna” means an antenna, small cell, or other device for wireless communication and any associated wires, conduits, cabinets, fixtures, facilities, or other equipment.

(b) “Antenna Pole” means a pole established for the purposes of supporting an Antenna, and any associated wires, conduits, cabinets, fixtures, facilities, or other equipment.

(c) “Applicable Laws” means all present or future requirements of common law, and all present or future federal, state, and local, provincial and foreign, civil and criminal laws, regulations, rules, ordinances, codes, decrees, judgments, directives, or judicial or administrative orders issued, adopted, or promulgated by any Governmental Authority (defined below), which governs, regulates, or affects any act, right, agreement, or obligation set forth herein or arising directly or indirectly herefrom, including but not limited to, the Telecommunications Act of 1996 (47 U.S.C. §224, et seq.), the National Electrical Safety Code, the regulations promulgated by the Federal Communications Commission (hereinafter “FCC”), and the Morris County Road Opening Permit Requirements.

(d) “Development” means the construction, reconstruction, conversion, structural alteration, relocation, enlargement, maintenance, attachment, or installation of any antenna, antenna pole, or other structure, or of any excavation or landfill, and any use or change in the use

of any antenna, antenna pole, or other structure, or Right of Way or extension of use of Right of Way.

(e) “Governmental Authority” means any applicable federal, state, local, provincial, foreign, or other governmental, legislature, regulatory or administrative agency, commission, official, department, board, or other governmental subdivision, court, tribunal, arbitral body, or other governmental body.

(f) “Right of Way” means the areas devoted to passing over, on, through or under lands as part of a way for such purpose, that are under the jurisdiction of the County. This term shall not include municipal, state, or federal rights of way or any property owned by any person, agency or entity other than the County, except as provided by applicable Laws or pursuant to an agreement between the County and any such person or entity.

ARTICLE II INSTALLATION OR ATTACHMENT OF POLES

(a) Any and all rights expressly granted to Developer under this Agreement, which shall be exercised at Developer’s sole cost and expense, shall be subject to the prior and continuing right of the County under Applicable Laws to use any and all parts of the Right of Way exclusively or concurrently with any other person or entity and shall be further subject to all deeds, easements, dedications, conditions, covenants, restrictions, encumbrances, and claims of title of record which may affect the Right of Way. Nothing in this Agreement shall be deemed to grant, convey, create, or vest in Developer a real property interest in land, including any fee, leasehold interest, or easement. Any work performed pursuant to the rights granted under this Agreement shall be subject to the reasonable prior review and approval of the County.

(b) Subject to the conditions and terms set forth in this Agreement, the County hereby authorizes, consents and permits Developer to enter upon the Right of Way and to **[add description of development: attach, install, maintain, and/or remove the Antenna(s) and/or Antenna Pole(s)]** within the Right of Way at locations illustrated in the enclosed project drawings attached hereto as *Exhibit A*.

(c) Developer, in the performance and exercise of its rights and obligations under this Agreement, shall not interfere in any manner with the existence and operation of any and all public and private rights of way, sanitary sewers, water mains, storm drains, gas mains, poles, aerial and underground electrical and telephone wires, electroliers, cable television, and other telecommunications, utility, or municipal property, without the express written consents or approvals of the governing body of the municipality with jurisdiction over the affected property, property owner(s) of the affected or abutting property, and/or pole owner as required by Applicable Law or this Agreement. The County agrees to require the inclusion of the same or a similar prohibition on interference as that stated above in all agreements and franchises the County may enter into after the Effective Date with other information or communications providers and carriers.

(d) In consideration of the right to being granted herein by the County, the County shall receive the benefit of enhanced telecommunications services.

ARTICLE III TERM

This Agreement shall be for an initial term of fifteen (15) years (“Initial Term”) to commence on the Effective Date. The County grants Developer the right to renew this Agreement for up to three (3) additional terms (each a “Renewal Term”) of five years each. The right to renew shall be exercised by written notice from Developer to the County one year prior to the end of the current term. Upon receipt of Developer’s notice, the County may cancel or modify such permission and authority affected at the end of the currently effective term. Notwithstanding the foregoing, either party may cancel or modify such permission and authority affected at the end of the currently effective term. Upon expiration of such consent and the end of the Initial or Renewal Term, or at such earlier date that Developer ceases to maintain its facilities, Developer shall remove the facilities at its costs and expense. Nothing herein shall be deemed to be a waiver of Developer’s rights under law.

ARTICLE IV OPERATIONAL RULES

(a) Developer will be solely responsible for obtaining any and all real property easements, rights-of-way, permissions, and consents, and any other required consents from third parties, including but not limited to the necessary express written consents of abutting property owners and/or municipalities having jurisdiction, as required by law, as are required in order to install, use, operate, and maintain the Antenna and/or Antenna Pole attached to or installed on the property of third parties and/or to perform any right or act under this Agreement. All costs associated with obtaining such easements, rights-of-way, permissions, and consents, including but not limited to legal, engineering, and administrative costs, will be borne solely by Developer.

(b) Prior to commencement of the Development set forth herein, Developer will obtain at its sole expense any required agreements, permits, licenses, certificates, and/or consents from Governmental Authorities, including but not limited to obtaining any and all zoning, planning, or other land use approvals required by the municipality in which the proposed antenna is to be located, all necessary approvals required by the Morris County Planning Board, if any, and a County Right of Way Occupancy Permit. Developer shall keep and maintain any and all required permits, licenses, certificates, or consents from Governmental Authorities as are necessary in order to continue to use and maintain the Antenna and/or Antenna Pole attached to or installed on the property of third parties and to properly carry-out and fulfill any obligation(s) under this Agreement, and shall comply with all Applicable Laws in performing any act of fulfilling any obligation arising from, directly or indirectly, this Agreement. All costs associated with obtaining such required agreements, permits, licenses, certificates, and/or consents from Governmental Authorities, including but not limited to legal, engineering, and administrative costs, will be borne solely by Developer.

(c) Without limiting the generality of the foregoing or any other obligation set forth herein, Developer shall comply with all applicable Federal, State, County, and Municipal laws,

statutes, rules, and regulations, including but not limited to (i) the County's Rules, Regulations Governing Road Opening, Right of Way Occupancy, and Storage Permits, (ii) the County's Land Development Standards, and (iii) requirements of the National Electrical Safety Code for proper bonding, grounding, clearances, guying, anchoring, and installing of its Antenna or Antenna Pole.

(d) Prior to commencement of any Development, Developer shall submit all construction permits required by law to the County Engineer.

(e) Developer warrants that its Antenna and/or Antenna Pole will be maintained in good operating condition as defined by any applicable industry standards, and in accordance with any and all Applicable Laws. Developer agrees that all required maintenance shall be performed by Developer personnel or by contractors acceptable to Developer. Except in the event of an emergency, maintenance work will be performed within four (4) business days following Developer's notification requesting such maintenance.

(f) The County reserves the right at all times to reasonably specify the type and methods of design, construction, and maintenance of the Antenna and/or Antenna Pole.

(g) The Developer agrees to pay to the County the reasonable costs incurred by the County for administrative, engineering, and or legal review, analysis and preparation of documents related to the Developer's application for a Right of Way Occupancy Permit.

ARTICLE V TERMINATION

(a) Notwithstanding anything to the contrary set forth in this Agreement, Developer or the County may cancel this Agreement in whole or in part as applicable to any location at which there is an attachment to the property of third parties upon sixty (60) days prior written notice, or as otherwise set forth herein, if: (a) Developer is unable to obtain and/or maintain any permits, licenses, certificates, and/or consents that may be required by any Governmental Authority and which are necessary in order to attach, use, and maintain the relevant Antenna and/or Antenna Pole, and/or (b) the location is or becomes unacceptable or unnecessary in Developer's sole discretion due to Developer's design or engineering specifications for its Antenna and/or Antenna Pole or due to any engineering specifications or other requirements imposed by the County under this Agreement.

(b) Notwithstanding anything to the contrary set forth in this Agreement, the County may terminate this Agreement immediately, following any applicable notice and cure provisions expressly set forth herein, if Developer fails to comply with the provisions of this Agreement. Any termination of one Agreement shall not affect the validity or existence of any other Agreements.

(c) Within thirty (30) days termination or expiration of this Agreement, Developer will cause to be removed by Developer personnel, or Developer approved contractors, its antennas, antenna poles, equipment, attachments, facilities, and other improvements and Developer shall restore the Right of Way to its original condition.

(d) Upon Developer's termination of this Agreement as provided in this Article or elsewhere in this Agreement, all Developer's obligations to the County shall terminate except for Developer's obligations as set forth in Articles 5, 8, and 12 hereunder.

ARTICLE VI FORCE MAJEURE

Neither Party shall be liable for any delay or failure in performance under this Agreement to the extent that such failure or delay is caused by acts of God, acts of civil or military authority, government regulations, embargoes, epidemics, war, terrorist acts, riots, insurrections, fires, explosions, earthquakes, nuclear accidents, floods, strikes, power blackouts, volcanic action, or other environmental disturbances, unusually severe weather conditions, inability to secure products or services of other persons or transportation facilities, or acts or omissions of transportation or common carriers, and other matters beyond the control of the Party. If any force majeure condition occurs, the Party delayed or unable to perform shall give immediate notice to the other Party and shall take reasonable steps to correct and mitigate the force majeure condition and its effects. During the pendency of the force majeure, the duties of the Parties under this Agreement which are affected by the Force Majeure condition shall be suspended and shall resume without liability thereafter.

ARTICLE VII ASSIGNMENT

Developer will not assign or transfer this Agreement without the prior written consent of the County, which consent will not be unreasonably withheld except that Developer may assign this Agreement to any party controlling, controlled by, or under common control with Developer without the County's consent, or to any party which acquires all or substantially all of the assets of Developer in the market as defined by the Federal Communications Commission in which the County is located ("Permitted Transfer"), provided, that within a reasonable time after such assignment, Developer shall furnish the County with written notice of such assignment certifying that such assignee assumes all of the Developer's obligations hereunder as set forth herein. Developer shall remain principally responsible for the performance of any obligations set forth herein, notwithstanding any assignment hereunder, other than a Permitted Transfer.

ARTICLE VIII INDEMNIFICATION AND INSURANCE

(a) Definitions

For purposes of this Article VIII only, the following definitions shall apply:

"Developer" shall mean Developer, its successors, assigns, subcontractors, agents, servants, officers, employees, designees, volunteers, guests and invitees (collectively "Developer"). For purposes of this Article VIII, "subcontractors" is expressly not limited to those persons or entities that may have entered into a written agreement with Developer, but includes any person or entity undertaking any work or performance for the benefit of Developer in furtherance of the purposes of this Agreement.

The “County” shall mean the County of Morris, its elected officials, officers, Freeholders, employees, professionals, volunteers, servants and agents, as well as any of its agencies, departments, divisions, bureaus, or offices (collectively, the “County”).

“LOSS” shall include, but is not limited to claims, liabilities, duties, obligations, debts, demands, allegations, causes, causes of action, counterclaims, cross-claims, liens, suits, dues, sums, and sums of money, bills, accounts, reckonings, bonds, specialties, rights of indemnity, rights of subrogation, injunctive relief, exonerations, covenants, contracts, controversies, agreements, promises, acts, omissions, trespasses, variances, damages, judgments, compensations, contributions, set-offs, reimbursements, restitution, extents, costs, expenses, penalties, damages, settlement costs, charges, professional fees, exposures, executions, and attorneys’ fees, of any nature whatsoever, whether in law, in equity, in admiralty, or otherwise, whether accrued or unaccrued, known or unknown.

(b) Indemnity

Developer shall defend, indemnify and hold the County harmless from and against any LOSS arising out of, relating to, or resulting from Developer’s performance pursuant to this Agreement, including, without limitation, any LOSS involving a request for relief of any kind, whether at law or in equity, civil or criminal, whether sounding in tort, contract, equity, nuisance, trespass, negligence or any other cause of action or relief of any sort, including claims, allegations or demands for punitive damages, declaratory judgment, injunctive relief, bodily injury, medical monitoring, mental injury or anguish, emotional distress, property damage, loss of use of property, or diminution of value of property, whether accrued or unaccrued, known or unknown.

Developer hereby agrees to assume the entire responsibility and liability for any and all LOSS caused by or resulting from or arising out of any alleged or actual act or omission, neglect or negligence, or agreement on the part of the Developer which in any way touches or concerns this Agreement, whether covered by the insurance specified elsewhere herein or not. It is hereby specifically stated to be the intention of Developer and the County to have this provision and these terms interpreted in the broadest legally permissible fashion in favor of the County, and in such way as to provide the County with the greatest possible protection. It is anticipated by Developer and the County that this protection will be provided by the purchasing of appropriate insurance, but the non-availability of insurance shall not relieve Developer of the obligations set forth herein.

Without any limitation to the obligations set forth herein, Developer further agrees that Developer’s defense, indemnification and hold harmless obligations to the County (1) shall extend to LOSS involving any alleged or actual imputed or vicarious liability of Developer that arises out of any alleged or actual act, negligence, omission or agreement of the County, Developer or any person or entity for whom Developer may be responsible; (2) shall extend to LOSS as to which Developer and the County may each be alleged to be or found jointly, severally, or concurrently liable (as between them or them and others) for negligence or other fault or liability arising from the same state of facts; (3) shall extend to any LOSS where the County is alleged to be or found negligent and/or at fault and is or may be held liable to any other party, and the fact that the County is alleged to be or may be held liable for such LOSS shall not abrogate the obligations of Developer

pursuant to this Article VIII; and (4) at the County's discretion and demand, shall include Developer assuming the defense of the County (including all attorneys' fees and litigation costs) using attorneys acceptable to the County, which acceptance shall not be unreasonably withheld. The only exception to the scope of Developer's indemnification and hold harmless obligations to the County is where New Jersey Statute(s) prohibit indemnification for its sole negligence; but this will not abrogate Developer's defense obligations to the County, which shall exist up to such time as there is a finding by a judge or jury that the County's liability is due entirely to its sole negligence.

(c) Insurance

Developer shall provide, at its own cost and expense, the following insurance to the County, which insurance shall be evidenced by certificates, declaration pages, and endorsements as required by the County. The insurance shall be maintained in full force and effect covering a period matching the Term of this Agreement as set forth in Article VIII herein. It is specifically acknowledged and agreed that the obligations imposed on Developer to provide such insurance and documentation as specified in this Article VIII are material terms and conditions of this Agreement, and the County may, at its discretion, direct Developer to cease all operations and/or suspend any permits or permissions under this Agreement until the required insurance and documentation are provided.

The insurance shall be provided by an entity authorized to write insurance in the State of New Jersey and rated "A:VII" or better by A.M. Best.

Certificates of insurance, declaration pages and endorsements shall be delivered to the County of Morris, Risk Management Division, prior to the commencement of the project identified in Article II herein. However, failure to obtain the required documents prior to the work beginning shall not waive Developer's obligation to provide them. The County reserves the right to require complete, certified copies of all required insurance policies, including endorsements, required by this Agreement at any time. All certificates of insurance shall state that the County is named as "an additional insured" under all required insurance policies. Filing of the certificates of insurance, declarations pages and endorsements with the County shall not be deemed approval by the County of the insurance or documentation provided or listed. The County reserves all rights to contest, challenge, reject or otherwise dispute the validity of insurance or documentation provided by Developer. Filing of the certificates of insurance, declarations pages and endorsements does not in any way abrogate Developer's indemnity obligations as set forth in this Article VIII. Developer's indemnity obligations are independent of the requirement to maintain insurance.

The insurance obligations under this Article VIII shall be: (1) all the insurance coverages and/or limits carried by and/or available to the Developer; or (2) the minimum insurance coverage requirements and/or minimum required limits shown in this Agreement, whichever is greater. Any insurance coverage or limits in excess of or broader than the minimum required coverage and/or minimum required limits, which are applicable to a given LOSS, shall be available to the County. No representation is made that the insurance requirements of this Agreement are sufficient to cover the obligations of the Developer under this Agreement.

MINIMUM SCOPE AND LIMIT OF INSURANCE

Coverage must be at least as broad as:

- 1) Worker's Compensation and Employers Liability Insurance. Developer shall provide proof of Worker's Compensation Insurance and be in compliance with the Workers' Compensation Law of the State of New Jersey. In the event any work is sublet, Developer shall require the subcontractor similarly to provide Worker's Compensation Insurance for all of the latter's employees to be engaged in such work unless such employees are covered by the protection afforded by the Developer's Workers' Compensation Insurance. Employer's Liability: Limit of liability shall be a minimum of \$500,000, in accordance with New Jersey Statute.
- 2) Comprehensive General Liability. Comprehensive general liability ("CGL") insurance ISO form CG 00 01, covering CGL on an "occurrence" basis, including products and completed operations, property damage, bodily injury, and personal and advertising injury with limits no less than \$2,000,000 per occurrence. If a general aggregate applies, either the general aggregate limit shall apply separately to this project/location (using ISO forms CG 25 03 or CG 25 04) or the general aggregate limit shall be twice the required occurrence limit.
- 3) Automobile Liability. Automobile liability insurance covering claims for bodily injury and property damage arising from all owned, hired and non-owned vehicles with limits of not less than \$1,000,000 combined single limit.

The County shall be named as an "additional insured" utilizing a form at least as broad as Form CG 20 10 11 85 or, if not available, through the addition of both CG 20 10 10 01 or earlier editions, and CG 20 37 10 01.

For any LOSS related to this Agreement, Developer's insurance shall be primary coverage at least as broad as CG 20 10 04 13 as respects the County. Any insurance or self-insurance maintained by the County shall be excess of all insurance policies maintained by the Developer (including primary, umbrella and excess policies) and shall not contribute with Developer's insurance.

Developer hereby grants to the County a waiver of any right to subrogation which any insurer of Developer may acquire against the County by virtue of the payment of any LOSS under such insurance. Developer agrees to obtain any endorsement that may be necessary to effect this waiver of subrogation, but this provision applies regardless of whether or not the County has received a waiver of subrogation endorsement from the insurer.

Self-insured retentions must be declared to and approved by the County. The County, at its discretion, may require Developer to purchase coverage with no retention, a lower retention, or provide proof of the ability to cover any LOSS. At the County's discretion, it may require that Developer's insurance policy be endorsed to provide that the self-insured retention may be satisfied by Developer or the County. In the event that the County satisfies any or all of any retention, Developer will immediately reimburse the County in the amount paid, plus interest assessed from the date of payment by the County to the date of reimbursement by Developer.

Developer shall require and verify that all subcontractors maintain insurance meeting all the requirements stated herein, and Developer shall ensure that the County is an additional insured on insurance required from subcontractors. For CGL coverage, subcontractors shall provide the County ongoing and completed operations coverage utilizing the same forms as Developer or forms at least as broad as the insurance required to be provided to the County by Developer.

Each insurance policy required above shall provide that coverage shall not be cancelled, except with prompt notice to the County. If Developer receives notice of cancellation or material change in the policies, notice thereof shall be given to the County Purchasing Agent by certified mail, return receipt requested. All such notices shall name the County.

**ARTICLE VIII
NOTICES**

All notices, requests, demands, and other communications hereunder (other than routine operational communications) shall be in writing and shall be deemed given if personally delivered or mailed, certified mail, return receipt requested, or sent by recognized overnight courier. All notices or other communications under this Agreement shall be sufficient if addressed as follows:

To the County: County of Morris
PO Box 900, 10 Court Street
Morristown, NJ 07963-0900
Attn: John Bonanni, County Administrator
cc John Napolitano, County Counsel

To Developer: **[To Be Added]**

COUNTY's emergency contact: COUNTY Administrator 973-285-6040
DEVELOPER's emergency contact:
Network Operations Center: 1-800-264-6620

**ARTICLE IX
DEFAULT**

If either Party is in default under this Agreement for a period of sixty (60) days following receipt of written notice from the non-defaulting Party, then the non-defaulting Party may pursue any remedies available to it against the defaulting Party under applicable law, including, but not limited to, the right to terminate this Agreement. If the default may not reasonably be cured within a sixty (60) day period, this Agreement may not be terminated if the defaulting Party commences action to cure the default within such sixty (60) day period and proceeds with due diligence to fully cure the default.

**ARTICLE X
ENVIRONMENTAL HEALTH AND SAFETY**

Developer shall comply with all Applicable Laws governing the Development or Developer's protection of human health, safety, and the environment as it pertains to the Developer's operation of any Antenna and/or Antenna Pole.

**ARTICLE XI
MISCELLANEOUS**

(a) This Agreement shall apply to and bind the heirs, successors, executors, administrators, and permitted assigns of the Parties to this Agreement.

(b) This Agreement is governed by the laws of the State of New Jersey.

(c) This Agreement (including any and all exhibits hereto) constitutes the entire agreement between the Parties and supersedes all prior written and verbal agreements, representations, promises, or understandings between the Parties; any amendments to this Agreement must be writing and executed by both Parties.

(d) If any provision of this Agreement is invalid or unenforceable with respect to any Party, the remainder of this Agreement or the application of such provisions to persons other than those as to whom it is held invalid or unenforceable, will not be affected and each provision of this Agreement will be valid and enforceable to the fullest extent permitted by law.

(e) Should the County be the prevailing Party in any action or proceeding to enforce the terms of this Agreement, the County is entitled to receive its reasonable attorney's fees and other reasonable enforcement costs and expenses from the non-prevailing Party. Should the County be the non-prevailing Party, under no circumstances may the prevailing Party receive reasonable attorney's fees and other reasonable enforcement costs and expenses from the County.

(f) The rights granted by County to Developer pursuant to this Agreement shall be exercised by the Developer subject to any Applicable Laws affecting the County or Developer.

(g) Developer acknowledges that the County may heretofore have entered into agreements and arrangements with third parties regarding the Right of Way covered hereby. All rights and privileges granted to Developer hereunder shall be subject to such agreements and

arrangements. Nothing contained herein is intended to limit the County's right to enter into agreements and arrangements with other third parties regarding the Right of Way covered hereby.

(h) The article, section, and exhibit headings contained in this Agreement are solely for the purpose of reference, and are not part of the agreement of the Parties and shall not in any way affect the meaning or interpretation of this Agreement.

(i) To the extent that there is any conflict between the terms of this Agreement and the terms of the Right of Way Occupancy Permit, this Agreement shall control, and nothing set forth in the Right of Way Occupancy Permit shall alter, supersede, or otherwise invalidate any provision of this Agreement.

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NOTARY ACKNOWLEDGMENT

State of _____)

)SS

County of _____)

On this ____ day of _____, 20__, before me personally appeared: _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that ____ (he/she) executed the same in ____ (his/her) capacity as _____ (position), that by ____ (his/her) signature on the instrument, the individual, or the entity, _____ (company), upon behalf of which the individual acted, executed the instrument, and that such individual made such appearance before the undersigned in the _____, County of _____, State of _____.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal at my office in said County and state of the day and year first above written.

Notary Public of _____

EXHIBIT A
PROJECT DRAWINGS