

VILLAGE OF DOWNERS GROVE
Report for the Village Council Meeting
9/13/2016

SUBJECT:	SUBMITTED BY:
Amendment to ROW license agreement with Wide Open West	Enza Petrarca Village Attorney

SYNOPSIS

A resolution has been prepared authorizing an amendment to the Right-of-Way License Agreement with Wide Open West to allow underground fiber optic cables.

STRATEGIC PLAN ALIGNMENT

The goals for 2015-2017 include *Exceptional Municipal Services*.

FISCAL IMPACT

N/A

RECOMMENDATION

Approval on the September 13, 2016 consent agenda.

BACKGROUND

In August 2014, the Village and WOW entered into a license agreement for the use of Village rights-of-way. The current agreement only allows WOW to install aerial fiber optic telecommunications cables on existing Commonwealth Edison poles. Certain business customers of WOW have now requested additional services, which require underground facilities. Therefore, the current agreement needs to be amended to allow underground facilities. The Illinois Telephone Company Act (220 ILCS 65/4) authorizes telecommunications carriers to construct, maintain, alter and extend its facilities along, upon, under and across any highway, street, alley, or public right-of-way dedicated to utility purposes, so long as it does not inconvenience or disturb the public in the use thereof.

This amendment to the License Agreement will allow WOW to install underground facilities. Stricter provisions regarding restoration of the rights-of-way have also been added, as has other general provisions including one that the Village can require WOW to relocate or remove its cables in certain circumstances.

ATTACHMENTS

Resolution
 First Amendment to License Agreement

RESOLUTION NO. _____

**A RESOLUTION AUTHORIZING EXECUTION OF A FIRST AMENDMENT TO
LICENSE AGREEMENT BETWEEN WIDE OPEN WEST ILLINOIS, LLC
AND THE VILLAGE OF DOWNERS GROVE
FOR USE OF THE VILLAGE RIGHTS-OF-WAY**

BE IT RESOLVED by the Village Council of the Village of Downers Grove, DuPage County, Illinois, as follows:

1. That the form and substance of a certain First Amendment to License Agreement (the "Agreement"), between the Village of Downers Grove ("Village") and Wide Open West Illinois, LLC ("Licensee"), to allow Licensee to install underground telecommunications facilities in the right-of-way, as set forth in the form of the Agreement submitted to this meeting with the recommendation of the Village Manager, is hereby approved.

2. That the Village Manager and Village Clerk are hereby respectively authorized and directed for and on behalf of the Village to execute, attest, seal and deliver the Agreement, substantially in the form approved in the foregoing paragraph of this Resolution, together with such changes as the Manager shall deem necessary.

3. That the proper officials, agents and employees of the Village are hereby authorized and directed to take such further action as they may deem necessary or appropriate to perform all obligations and commitments of the Village in accordance with the provisions of the Agreement.

4. That all resolutions or parts of resolutions in conflict with the provisions of this Resolution are hereby repealed.

5. That this Resolution shall be in full force and effect from and after its passage as provided by law.

Mayor

Passed:

Attest: _____

Village Clerk

**FIRST AMENDMENT TO LICENSE AGREEMENT
FOR THE USE OF VILLAGE RIGHTS-OF-WAY
BETWEEN WIDE OPEN WEST ILLINOIS, LLC AND
THE VILLAGE OF DOWNERS GROVE**

THIS FIRST AMENDMENT TO LICENSE AGREEMENT ("First Amendment") is entered into on the ____ day of September, 2016 ("Effective Date"), by and between the Village of Downers Grove, an Illinois municipal corporation (hereinafter referred to as the "Village") and Wide Open West Illinois, LLC, a Delaware limited liability company (hereinafter referred to as the "Licensee").

WHEREAS, the Village and Licensee entered into a License Agreement ("License Agreement") for the use of Village rights-of-way ("ROW") for the limited purpose of installation and maintenance of aerial fiber optic telecommunications cables to be installed on existing Commonwealth Edison poles located in the ROWs; and

WHEREAS, certain business customers have requested additional services from Licensee, which require underground facilities; and

WHEREAS, the License Agreement does not currently allow Licensee to install any underground facilities, and as such, the License Agreement needs to be amended.

NOW, THEREFORE, in consideration of the mutual consideration exchanged between the parties as set forth herein, the sufficiency and receipt of which are mutually acknowledged, the parties agree to amend the License Agreement as follows:

1. The above-stated Recitals are hereby incorporated into this Section 1 as though fully set forth herein.
2. Section 3, "**Location and Description of Licensee's System**", of the License Agreement shall be amended by adding the following:

The location of the underground portion of the System shall be as approved by the Village's Director of Public Works or designee. Licensee shall provide the Village with an accurate map "as built" certifying the proposed locations of the System within the ROWs each time it submits a permit application. Licensee shall provide an updated map "as built" each time any location changes are made to the System. Unless otherwise stated on a permit issued by the Village, Licensee shall not locate the System so as to unreasonably interfere with the use of the ROWs by the Village, by any utility, by the general public or by other persons authorized to use or be present in or upon the public ROWs. Licensee shall relocate, at its sole cost and expense, any part of its System that is not located in compliance with the permit requirements.

3. Section 5, "**Use of ROWs**", of the License Agreement shall be deleted in its entirety and replaced with the following:

In its use of the ROWs and any work to be performed therein, Licensee shall comply with all applicable laws, ordinances, regulations and requirements of federal, state, county and local regulatory authorities, including the applicable provisions of the Downers Grove Municipal Code, and the Village Council Policy entitled "Standards for the Construction of Facilities on the Public Right-of-Way" dated 11-6-07, as may be amended from time to time ("the Village ROW

Policy”). In the event of a conflict between this Agreement and the Village ROW Policy, the terms and conditions of this Agreement shall control.

Licensee shall use and occupy the ROWs to install, operate and maintain the System, which may include fiber optic aerial cable and underground conduit and fiber optic telecommunications cable, it being specifically understood that the ROWs shall not be used for the burning of refuse, the accumulation and/or storage of debris or other material, or for any unsanitary or unhealthful purposes. Licensee is not permitted to install ground equipment, telephone poles, pipes or other related equipment or appurtenances. Any unauthorized or impermissible use of the ROWs shall be deemed to be a material breach of this License Agreement.

Licensee warrants that the installation of the System will be performed without any trenching or open trenching, but rather by directional boring. Licensee shall not disturb any pavement for the installation, operation, maintenance or removal of its System. All movement and storage of equipment and materials shall be confined to the area designated by the Village. All surplus excavated material shall be removed from the ROWs and disposed of in accordance with any applicable laws or regulations. All tree stumps, and other debris resulting from construction operations shall be removed from the ROWs.

This License and the grant of authority conferred in Section 2 above are non-exclusive. The Licensee shall respect the rights and property of Village and other authorized users of streets, sidewalks, easements, power poles, street light poles, vaults, conduits and rights-of-way, and adjacent property owners.

4. Section 6, "**Permits**", of the License Agreement shall be amended by adding the following:

Licensee shall not perform work on, nor make any alterations to, the ROWs without first having paid any applicable permit fees and obtained the necessary permit(s) from the Village, including any construction permits for telecommunications facilities as required by law and the Village ROW Policy. Licensee shall obtain a permit for each separate location.

5. Section 8, "**Restoration of ROWs**", shall be deleted in its entirety and replaced with the following:

Within ten (10) days after initial construction operations have been completed or after repair, relocation or removal of the System, Licensee shall grade and restore all areas disturbed by construction operations to a condition substantially similar to that which existed prior to the work. This time period may be extended for good cause shown. If weather or other conditions do not permit the complete restoration required by this Section, Licensee shall temporarily restore any disturbed property. Such temporary restoration shall be at Licensee's sole expense and Licensee shall promptly undertake and complete the required permanent restoration when the weather or other conditions permit such permanent restoration.

For a period of twelve (12) months following any work in the ROWs by Licensee or any person acting on Licensee's behalf, except for backfilling which shall be a five (5) year period, Licensee shall, at its sole expense, be responsible for all costs of restoring any disturbances or damage to the ROWs or any other Village property and for all repairs or damage to Village

property caused by Licensee, its officers, agents, employees, contractors, subcontractors, successors, and assigns, except to the extent any of the foregoing are caused by the negligence of the Village. All such restoration shall be performed in accordance with the Village ROW Policy and to the reasonable satisfaction of the Village.

Disturbed grass areas shall be restored with sod. All open excavations necessary for the installation, repair, relocation, maintenance or removal of the System shall be properly backfilled, and any asphalt pavement or PCC concrete pavement or sidewalk shall be replaced with like-kind and quality materials. The backfill settlement repair period shall be for five (5) years from the date of placing said backfill, during which time the affected areas shall be maintained by Licensee at its sole expense in a condition satisfactory to the Village. Under hard surface areas, such as roadways, sidewalks and drives, trench backfill shall be compacted and certified by the Village to comply with the Village construction standards. All restoration work shall be completed in accordance with the Village ROW Policy or other Village zoning or construction standards, whichever is more stringent and/or comprehensive.

In the event Licensee fails, in a timely manner, to restore any disturbances or make any and all repairs to the ROWs or other Village property as set forth above, the Village may make or cause to be made such restoration or repairs and either demand payment from Licensee, who agrees to pay the reasonable costs of such restoration or repairs upon written demand and receipt by Licensee of all invoices and documentation supporting the actual costs incurred by the Village, or demand payment from the security posted by Licensee, which payment must be received by the Village within thirty (30) days of demand and receipt by Licensee of all invoices and documentation supporting the actual costs incurred by the Village.

6. The License Agreement shall be further amended by adding the following sections:

22. **Marking.** Prior to and during any installation or relocation of any underground cables or utility lines, Licensee shall contact J.U.L.I.E. to ascertain the presence and location of existing aboveground and underground facilities within the ROWs to be occupied by Licensee's System and install route markers in accordance with the Illinois Underground Facilities Damage Prevention Act.

The Village shall have no obligation to mark the location of Licensee's System. Licensee agrees that it will become a member of J.U.L.I.E. as a requirement of this License Agreement and that such a system is designed to alert Licensee to planned work in the rights-of-way, so that Licensee can mark the location of its facilities to avoid damage. The Village shall have no obligation to alert Licensee to proposed work by itself or others, other than as a participating member of the J.U.L.I.E. system.

23. **Public Safety.** Licensee or other person acting on its behalf, at its own expense, shall use suitable barricades, flags, flagmen, lights, flares and other measures as required for the safety of all members of the general public and to prevent injury or damage to any person, vehicle or property by reason of any work in or affecting the ROWs or other property.

If the Village, in its reasonable discretion, determines that a particular use of the ROWs by Licensee is, or will be, hazardous to the public or the property, Licensee, upon written notice from the Village, shall install commercially reasonable safety devices or make

commercially reasonable modifications at Licensee's sole expense to render the ROWs safe for, and compatible with, public use. In the event Licensee fails to install such safety devices or make required modifications within twenty-four (24) hours, or, if such modifications cannot be completed expeditiously to render the ROWs safe for the public, the Village may install such safety devices. In the event the Village installs such safety devices, the Licensee agrees to pay the actual costs of such improvements upon written demand, or the Village may terminate this License Agreement, with all rights of Licensee hereunder being forfeited, and the Licensee waives all rights and claims of any kind against the Village arising out of this License Agreement and its termination.

24. **Environmental.** Licensee shall not trim or cut any trees or shrubs, alter or impede water flowage, apply chemicals or disturb the topography of the ROWs in any manner without prior written approval of the Village. Licensee will take all reasonable steps to assure that Licensee will not release any regulated material in violation of any federal or state environmental law on the ROWs. Licensee, at its sole cost and expense, shall remediate, remove, clean up or abate in accordance with federal or state law, or the directives of the appropriate oversight agency, a release of a regulated material in violation of a federal or State law occurring on the ROWs, to the extent such a release was caused by Licensee. In the event of a release of a regulated material in violation of a state or federal law on the ROWs by Licensee, or any claim or cause of action brought against the Village regarding such release, the indemnification provided for in Section 15 shall apply.

25. **No Encumbrances.** Licensee shall not place or allow any liens, mortgages, security interests, pledges, claims of others, equitable interests, or other encumbrances to attach to or to be filed against title to the ROWs.

26. **Video Programming.** Licensee shall notify the Village if it intends on providing cable television content over the System to subscribers within the Village. If required by law, Licensee will enter into a cable franchise or an open video system franchise agreement with the Village in the event Licensee does provide cable television content over its System.

27. **Removal, Relocation, or Modifications of Utility Facilities.** Within thirty (30) days following written notice from the Village, Licensee shall, at its own expense, protect, support, temporarily or permanently disconnect, remove, relocate, change or alter the position of any part of its System within the ROWs whenever the Village has determined that such removal, relocation, change or alteration, is reasonably necessary for the construction, repair, maintenance, or installation of any Village improvement in or upon, or the operations of the Village in or upon, the ROWs. In the event that relocation of any or all of the System is required and the Village and Licensee are unable to identify a feasible alternative to relocation within the thirty (30) day period, then the Village may terminate this License Agreement, without penalty or payment to Licensee, solely with respect to the portion of the ROWs required by the Village for the above reasons or other public purposes.

Removal of Unauthorized Facilities. Within thirty (30) days following written notice from the Village, Licensee shall, at its own expense, remove all or any part of any

unauthorized facilities or appurtenances from the ROWs. A facility is unauthorized and subject to removal in the following circumstances:

- 1) Upon expiration or termination of this License Agreement or permit obtained by Licensee, unless otherwise permitted by applicable law;
- 2) If the facility was constructed or installed without the prior grant of a license or permit;
- 3) If the facility was constructed, installed or maintained in violation of this License Agreement or the Village ROW Standards; or
- 4) If the facility was constructed or installed at a location not permitted by any permit obtained by Licensee.

Emergency Removal or Relocation of Facilities. The Village retains the right and privilege to disconnect, cut, move or remove any part of Licensee’s System located within the ROWs of the Village, as the Village may determine to be necessary, appropriate or useful in response to any public health or safety emergency. If circumstances permit, the Village shall attempt to notify Licensee, if known, prior to cutting or removing any part of the System and shall notify Licensee after cutting or removing any part of the System.

In the event Licensee is required to disconnect, relocate, remove, change or alter the position of part or all of its System from Village ROWs and fails to do so within the time required by the Village, the Village may make or cause to be made such disconnection, relocation, removal, change, or alteration, and Licensee shall be liable to the Village for all costs regarding same. The Village may either demand payment from Licensee, who agrees to pay the reasonable costs of such relocation or removal upon written demand and receipt by Licensee of all invoices and documentation supporting the actual costs incurred by the Village, or demand payment from the security posted by Licensee, which payment must be received by the Village within thirty (30) days of demand and receipt by Licensee of all invoices and documentation supporting the actual costs incurred by the Village.

7. All other terms and conditions contained in the License Agreement shall remain in full force and effect.

IN WITNESS THEREOF, the parties have signed below, effective as of the Effective Date, by their duly authorized representatives.

VILLAGE:

VILLAGE OF DOWNERS GROVE

By: _____
Its: Mayor

Attest: _____
Village Clerk

LICENSEE:

WIDE OPEN WEST ILLINOIS, LLC

By: Jerry B. Leiby JERRY B. LEIBY

Its: VP BACKHAUL CONSTRUCTION