

## ORDINANCE NO. 23-085

**AN ORDINANCE AUTHORIZING AND DIRECTING THE CITY MANAGER TO ENTER INTO A MUNICIPAL CONDUIT LEASE AGREEMENT WITH EVERSTREAM SOLUTIONS LLC OF CLEVELAND, OHIO, FOR THE LEASE OF CITY CONDUIT IN THE RIGHT-OF-WAY ON SHORELINE DRIVE; AND DECLARING THAT THIS ORDINANCE SHALL TAKE IMMEDIATE EFFECT IN ACCORDANCE WITH SECTION 14 OF THE CITY CHARTER.**

**WHEREAS**, during the rehabilitation of Shoreline Drive, the City relocated overhead telecommunication lines and installed additional conduits in the right-of-way for the purpose of leasing to interested private providers of telecommunications without impacting service conditions; and

**WHEREAS**, Everstream Solutions LLC is a company that provides, implements and manages telecommunication services and facilities in Ohio and desires to lease a portion of the City's conduit placed in the right-of-way along Shoreline Drive; and

**WHEREAS**, pursuant to the agreement, Everstream Solutions LLC will pay Fifty Cents (\$.50) per linear foot, per year, for the occupation of approximately 1,430 feet of the City's conduit for a total annual payment of \$715.00; and

**WHEREAS**, this Ordinance should be passed as an emergency measure under suspension of the rules in accordance with Section 14 of the City Charter in order to immediately execute the agreement so the installation of cable can be completed as soon as possible and prior to the increased traffic along Shoreline Drive beginning this spring; and

**WHEREAS**, in that it is deemed necessary in order to provide for the immediate preservation of the public peace, property, health, and safety of the City of Sandusky, Ohio, and its citizens, and to provide for the efficient daily operation of the Municipal Departments, including the Department of Information Technology, of the City of Sandusky, Ohio, the City Commission of the City of Sandusky, Ohio finds that an emergency exists regarding the aforesaid, and that it is advisable that this **Ordinance** be declared an emergency measure which will take immediate effect in accordance with Section 14 of the City Charter upon its adoption; and NOW, THEREFORE,

BE IT ORDAINED BY THE CITY COMMISSION OF THE CITY OF SANDUSKY, OHIO, THAT:

Section 1. The City Manager be and hereby is authorized to enter into a Municipal Conduit Lease Agreement with Everstream Solutions LLC for the lease of City conduit located in the right-of-way on Shoreline Drive, substantially in the same form as reflected in Exhibit "1" which is attached to this Ordinance and specifically incorporated as if fully rewritten herein together with such revisions or additions as are approved by the Law Director as not being adverse to the City and as being consistent with carrying out the terms of this Ordinance.

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Section 2. If any section, phrase, sentence, or portion of this Ordinance is for any reason held invalid or unconstitutional by any Court of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision, and such holding shall not affect the validity of the remaining portions thereof.

Section 3. This City Commission finds and determines that all formal actions of this City Commission concerning and relating to the passage of this Ordinance were taken in an open meeting of this City Commission and that all deliberations of this City Commission and of any of its committees that resulted in those formal actions were in meetings open to the public in compliance with the law.

Section 4. That for the reasons set forth in the preamble hereto, this Ordinance is hereby declared to be an emergency measure which shall take immediate effect in accordance with Section 14 of the City Charter after its adoption and due authentication by the President and the Clerk of the City Commission of the City of Sandusky, Ohio.



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RICHARD R. BRADY  
PRESIDENT OF THE CITY COMMISSION



ATTEST: 

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CATHLEEN A. MYERS  
CLERK OF THE CITY COMMISSION

Passed: April 10, 2023

## MUNICIPAL CONDUIT LEASE AGREEMENT

THIS MUNICIPAL CONDUIT LEASE AGREEMENT (this "Agreement") is made effective on the date of the last signature hereto (the "Effective Date"), by and between the **CITY OF SANDUSKY, OHIO** ("LESSOR") located at 240 Columbus Avenue, Sandusky, OH, 44870 and **EVERSTREAM SOLUTIONS LLC** ("LESSEE") located at 1228 Euclid Ave, Suite 250, Cleveland, OH 44115. LESSOR and LESSEE may each be collectively referred to as "Parties," and individually as a "Party".

**WHEREAS**, LESSEE is a company that provides, implements and manages telecommunication services and facilities in Ohio; and

**WHEREAS**, LESSOR is an Ohio municipality which owns conduit infrastructure assets; and

**WHEREAS**, LESSEE desires to lease from LESSOR and LESSOR desires to lease to LESSEE a non-exclusive lease of a portion of LESSOR's four inch (4") conduit(s) ("Conduit Facilities"), per this agreement, being more particularly described below.

**NOW, THEREFORE**, in consideration of the mutual terms, covenants and conditions set forth herein, and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the Parties agree as follows:

### SECTION 1. LEASE

1.1 The purpose of this Agreement is to set forth the terms and conditions under which LESSOR agrees to lease to LESSEE space within the Conduit Facilities.

1.2 LESSOR, for the consideration of the rents and covenants specified to be paid and performed by LESSEE, hereby leases to LESSEE, and LESSEE hereby leases from LESSOR, the Conduit Facilities on an "as is" and "where is" basis without warranty for the terms and conditions contained herein (the "Lease").

1.3 The installation of LESSEE-owned communication cable(s) and fiber(s) into the Conduit Facilities shall be at LESSEE's expense and in accordance with this Agreement. LESSEE shall be permitted to pull one (1) one fiber optic innerduct cable ("LESSEE's Cable") through the Conduit Facilities.

1.4 LESSEE's Cable within the Conduit Facilities is described as follows:

**One and one quarter inch (1 ¼") in diameter, for a distance of one-thousand four hundred thirty feet, more or less (+/- 1,430') – the location of which is more particularly depicted and shown at Attachment A annexed hereto, incorporated herein, and made a part hereof by reference.**

### SECTION 2. LESSOR RESPONSIBILITIES

2.1 LESSOR retains ownership and legal title of the Conduit Facilities and all rights to access all LESSOR-owned facilities, rights-of-way, easements and locations where the Conduit Facilities are located.

2.2 LESSOR will allow the connection of the Conduit Facilities with LESSEE's Cable at the starting and ending points of the Conduit Facilities.

2.3 LESSOR will ensure the Conduit Facilities are accessible for the initial installation of LESSEE's Cable. LESSOR will make any repairs necessary to the Conduit Facilities if they are found to be damaged or unusable by LESSEE upon the initial installation of LESSEE's cable. LESSOR shall maintain the Conduit Facilities solely at its own cost unless maintenance is necessary due to LESSEE's gross negligence or willful misconduct, in which case LESSEE shall, as the Parties mutually agree, either (a) make the repairs at LESSEE's own cost, or (b) reimburse LESSOR for the actual, reasonable, and demonstrative costs.

2.4 LESSOR will not over-subscribe or lease remaining conduit space so as to "over crowd" or "over fill" the conduit beyond reasonable construction practices acceptable to LESSOR and LESSEE.

2.5 LESSOR will not install electric or power circuits in the Conduit Facilities unless agreed to by the Parties.

### SECTION 3. LESSEE RESPONSIBILITIES

3.1 LESSEE's cable will not prohibit LESSOR from utilizing the remaining space in the Conduit Facilities or leasing the Conduit Facilities to other lessees.

3.2 LESSEE will compensate LESSOR annually, within forty-five days after receipt of an invoice from LESSOR, unless otherwise agreed between the Parties.

3.3 LESSEE will take precautions not to damage the Conduit Facilities or other LESSOR utilities. Any damages caused by LESSEE will be as the Parties mutually agree, either (a) repaired by LESSEE, or (b) LESSEE will pay LESSOR for all actual, reasonable, and demonstrable expenses incurred by LESSOR to repair such damages.

3.4 LESSEE will contact the LESSOR at least twenty-four (24) hours prior to performing work in the Conduit Facilities. A LESSOR representative may be present to inspect the installation and all other work involving the Conduit Facilities.

3.5 LESSEE will cooperate with other LESSOR cables or communication companies that require access to the Conduit Facilities.

### Section 4. COMPENSATION

4.1 LESSEE will pay to LESSOR **Fifty Cents (\$0.50) per foot, per year**, for the leased Conduit Facilities. Therefore, the annual payment due to LESSOR shall be **Seven Hundred, Fifteen Dollars and Zero Cents (\$715.00) per year**, based on approximately **one thousand, four-hundred, thirty feet, more or less (+/- 1,430')** of LESSEE's Cable occupation within the Conduit Facilities.

4.2 LESSOR will invoice LESSEE annually in January of each year for leasing the Conduit Facilities for the new or upcoming lease year.

4.3 LESSEE will pay the invoiced amount within forty-five (45) days within receipt of the invoice.

4.4 The amount and timing of the Conduit Facilities Payment may be adjusted, as agreed between the Parties.

4.5 Both Parties shall have the right to renegotiate the compensation structure herein as a result of significant changes in the operational and/or fiscal viability of the system.

## **SECTION 5. TERM AND TERMINATION OF AGREEMENT**

5.1 The Lease granted herein will commence on the Effective Date and the "Initial Term" shall be three (3) years from the Effective Date, renewing on a year-to-year basis unless terminated earlier pursuant to this Agreement (the "Renewal Term"). The Initial Term and Renewal Term may collectively be referred to as the "Term".

5.3 This Agreement and its terms and conditions may be terminated by either Party upon written notice provided to the other Party within at least One Hundred Eighty Days (180) Days prior to the expiration of the current Term.

5.4 Either Party may terminate this Agreement upon uncured default of the other Party, as defined herein.

5.5 In the event that LESSEE no longer uses LESSEE's Cable, LESSEE may terminate this Agreement upon thirty (30) days' prior written notice.

5.5 LESSEE will remove LESSEE's Cable from the Conduit Facilities upon termination of this agreement. If agreeable by the Parties, LESSEE may leave the cable wherein LESSOR will acquire ownership to the cable at no cost to the LESSOR. LESSOR does not assume any past liability as a result of acquiring ownership.

## **SECTION 6. CONDUIT EXTENSIONS AND ADDITIONAL CAPACITY**

If, during the Term of this Agreement, LESSEE requires conduit extensions or additional capacity beyond that leased in this agreement, LESSOR will have the option to supply such extension or additional capacity and LESSOR will be compensated by LESSEE in accordance with this Agreement unless both Parties agree to a different compensation rate. If LESSOR does not desire to supply the additional capacity, LESSEE may install additional conduit capacity as allowed by law and as permitted by the LESSOR if conduit is to be within LESSOR's right-of-way. LESSOR does not grant any use of private property to LESSEE as part of this Agreement.

## **SECTION 7. INTERFERENCE**

LESSEE shall not use the Conduit Facilities in a way that interferes with or adversely affects the use of the remaining space in the Conduit Facilities. LESSEE acknowledges the Conduit Facilities may include cables from other communication companies or the LESSOR.

## **SECTION 8. RELATIONSHIP OF THE PARTIES**

Each Party is an independent contractor and neither Party is authorized to act as an agent for, or legal representative of, the other Party. Neither Party shall have authority to make a contract, agreement, warranty, or representation on behalf of the other Party, or to assume or create any obligation, express or implied, on behalf of, in the name of, or binding upon, the other Party. The Parties agree that this Agreement does not create a fiduciary relationship between the Parties.

## **SECTION 9. ASSIGNMENT, SUBLEASE**

Unless otherwise provided in this Agreement, neither Party may assign its rights and/or obligations under this Agreement, or any portion thereof, without the express written consent of the other Party, which will not be unreasonably withheld. This Agreement will be binding upon, and inure to the benefit of, the Parties hereto and their respective successors and permitted assigns. LESSEE may not sublease any portion of the Conduit Facilities without receiving the express written consent of LESSOR. The sale of all or substantially all ownership interest of LESSEE, or corporate consolidation and or merger shall not constitute an assignment under this Agreement when LESSEE remains the surviving entity.

## **SECTION 10. RELOCATION**

LESSOR may relocate all or a portion of the Conduit Facilities: 1) if a third party with legal authority orders such relocation (such as condemnation); or 2) in order to comply with federal state or local laws; or 3) to prevent or clear a conflict with a utility service. LESSOR shall provide LESSEE at least sixty (60) calendar days notice prior to such relocation. LESSOR shall be responsible for relocating the Conduit Facilities. LESSEE shall be responsible for relocating LESSEE's Cable.

## **SECTION 11. NOTICE**

11.1 Any notice under this Agreement shall be in writing and be delivered in person or by public or private courier service (including but not limited to U.S. Postal Service Express Mail and Federal Express) or certified mail or by facsimile. Any notice given by certified mail will be sent with return receipt requested. Any notice given by facsimile will be verified by a facsimile confirmation. All notices will be addressed to the Parties at the following addresses or at such other addresses as the Parties may from time to time direct in writing.

If to LESSOR:

City of Sandusky  
Attn: Cody Browning, IT Director  
240 Columbus Avenue  
Sandusky, OH 44870  
Telephone: 419-627-5729  
Email: cbrowning@cityofsandusky.com

If to LESSEE

Everstream Solutions LLC  
Attn: General Counsel  
1228 Euclid Ave, Suite 250  
Cleveland, OH 44115  
Telephone: 216-923-2246  
Email: legalnotices@everstream.net

Either Party may, by proper notice to the other Party, designate any other address for the giving of notice. Any notice shall be deemed to have been given on (a) actual delivery or refusal to accept delivery, (b) the day of mailing by registered or certified mail, or (c) the day facsimile transmission is verified.

## **SECTION 12. DEFAULT**

12.1 The occurrence of any one or more of the following events will constitute a default under this Agreement:

12.1.1 Failure by LESSEE to make any payment when due, or failure to make any other payments or other compensation payable by LESSEE to LESSOR under the terms of this Agreement, upon the expiration of forty-five (45) days from receipt of written notice ("Notice of Default") from LESSOR; or

12.1.2 Failure by either Party in performing any other term, covenant, or condition of this Agreement (each a "Breach") or the inaccuracy in any material respect of any representation or warranty made by either Party to the other, upon Notice of Default.

12.1.3 The Party failing to perform will not be deemed to be in default if such Party has cured such failure within thirty (30) days after notice by the Notice of Default (the "Cure Period"). With respect to any Breach that cannot reasonably be cured within the Cure Period, the default will not be deemed to be uncured if the defaulting party commences cure within thirty (30) days has begun to cure within the Cure Period.

12.1.4 If LESSEE fails to remedy any default of this agreement upon within the timeframes in this Section 12, LESSOR may, within one hundred twenty (120) calendar days' notice, terminate this Agreement. Upon termination, LESSEE's rights to this lease shall cease.

## **SECTION 13. ABANDONMENT**

13.1 LESSEE's ABANDONMENT. LESSOR shall consider the Agreement as abandoned should LESSEE fail to use the Conduit Facilities for more than one (1) year. For purposes of this Section 13.1, "fail to use" is interpreted by the Parties to mean "not occupy". At time of abandonment, LESSEE shall have no further rights with respect to this Agreement. LESSOR shall have the right to use the abandoned Conduit Facilities for its own purposes.

13.2 LESSOR's ABANDONMENT. In the event that LESSOR desires to abandon the Conduit Facilities, LESSEE shall remove and/or relocate LESSEE's Cable from the Conduit Facilities within ninety (90) days' notice from LESSOR of LESSOR's intent to abandon. If such abandonment by LESSOR occurs, then LESSOR may sell the Conduit Facilities to a successor in interest, in which case LESSEE will have the right to maintain LESSEE's Cable within the Conduit Facilities. In the event that LESSOR sells the Conduit Facilities upon abandonment, LESSOR will give LESSEE first right of purchase. If LESSEE purchases the Conduit Facilities under the conditions set forth in this Section 13.2, then LESSOR will execute a bill of sale and all rights, title, and interest in and to the Conduit Facilities will pass to LESSEE as a successor in interest in fee to the Conduit Facilities.

## **SECTION 14. FORCE MAJEURE**

With the exception of payment of fees and charges due under this Agreement, a party will be excused from performance, if its performance is prevented by acts or events beyond the Party's reasonable control, including but not limited to, severe weather and storms; earthquakes or other natural occurrences; strikes or other labor unrest; pandemic or epidemic; the unavailability of necessary materials at reasonable costs; nuclear or other civil or military emergencies; or acts of legislative, judicial, executive, or administrative authorities.

## **SECTION 15. SEVERABILITY**

15.1 If any provision(s) of this Agreement shall be determined to be void by any court of competent jurisdiction, then such determination will not affect any other provision of this Agreement and all such

other provisions will remain in full force and effect and will be valid and enforceable to the fullest extent permitted by law.

#### **SECTION 16. INDEMNIFICATION**

LESSEE shall indemnify, defend and hold harmless LESSOR, its members, affiliates, directors, officers, employees, agents, successors, and assigns (collectively, "Assigns"), from any loss, debt, liability, damage, obligation, claim, demand, judgment or settlement of any kind, including, without limitation, reasonable attorneys' fees and other disbursements, arising out of or sustained in any claim, suit, proceeding or action commenced by any third party (collectively the "Claims") caused by LESSEE's obligations and duties under this Agreement, unless the Claims are caused by LESSOR's gross negligence or willful misconduct. LESSOR shall promptly notify LESSEE in writing of any such claim, suit, proceeding or action to trigger this indemnification. This Section shall survive termination of this Agreement.

#### **SECTION 17. GOVERNING LAW**

This Agreement will be governed by, construed, and enforced in accordance with the laws of the State of Ohio.

#### **SECTION 18. ENTIRE AGREEMENT**

This Agreement, together with all Attachments, notices, appendices and any jointly executed written supplements attached hereto or referenced herein, all of which are hereby incorporated by reference herein, represent the entire Agreement contemplated by the Parties, and supersede all prior oral or written agreements, representations, statements, negotiations, understandings, proposals, and undertakings with respect to the subject matter thereof. It is understood and agreed by the Parties that there are no verbal promises or implied promises, agreements, stipulations or other representations of any kind or character pertaining to the Fiber Facilities between them other than as set forth herein.

#### **SECTION 19. MODIFICATIONS**

No modification, release, discharge, or waiver of any provision(s) of this Agreement will be of any force, effect or value unless in mutual writing signed by both Parties or their duly authorized agent or attorney.

#### **SECTION 20. WAIVER**

The failure of either Party to enforce or insist upon compliance with any of the provisions of this Agreement or the waiver thereof in any instance shall not be construed by the other Party as a general waiver or relinquishment of any other provision of this Agreement, but the same shall, nonetheless be and remain in full force and effect.

**[SIGNATURES ARE LOCATED ON THE FOLLOWING PAGE]**



The Parties have executed this Agreement as of the effective date first written above.

**LESSOR:** **THE CITY OF SANDUSKY, OHIO**

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

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

Title: \_\_\_\_\_

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

**LESSEE:** **EVERSTREAM SOLUTIONS LLC**

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

Name: Greg Meinczinger

Title: Executive Vice President Operations

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

EXHIBIT "1"

**APPROVED AS TO FORM:**

BY: \_\_\_\_\_

NAME: \_\_\_\_\_

TITLE: CITY OF SANDUSKY LAW DIRECTOR

DATE: \_\_\_\_\_

## ATTACHMENT A

(LESSEE'S CABLE WITHIN THE CONDUIT FACILITIES)

