

**AGREEMENT**

**BETWEEN THE TOWNS OF CHILMARK, AQUINNAH AND WEST TISBURY,  
MASSACHUSETTS**

**AND**

**ATC OUTDOOR DAS, LLC**

**REGARDING THE INSTALLATION OF AN UP ISLAND DISTRIBUTED  
ANTENNA SYSTEM AND RIGHT OF WAY LICENSE**

The Towns of Chilmark, Aquinnah and West Tisbury, by and through their respective Boards of Selectmen and Town Managers, each a Massachusetts municipal corporation (collectively, the “**Towns**”) and ATC Outdoor DAS, LLC, a limited liability company organized and existing under the laws of Delaware, having its principal place of business at 116 Huntington Avenue, Boston, MA 02116 and duly licensed to conduct business in the Commonwealth of Massachusetts (“**Provider**”) (which term shall include its approved successors and assigns as per this agreement) hereby enter into this agreement (“**Agreement**”) made as of this \_\_\_\_\_ day of \_\_\_\_\_, 2009 (the “**Effective Date**”).

**WITNESSETH:**

- A. Towns issued a Request for Proposals for the Up Island Distributed Antenna System on August 15, 2008 (the “**RFP**”), and chose Provider as the successful bidder.
- B. Provider intends to construct, install, replace, repair, relocate and maintain cable, dark optical fiber system network, antenna and related equipment comprising a distributed antenna system (collectively, the “**DAS**”) across, above, over and under public rights of way and other public property within the Towns and provide to the Towns for their shared use a dark optical fiber system network as more particularly described herein.
- C. Towns intend to use the dark optical fiber system network, referred to herein as the Municipal Fiber Network (as defined herein) to provide data communication, telecommunications services and video transmission and other technological services and capabilities for governmental facilities within the Towns.
- D. Provider, through its own efforts, intends to obtain any pole attachment agreement(s) to permit its location of the DAS on utility poles owned and operated by the Towns or other third party owners and operators. In addition, Provider, through its own efforts, intends to enter into any other additional agreement(s) necessary to permit its location of the DAS on any real property located outside of the public right of way and owned by third party owners.

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- E. Provider will install and operate the DAS for purposes of acting as a neutral host of wireless communication and ancillary wireless services, making the DAS commercially available for use by wireless telecommunications providers.

NOW, THEREFORE, in consideration of the mutual promises contained herein and intending to be legally bound hereby, the parties agree as follows:

A. GENERAL TERMS AND CONDITIONS

1. Applicability of Section. The terms and conditions in this Section A are applicable to all sections of this Agreement.

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2. Definition of Terms.

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i. Aggregate License Fees – shall mean all rents, payments, fees and other amounts actually collected from any Permitted TC Provider and received by Provider and allocable to the period within the term pursuant to any Collocation Agreement, together with any fees collected from any actual or prospective Permitted TC Provider with respect to the DAS, but exclusive of (i) any reimbursements or pass-throughs from or contributions by Permitted TC Providers to Provider (A) for utility charges, taxes and other pass-through expenses, or (B) in connection with work performed or equipment installed by Permitted TC Providers; (ii) construction management or supervision fees related to the installation of the Permitted TC Provider's equipment; (iii) initial contributions of capital by Permitted TC Providers to reimburse Provider in whole or in part for the installation of the Equipment on the DAS; and (iv) "speed bonuses" or other incentive fees or remuneration paid by Permitted TC Providers or which are not totally and directly related to the location of the Permitted TC Providers on the DAS.

ii. Collocation Agreement- shall mean the Provider's service level agreement, agreement to sublease or sub-license the Licensed Area and access to the Equipment to a Permitted TC Provider for its Permitted Use.

iii. Commencement Date- shall mean the date construction and installation of the DAS begins, which shall be no later than 30 days after the Provider's receipt of a fully executed Collocation Agreement from a Permitted TC Provider and any other fully executed agreement, license, permit or right of way necessary for Provider to construct, operate, maintain and remove the DAS.

iv. Completion Date- shall mean the date upon which the Towns accept and approve ~~the~~ DAS constructed and installed by Provider, pursuant to this Agreement.

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v. DAS- shall mean the Distributed Antenna System proposed, constructed and installed by Provider, including those portions designated as the Municipal Fiber Network, other than Pre-Construction Work.

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- vi. Demarcation Point- shall mean the point where the Municipal Fiber Network will end and the Towns in-building or other network facilities will begin.
- vii. Effective Date- shall mean the date of execution of this agreement by the Towns and Provider.
- viii. Environmental Laws- shall mean all applicable federal, state, county and town environmental laws.
- ix. Equipment- shall mean all material required to install, operate, maintain and replace a multi-carrier DAS, including but not limited to poles, support structures, antennas, radio cabinets and other miscellaneous hardware, supporting mounts, equipment shelters, wiring, cables, conduits and connecting hardware.
- x. Hazardous Material- shall mean any petroleum or any petroleum product, asbestos, any substance known by the state in which the Licensed Area is located to cause cancer and/or reproductive toxicity, and/or any substance, chemical or waste that is identified as hazardous, toxic or dangerous in any applicable federal, state, county or local laws, statutes, and/or regulations, which is not permitted by law.
- xi. Hub Site Commencement Date- shall mean the first day of construction of the Hub Site, as defined in the Hub Site Agreement, a form of which is annexed hereto as Exhibit "D".
- xii. Hub Site Rent- shall mean the Provider's payment of One Thousand Two Hundred Dollars (\$1,200) per month for Provider's rent of the hub site.
- xiii. Initial Term- shall mean the Ten (10) years from the earlier of (i) the date the first Permitted TC Provider commences utilization of the DAS, or (ii) the date that is three (3) years from the date of the Effective Date.
- xiv. Licensed Area- shall mean the area within, across, above, over and under those public rights of way with the Towns that Provider locates, constructs, installs, operates, controls, replaces, repairs, relocates and maintains the DAS.
- xv. Maintenance and Repair- shall mean the supply of any and all parts, mechanisms, devices and servicing required to keep the DAS in good mechanical and working order.
- xvi. Municipal Fiber Network- shall mean the twelve strands of single mode optical fibers terminated with optical connectors to be contained within the DAS as constructed by the Provider, pursuant to this Agreement.
- xvii. Permitted TC Provider- shall mean a telecommunications company that has entered into a Collocation Agreement with Provider.
- xviii. Permitted Use- shall mean a Permitted TC Provider's attachment of their radio cabinets, racks and other equipment to the Equipment for the purpose of

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receiving and/or distributing the wireless frequency within or immediately surrounding the DAS for use in connection with a wireless communications business and related activities.

xix. Pre-Construction Work – shall mean all work required by Provider to prepare and install the DAS in the Towns, in accordance with the RFP, the Bid Package and this Agreement, through and including make-ready work on poles that will be used for the DAS.

xx. Provider- shall mean ATC Outdoor DAS, LLC, a limited liability company organized and existing under the laws of Delaware, having its principal place of business at 116 Huntington Avenue, Boston, MA 02116, its approved successors and assigns.

xxi. Renewal Term- shall mean the renewal of the Agreement for a period of five (5) additional years, after the expiration of the Initial Term or any subsequent Renewal Term.

xxii. Term- shall mean collectively the Initial Term and any Renewal Term.

xxiii. Technical Assistance- shall mean Provider's technical servicing of the DAS, including but not limited to, all splicing, testing and technical work required to provide a fully operational DAS on completion of installation

xxiv. Towns- shall mean The Towns of Aquinnah, Chilmark and West Tisbury collectively.

xxv. Turnkey Basis- shall mean that Provider shall have all the obligations with respect to the design, procurement, supply and installation of the Municipal Fiber Network, without further installation or supply by the Towns.

3. **Pre-Construction Work.** Upon the execution of this Agreement, Provider will commence the Pre-Construction Work.

4. **Commencement of Installation of DAS.** Provider will have no obligation to commence installation of the DAS until it has received a fully executed Collocation Agreement from a Permitted TC Provider and any other fully executed agreement, license, permit or right of way necessary for Provider to construct, operate, maintain and remove the DAS. If Provider fails to enter into a Collocation Agreement with a Permitted TC Provider within three (3) years from the Effective Date of this Agreement, either party shall have the right to terminate this Agreement in its entirety, with no further obligations to the other.

5. **Term.** The Agreement is in effect from the Effective Date through the Initial Term (as defined above). Provider shall have the option to renew the term of such license for each of three (3) additional terms of five (5) years each, and such options shall be deemed automatically exercised unless Provider gives notice to Towns at least six (6) months prior to the expiration of the then current Initial

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Deleted: ~~<#>Project Management During Construction.~~ The Towns, in their sole discretion, may hire an independent consulting engineer to serve as Project Manager overseeing the Provider's installation and construction of the DAS, Municipal Fiber Network and Public Safety System, as described more fully herein. The independent consulting engineer's responsibilities will include, among other things: (i) limited Project Management during construction, (ii) the final inspection of the completed DAS, Municipal Fiber Network and Public Safety System and (iii) Co-op road/field testing/measurements of the final DAS performance. Provider shall pay all the fees for the independent consulting engineer retained by the Towns, up to the sum of fifty thousand dollars (\$50,000).¶ ~~<#>Outside Counsel Fees-~~ The Towns may retain outside counsel during the negotiation, drafting and execution of this Agreement, as well as during the Term of this Agreement, as they may deem necessary. Provider agrees to pay the first fifty thousand dollars (\$50,000) of the Towns' incurred outside counsel fees, as described herein. ¶

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Term or Renewal Term, as the case may be. Subject to the approval of the Towns and provided that the Provider shall be in compliance with all terms and guidelines set forth in this Agreement, or any amendment thereto signed by all parties, at the expiration of the Term of this Agreement, or any extension or renewal thereof, this Agreement may be renewed for additional terms subsequent to the foregoing Renewal Terms, as mutually agreed upon by the Towns and Provider.

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6. **Rent.**

- i. Provider will pay the Towns One Hundred Fifty Thousand Dollars (\$150,000.00) when the first Permitted TC Provider commences utilizing the DAS, One Hundred Fifty Thousand Dollars (\$150,000.00) as of the date that two Permitted TC Providers are utilizing the DAS, and an additional One Hundred Fifty Thousand Dollars (\$150,000.00) as of the date that three Permitted TC Providers are utilizing the DAS, for a total maximum due under this Section of Four Hundred Fifty Thousand Dollars (\$450,000.00). Provider will pay the Towns the above amounts on or before the thirtieth day after the date that each of the foregoing conditions is met and the Permitted TC Provider which triggers such obligation commences paying Provider Aggregate License Fees for its use of the DAS.
- ii. During the Term, Provider shall remit to Towns percentage rent in the amount of fifteen percent (15%) of the Aggregate License Fees from the first Permitted TC Provider, twenty percent (20%) of the Aggregate License Fees from the second Permitted TC Provider utilizing the DAS at any given time, and thirty percent (30%) of the Aggregate License Fees from the third and each subsequent Permitted TC Provider utilizing the DAS at any given time. Beginning on the fifteenth day of each calendar month following the month in which the commencement date of each respective agreement with a Permitted TC Provider occurs and on the fifteenth day of each calendar month thereafter during the Term, Provider shall pay to Towns the Percentage Rent then due based on Aggregate License Fees collected in the prior calendar month.
- iii. In the event that Provider constructs its hub site on the Licensed Area or otherwise in accordance with the Hub Site Agreement (the form of which is attached hereto as Exhibit D) Provider shall also pay the Town in which such hub site is located the Hub Site Rent, pursuant to the terms of such Hub Site Agreement. The Hub Site Agreement shall provide that the Hub Site Rent shall be due on the first of the month following the commencement of construction on the Hub Site, and then monthly thereafter for the duration of the Term. The Hub Site Rent will escalate annually on the anniversary of the Hub Site Commencement Date by the amount equal to three percent (3%) of the Hub Site Rent, compounded annually.
- iv. Except for the Hub Site Rent, all sums payable by Provider under this Agreement, whether or not stated to be Percentage Rent or rent or additional rent,

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shall be collectible by Towns as “Rent,” and upon default in payment thereof Towns shall have the same rights and remedies as for failure to pay Rent (without prejudice to any other right or remedy available therefore).

- v. All Rents due and payable under the terms of this Agreement will be paid in the amounts of 33 1/3 of the Rent to the Town of Chilmark, 33 1/3 of the Rent to the Town of Aquinnah, and 33 1/3 of the Rent to the Town of West Chilmark. All Rents will be paid to the address set forth in Section C, paragraph 3.

7. **Records; Right of Inspection and Audit; Reporting.**

i. Provider shall utilize an accounting system in accordance with good accounting practices, consistently applied, that will accurately record all Aggregate License Fees derived from the DAS. Provider shall keep at its main office records conforming to such accounting system showing all Aggregate License Fees derived from the DAS for such time period, for at least three years after each twelve month period during Term. If any litigation, claim, negotiation, audit or other action involving the records is commenced prior to the expiration of the retention period, all records shall be retained until the completion of the action and resolution of all issues resulting there from, or until the end of the retention period, whichever is later.

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ii. The Provider, at all reasonable times and at the location where such records are kept in the ordinary course of Provider’s business, shall make available to the Towns and/or their designee(s), for the purposes of inspection and audit, any and all documents and records showing all Aggregate License Fees derived from the DAS.

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iii. At the end of each calendar year, the Provider shall furnish to the Towns a report showing a summary, on a monthly basis, of the all fees derived from the DAS or rents payable under this Agreement. The Towns reserve the right to request additional information, if required, when reviewing said annual report.

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8. **Confidentiality.** In connection with the receipt by Towns of any written statements calculating Percentage Rent and/or the inspection or audit as contemplated herein, Towns and the person conducting the inspection or audit agrees to keep all such information gathered as confidential and shall not disclose same to any other person or entity except on a need-to-know basis in connection with the administration of or a dispute involving this Agreement, any existing financing or any prospective sale, lease or leaseback of all or any part of the DAS, or any registration or filing with any governmental authority or pursuant to a subpoena or other judicial process. The Towns’ obligations under this Agreement are subject to and limited by (a) the Towns’ obligations pursuant to G.L. c. §4, cl. 26 and G.L c. 66, §10 (Public Records Law) and (b) the Towns’ annual financial reporting obligations and/or any other municipal reporting obligations in the course of their municipal duties.

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i. *By Provider.* The Towns shall have the right to pursue any and all remedies in law or in equity, pursuant to the terms of this Section if Provider fails to materially comply with any of the terms and conditions of this Agreement. The Towns will notify the Provider in writing of any such noncompliance (hereinafter “Notice of Non-Compliance”). The Provider shall take corrective action as necessary to eliminate the non-compliance and shall confirm in writing to the Towns within 10 days following receipt of the Notice of Non-Compliance or within such additional time following receipt of Notice of Non-Compliance that Provider is diligently pursuing corrective action and that the non-compliance has ceased or been corrected.

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ii. *By Towns.* Provider shall have the right to terminate this Agreement pursuant to the terms of this Section if the Towns fail to materially comply with any of the terms and conditions of this Agreement. Provider will notify the Towns in writing of any such noncompliance. The Towns shall take corrective action as necessary to eliminate the non-compliance and shall confirm in writing to the Provider within 10 days following such written notice or within such additional time following such written notice that the Towns are diligently pursuing corrective action and that the non-compliance has ceased or been corrected. If Towns fail to discontinue or correct such non-compliance or ceases diligently pursuing such cure and fails to give the required written confirmation to the Towns within the time stated above, the Provider may terminate this Agreement, and/or pursue any and all remedies available in law or equity, except as any such remedy is expressly limited or waived under this Agreement.

Deleted: If provider fails to cure the non-compliance with 90 days from the date of the Notice of Non-Compliance, the Towns may terminate this Agreement, and pursue any and all remedies available in law or equity, except as any such remedy is expressly limited or waived under this Agreement. The Towns, upon written request from the Provider, stating both the reason for its failure to cure within the prescribed time period and its planned corrective actions, may extend the time to cure an additional 90 days.

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**10. Regulations and Disclaimer.** With respect to all equipment and facilities Provider supplies under the terms of this Agreement, Provider shall ensure such equipment and facilities comply with the National Electric Code, National Electrical Safety Code, regulations promulgated by the United States Federal Communications Commission or any successor federal agency established for the same or similar purpose (“*FCC*”), as well as all other laws, rules and regulations which apply to the construction, operation or maintenance of such equipment and facilities. The Towns shall be responsible for ensuring that all equipment which Provider has not supplied under the terms of this Agreement is operated in compliance with all applicable statutes, ordinances, regulations, guidelines, standards; that all communication carried on the Municipal Fiber Network conforms with any applicable statutes, ordinances, regulations, guidelines, standards applicable to the operation of such networks. Furthermore, the Towns in their reasonable discretion are responsible for determining the appropriateness of any communications carried on the Municipal Fiber Network for any particular network application or communications service.

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11. **Service.** As used in this Agreement, the term “telecommunications” or “communications” service shall include in its broadest sense, all electronic or wireless transmissions of data in any form, and shall include but not be limited to information services, cable services, telecommunications services, communication services and the like.

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12. **Environmental Compliance.**

- i. Provider shall, at Provider's sole cost and expense, comply with all Environmental Laws pertaining to Provider's operations on the Licensed Area.
- ii. Provider shall not cause or permit any Hazardous Material (as defined herein) to be brought, kept, stored, or used in or about the Licensed Area except in compliance with all applicable environmental laws.
- iii. If Provider causes or permits any Hazardous Material to be brought, kept, stored, or used in or about the Premises and such activity results in the contamination of the Licensed Area, then Provider shall indemnify, save harmless, and defend the Towns, and its boards, committees, commissions, officers, attorneys, agents, and employees, against any and all lawsuits, claims, demands, damages, liabilities, losses, and expenses, including reasonable attorneys' fees and administrative expenses, that may arise, or be alleged to have arisen, out of or in connection with Provider's acts or omissions in connection with such Hazardous Material, except to the extent caused by the intentional or negligent acts or omissions of the Towns or their employees, licensees, contractors or agents. This paragraph shall survive expiration or termination of this Agreement.
- iv. Provider represents, covenants, and warrants that Provider's operations in, on, or under the Licensed Area shall be in compliance with all applicable environmental and other laws.
- v. [We think this provision should be included in the hub site agreement]The Towns will make reasonable inquiry of their Police, Fire and any other Town department(s) that may have information regarding the use, generation possible storage of Hazardous Material on, under, about or within the Licensed Area. The Towns shall make full disclosure to the Provider of any information received as a result of said inquiry.
- vi. After the Execution Date, the Towns will not, and will not permit any third party to use, generate, store or dispose of any Hazardous Material on, under, about or within the Licensed Area in violation of any law or regulation.

13. **Consents.** Whenever the consent or approval of either party is required herein, such consent or approval shall be in writing and shall not be unreasonably withheld or delayed, and, in all matters contained herein, both parties shall have an implied obligation of reasonableness, except as may be expressly set forth otherwise. [This is duplicative of paragraph 10 above]

14. **Police and Regulatory Powers.** The Provider's rights are subject to the powers of the Towns to adopt and enforce general bylaws/ordinances necessary for the safety and welfare of the public, and of general applicability and not specific to this Agreement. The Provider shall comply with all applicable laws, rules and regulations enacted by the Towns and other governmental authority pursuant to its authority. The Towns covenant that each

**Deleted:** In the event the Provider constructs its hub site on the Licensed Area, the Towns represent, warrant and agree (i) that Towns have not used, generated, stored or disposed of, or permitted the use, generation, storage or disposal of, any Hazardous Material on, under, about or within the area that Provider has constructed its Hub Site, in violation of any law or regulation, and (ii) that Towns will not, and will not permit any third party to use, generate, store or dispose of any Hazardous Material on, under, about or within the Hub Site area in violation of any law or regulation. The Towns agree to defend, indemnify and hold harmless Provider and Provider's partners, affiliates, agents and employees against any and all losses, liabilities, claims and/or costs (including reasonable attorneys' fees and costs) arising from any breach of any representation, warranty or agreement contained in this paragraph.

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Town will not recommend the construction of a DAS or otherwise act in support of the construction of a DAS other than as provided herein.

15. **System Maintenance.**

i. When installing, operating and maintaining equipment, cable and wires, the Provider shall avoid damage to structures and improvements in and along the routes authorized by the Towns, except as may be approved by the Towns if required for the proper installation, operation and maintenance of such equipment, cable and wires.

ii. ~~[This is duplicative of Paragraph 10 above in the agreement]~~ Operating and maintenance personnel shall be thoroughly trained in the use of proper safety equipment and the safe operation of vehicles and equipment. The DAS shall be routinely inspected and maintained so that conditions that are reasonably likely to develop into safety hazards for the public and/or operating and maintenance personnel can be corrected. The Provider shall install and maintain its wire, cable, fixtures, and other equipment in such a manner as shall not interfere with any installations of the Towns or any public utility serving the Towns existing at the time of such installation.

iii. Structures and lines, equipment and connections in, over, under, and upon streets, sidewalks, alleys, and public and private ways and places of the Towns, wherever situated or located shall at all times be kept and maintained in a safe and suitable condition and in good order and repair.

16. **Repairs and Restoration.** Whenever the Provider takes up or damages any pavement, sidewalk or other improvement of any public or private way or place, the same shall be replaced and the surface restored in as good condition as before entry as soon as practicable, subject to approval of the relevant Town's Department of Public Works, or their designee, provided that such approval is a requirement of general applicability and not specific to Provider or other telecommunications or cable television operators. If the Provider fails to make such restoration within a reasonable time after written notice from the Towns, the Towns may establish a reasonable time for such restoration and repairs, and shall notify the Provider in writing of the restoration and repairs required and the time fixed for the performance thereof. Upon failure of the Provider to comply within the time specified, the Towns may cause proper restoration and repairs to be made and the reasonable cost of such work shall be paid by the Provider upon demand by the Towns.

17. **Tree Trimming.** The installation, maintenance, operation and repair of the poles, cable, wires and all appliances or equipment of the DAS, shall be performed by the Provider in a manner which is intended to avoid unnecessary damage to trees whether on public or private property in the Towns and Provider shall cut or otherwise prune such trees only to the least extent necessary. No cutting of trees on Towns property shall occur except upon a permit in writing from the Towns provided that such written permit is a requirement of general applicability and not specific to Provider or other telecommunications operators. Provider shall make reasonable effort to secure the

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permission of any private property owner prior to reasonable tree trimming on such party's property.

18. **Building Moves.** In accordance with applicable laws, the Provider shall, at its expense, upon the request of any person holding a building moving permit issued by the Towns, temporarily raise or lower its wires to permit the moving of a building.

19. **Dig Safe.** The Provider shall comply with all applicable "DIG SAFE" provisions pursuant to G.L.C. 82.

**20. Disconnection and Relocation.**

i. The Provider shall protect, support, temporarily disconnect, relocate in the same street, or other public way and place, or remove from any street or any other public ways and places, any of its property as required by the Towns or their designee(s) by reason of traffic conditions, public safety, street construction, change or establishment of street grade, or the construction of any public improvement or structure by any Towns department acting in a governmental capacity, provided that the Towns shall reimburse Provider for the reasonable costs incurred by Provider to fulfill such requirements within 30 days of Provider's written request therefore. Except in the event of emergency as described in Section 21 below, Towns will give Provider 180 days' prior written notice of any disconnection, relocation or removal required pursuant to this section. The Towns will cooperate with Provider to expedite any needed permits or approvals to effect any relocation of any part of the DAS. In requiring the Provider to protect, support, temporarily disconnect, relocate or remove any portion of its property, the Towns shall require no more of Provider, than any other party attached to the pole(s).

**21. Emergency Removal.**

i. If, at any time, in case of fire or disaster in the Towns, it shall be necessary in the reasonable judgment of the Towns to cut or move any of the wires, cable or equipment of the DAS, the Towns shall have the right to do so without cost or liability, provided however that, wherever possible, the Towns gives Provider as much notice and the ability to relocate wires, cable or other equipment as is practicable under the circumstances.

ii. In either case, the Provider shall have the right to seek reimbursement under any applicable insurance or government program for reimbursement.

**22. Continuity of Service.** Except where there exists an emergency situation necessitating a more expeditious procedure, the Provider shall use reasonable efforts to interrupt service for the purpose of DAS construction, routine repairing or testing the DAS only during periods of minimum use. When necessary service interruptions can be anticipated, the Provider shall use reasonable efforts to notify the Towns prior to the service interruption and the public via message on the community channel community bulletin board, if such a bulletin board is available.

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23. **Indemnification.**

- i. The Provider shall at its sole cost and expense protect, indemnify, defend, and hold the Towns, their agents, officers, elected officials and employees harmless from any and all claims, actions, liabilities, losses (including economic losses) and costs arising out of any actual or alleged:
  - a. Bodily injury, sickness, disease or death, or injury or destruction of tangible property including the loss of use resulting there from, or any other damage or loss arising out of, or claimed to have resulted in whole or in part from any actual or alleged negligent or intentional misconduct of the Provider or one of Provider's subcontractor , anyone directly or indirectly employed by any of them, or anyone for whose acts any of them may be liable in the performance of work under this Agreement; or
  - b. Violation of law, statute, ordinance, governmental administration order, rule or regulation by Provider with respect to the DAS or otherwise in exercising Provider's rights granted under this Agreement; or
  - c. Liens, claims or actions made by Provider or any sub-contractor or other party performing work on the DAS.
- ii. Any costs or expenses, including reasonable attorney's fees, incurred by the Towns to enforce this Agreement shall be borne by Provider, provided that the Towns prevail with respect to such action.
- iii. The Towns shall fully cooperate with the reasonable requests of the Provider in its participation in, and control, compromise, settlement or resolution or other disposition of any such claim or proceeding.
- iv. This provision will survive any termination or expiration of the Agreement.

Deleted: <#>Any other third party claims arising from Provider's acts or omissions hereunder unless proximately caused by Town.¶

24. **Insurance.**

- i. The Provider will carry insurance throughout the Term of this Agreement and any removal period with the Towns listed as an additional insured with an insurance company authorized to conduct business in The Commonwealth of Massachusetts. The amount of such insurance shall be:

Workers Compensation-	Statutory Limits
Automotive Liability-	Bodily Injury- \$500,000 per occurrence
	Property Damage-\$500,000 per occurrence
General Liability	Aggregate- \$3,000,000 annually
	Bodily Injury- \$1,000,000 per occurrence

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Property Damage- \$1,000,000 per occurrence

Professional Liability (Errors & Omissions)-

\$1,000,000 per claim and in the aggregate.

ii. All insurance coverage, including workers' compensation, shall be maintained throughout the period of this Agreement. All expenses incurred for said insurance shall be at the sole expense of the Provider. Policy will contain a provision that the Towns will receive 30 days' written notice prior to any cancellation.

**25. Damage or Destruction.** If, after the expiration of the Initial Term, the Licensed Area or DAS is destroyed or damaged so as to prevent the intended use of the DAS, Provider may elect to terminate this Agreement as of the date of the damage or destruction by written notice to the Towns. In such event, all obligations of Provider to the Towns shall cease to accrue as of the date of the damage or destruction, except for the rights of the parties set forth in Section C, paragraph (8) of this Agreement.

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### **B. MUNICIPAL USE OF MUNICIPAL FIBER NETWORK**

**1. Municipal Fiber Network.** Upon the terms stated herein, Provider will provide dedicated dark optical fibers to the Towns' governmental use at no cost to the Towns. The dedicated dark optical fibers will consist of up to twelve strands of single mode optical fibers terminated with optical connectors (the "*Terminated Fibers*") contained within cables deployed within the Towns by Provider as is described more fully in Exhibit A, attached hereto (for the purposes of this Agreement, the "*Municipal Fiber Network*"). Such Terminated Fibers shall be installed so that there are twelve such strands running through the DAS, through and including each node. The intersection where the Municipal Fiber Network will end and the Towns in-building or other network facilities will begin (the "Demarcation Box") shall be specifically identified within Exhibit A. Any lateral connections and/or additional Demarcation Boxes requested by the Towns shall be subject to mutual agreement with Provider and would be further subject to the Towns paying or reimbursing Provider for the cost thereof. Maintenance and/or other obligations with respect to the DAS and Municipal Fiber Network shall be as set forth in this Agreement.

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**2. Towns' In-Building and Networking Facilities.** The costs of construction, maintenance, repair and operation of network facilities and equipment comprising the Towns' in-building or other networking facilities not comprising a part of the Municipal Fiber Network (or the Public Safety System contemplated under **Section 15 hereof**) shall be the sole responsibility of the Towns. Any obligations of Provider with respect to the maintenance or repair of the Municipal Fiber Network shall be limited to those expressly provided for in this Agreement.

**3. Resale.** Except as provided in Paragraph 14 below, the Municipal Fiber Network may only be used for the Towns' governmental use. The Towns may not sell, resell, license, lease or sublease capacity or allow use of the Municipal Fiber Network or

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communications services provided over the Municipal Fiber Network to any person or entity, except for those persons or entities that have agreed to provide governmental service, e.g. emergency response services, to the Towns.

**4. Permitted Communications.** The Municipal Fiber Network may be used by the Towns, as needed in their delivery of any governmental services, for lawful voice, video, data and other telecommunications services only. The Towns shall be solely responsible for ensuring that all uses of the Municipal Fiber Network and all communications carried on the Municipal Fiber Network are at all times in compliance with all local, county, state and federal laws and regulations. To the extent legally permissible, the Towns and Provider acknowledge and agree that the provision of the Terminated Fiber for the Municipal Fiber Network by virtue of this Agreement does not constitute the provision of telecommunications services by Provider nor does it constitute a common carrier offering by Provider.

**5. Technical Assistance.** The Towns agree that the Provider and/or its approved contractors shall provide further technical assistance, as may be needed, including but not limited to all splicing, testing and technical work (together, “*Technical Assistance*”) on the Municipal Fiber Network. The charges, which shall be reasonable and approved by the Towns prior to any obligation for payment by the Towns, for any Technical Assistance including supplies and labor will be payable by the Towns within 60 days of presentation and approval of an invoice by Provider. Provider will notify the Towns prior to incurring any costs when any additional service will require compensation by the Towns. Any and all work shall be done in accordance with all applicable laws, rules and regulations.

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**6. End User Equipment.** The end users of the Municipal Fiber Network shall purchase at their own cost all necessary end user equipment for Municipal Fiber Network applications. Provider in no way shall be deemed to be providing, or to be obligated to provide or maintain, any network or end user equipment under this Agreement or otherwise.

**7. Municipal Fiber Network Installation.** Provider shall construct the Municipal Fiber Network concurrently with the construction of the DAS. Upon completion (including testing by Provider) of the Municipal Fiber Network, Provider shall notify the Towns to give the Towns the opportunity to conduct their own tests, which tests shall be conducted within 21 days of such notification. Upon expiration of the 21 day period for testing by the Towns or the Towns’ completion of such testing, whichever shall occur first and the correction of any deficiencies, the Municipal Fiber Network shall be deemed complete.

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(a) *Installation of the Network.* Provider agrees to engineer, procure materials and equipment, and install and connect the Municipal Fiber Network, on a Turnkey Basis, as more specifically described in the Municipal Fiber Network Technical Specifications set forth in Exhibit B to this Agreement.

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(b) **Fiber Access to Towns' Buildings.** The Towns shall be responsible for all connections to the Municipal Fiber Network from the Demarcation Box(es) to any of the Towns' buildings or other network facilities, including any lateral connections, (Can ATC provide for these connections?) [These connections were not contemplated in the RFP response]

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(c) *Schedule.* Provider shall commence installation of the Municipal Fiber Network on the Commencement Date, as defined in Section A.1. Except for delays caused by circumstances or events beyond the reasonable control of Provider, failure to commence such installation by the Commencement Date, or such other date as approved by the Towns, shall be a material breach of this Agreement.

8. **Maintenance and Repair.** Provider agrees to keep the Municipal Fiber Network in good condition and in working order, for the Term of this Agreement, wear and tear and damage caused by the employees, licensees, contractors or agents of the Towns excepted. Provider shall supply all Maintenance and Repair required to the Municipal Fiber Network to keep it in good mechanical and working order. The Maintenance and Repair will be completed by Provider or by one of the Provider's approved contractors. The charges for any Maintenance and Repair costs, including supplies and labor, will be payable by the Towns within 30 days of presentation and approval of an invoice by Provider. Provider will notify the Towns prior to incurring any costs when any additional service will require compensation by the Towns and obtain the approval of the Towns prior thereto.

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9. **Towns' Right to Use the Municipal Fiber Network.** In the event that (a) Provider transfers its interest in this Agreement or (b) Provider shall (i) apply for or consent to the appointment of a receiver, trustee or liquidator of it or any of its property, (ii) make a general assignment for the benefit of creditors, (iii) be adjudicated as bankrupt or insolvent, or (iv) file a voluntary petition in bankruptcy or a petition or an answer seeking reorganization, arrangement, insolvency, readjustment of debt, dissolution or liquidation under any law or statute or an answer admitting the material allegations of a petition filed against it in any proceeding under any such law or statute, provided the Towns is not then in default of the terms of this Agreement, then such transferee, receiver, trustee, liquidator or debtor-in-possession shall be bound by the terms of this Agreement and the Towns shall retain the right to utilize the Municipal Fiber Network as set forth in this Agreement. Nothing contained herein shall be construed as a consent to or waiver of the right of Provider to object to an involuntary transfer or involuntary petition for bankruptcy.

Deleted: <#>The charges for any Maintenance and Repair costs, including supplies and labor, will be payable by the Towns within 30 days of presentation and approval of an invoice by Provider. Provider will notify the Towns prior to incurring any costs when any additional service will require compensation by the Towns and obtain the approval of the Towns prior thereto. Nothing contained herein shall preclude the Towns from obtaining its own maintenance and repair providers, provided that access to the Municipal Fiber Network shall be coordinated with Provider and the work to be performed and the contractors to perform the work must be approved in advance by Provider, such approval not to be unreasonably withheld, due to the location of the Municipal Fiber Network within the DAS. ¶

10. **Ownership of the Municipal Fiber Network.** Notwithstanding the Towns' rights to utilize the Municipal Fiber Network, Provider shall own the Municipal Fiber Network.

11. **No Payment Obligations by the Towns.** Provider shall engineer and procure all materials and equipment and install the Municipal Fiber Network at its sole cost and expense. No payments shall be owed by the Towns to Provider hereunder with respect to the Municipal Fiber Network unless otherwise stated herein. The installation of the

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Municipal Fiber Network shall be additional consideration for the Pole Attachment License Agreement and other agreements, permits, licenses or approvals with Provider.

**12. Towns' Right to Modify the Municipal Fiber Network.** The Towns shall have the right to modify, enlarge or make any other improvements to the Municipal Fiber Network or to connect the Municipal Fiber Network to the Towns' buildings or other network facilities at the Towns' sole cost. Any modifications or improvements to the Municipal Fiber Network shall be performed by Provider or Provider's contractors at the Towns' sole cost. In the event the Towns exercise their right to expand the Municipal Fiber Network, the Provider shall work cooperatively with the Towns and/or the Towns' contractors during completion of any enlargement. Notwithstanding anything to the contrary, Provider's Maintenance and Repair obligations shall not extend to modifications, enlargements or improvements made by the Towns to the Municipal Fiber Network or otherwise extend beyond the location of any Demarcation Box(es) identified on Exhibit A at the time of execution hereof. **13. No Interference with DAS; Municipal Fiber Network.** The Towns will consult with Provider before making any changes or modifications to the Municipal Fiber Network which may affect the DAS. The Towns shall coordinate their work on the Municipal Fiber Network with Provider to ensure that modifications thereto do not interfere with the DAS. From and after acceptance of the completed DAS and Municipal Fiber Network by the Towns, Provider shall not take any actions which will interfere with or disrupt the operation of the Municipal Fiber Network.

**14. Public Safety System.** Upon request by the Towns, Provider will install a public safety system as described and defined in Exhibit C (the "Public Safety System") for use by the Towns, which system shall utilize the fiber contained within the Municipal Fiber Network only and no other portion of the DAS. The cost to the Towns to deploy the Public Safety System will be the actual cost to Provider which will include Provider's internal labor cost, without mark-up for overhead, and Provider will obtain Towns' approval of such costs prior to installation. Towns will pay Provider such costs within 30 days of invoice by Provider. Except to the extent that maintenance of the Municipal Fiber Network under Section 8 hereof, Provider shall have no other obligations to maintain, repair or replace the Public Safety System. **15. Towns' Wi-Fi Network.** Notwithstanding any provision contained herein to the contrary, Towns may continue to maintain and utilize its existing Wi-Fi network. In the event that a Permitted TC Provider provides Wi-Fi service, Towns agree to discontinue the use of its Wi-Fi network.

**C. LICENSE AGREEMENT**

**1. Grant of License.** Towns hereby grants to Provider a non-exclusive license to locate, construct, install, operate, control, replace, repair, relocate and maintain a DAS, including, but not limited to, the right to locate new poles or support structures within, across, above, over and under those public rights of way within the Towns (the "Licensed Area"). This License is granted to Provider, its agents, employees and contractors, all of which shall be deemed to be Provider for purposes of this License.

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**2. Limitations of License.**

a. Provider acknowledges that it must obtain permission by separate agreement to attach the DAS to existing poles and related structures located within the Licensed Area.

b. Provider acknowledges that this non-exclusive license does not authorize drops from the poles or fiber optic cable to buildings, other than to Provider's telecommunication equipment shelters, without the prior approval of the Towns, which shall not be unreasonably withheld or delayed.

c.

3. Provider shall use the Licensed Area for the purposes of (i) installing, operating, maintaining, and replacing a multi-carrier DAS, including poles, support structures, and all Equipment for all lawful telecommunications purposes, including, but not limited to, providing telecommunications companies the ability to provide voice and/or data, narrowband or broadband wireless and other related wireless services to such companies' respective customers in or immediately surrounding the DAS, and/or (ii) granting one or more subleases or licenses with respect to the Licensed Area and access to the Equipment (each sublease or license, a "Collocation Agreement") to one or more telecommunications companies (each, a "Permitted TC Provider") for attachment of its/their radio cabinets, racks and other equipment to the Equipment for the purpose of receiving and/or distributing the wireless frequency within or immediately surrounding the DAS; all of the foregoing to be used in connection with a wireless communications business and related activities (collectively, "Permitted Use")

4. **Provider's Obligations.** At all times during the Term of this Agreement, Provider shall, at its sole cost and expense, perform all repairs, replacements and maintenance to the Licensed Area to the extent reasonably required to support and maintain the DAS in good condition and working order and which repairs, replacements and maintenance are necessary as a result of the act or omission of Provider in the exercise of the rights granted by this Agreement.

5. **Applicable Rules and Regulations.** Provider shall observe and comply with all laws, rules and regulations of the federal, state, county and local government applicable. It is Provider's sole responsibility and obligation to determine any approvals or permits required for its completion of the DAS, as described herein. The Towns agree that any such ordinances or regulations promulgated, hereinafter, by any of the Towns shall be reasonable and nondiscriminatory. To the extent the Towns promulgate any additional ordinances and regulations that are applicable to Provider and its obligations under this Agreement, the Towns shall not require Provider to modify the DAS as long as the DAS when installed would comply with all applicable ordinances and regulations of the Towns in effect as of the Effective Date, unless, however, compliance with the applicable local ordinance and/or regulation is mandated by other governmental authorities, including but not limited to the county, state and/or federal government.

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6. **Storage.** Provider shall not use the Licensed Area for storage of either vehicles or materials which do not comprise a portion or part of the DAS.

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7. **Contact Person; NOC.** The Provider shall provide and maintain an emergency contact person or network operating center and telephone number with the Towns during the Term, which person or center shall at all times be reachable by pager and/or mobile phone.

8. **Removal.** In the event of termination of or at the expiration of this Agreement, unless otherwise agreed upon in writing between the Towns and Provider, ~~Provider may~~ within 60 days of the date thereof elect to, submit a plan and schedule to the Towns under which it will remove the DAS, the Municipal Fiber Network and the Public Safety System (to the extent any portion of the Public Safety System is located in the Licensed Area) from the Licensed Area within 12 months from date of such termination or expiration. The Provider shall surrender the Licensed Area in the same or better condition that the Licensed Area was at the Commencement Date, wear and tear excepted.

Deleted: the Towns may within 90 days exercise an option to purchase ("Option Period") the DAS and Municipal Fiber Network for \$ 10 (ten dollars) (the "Option to Purchase."). The Towns may exercise the Option to Purchase by providing notice to the Provider in accordance with the manner set forth in this Agreement. If after expiration of the Option Period, the Towns have not exercised the Option to Purchase, the

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9. **Security.** Towns shall have no responsibility or obligation to police the Licensed Area or to provide any security with respect thereto except in the Towns' ordinary performance of their governmental police functions, and Towns shall have no liability for any claim by any person on account of Provider's use thereof.

**D. MISCELLANEOUS**

Deleted: <#>Provider shall provide the Towns with a performance bond in a form acceptable to the Towns securing its satisfactory performance of its removal obligations under Section B, paragraph 8, of this Agreement. The performance bond shall be issued by a surety licensed to issue insurance in the Commonwealth of Massachusetts and shall be in a form acceptable to the Towns. ¶

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1. **Breach.** A breach or violation of any material provision of this Agreement shall be deemed a breach or violation of the entire agreement and shall entitle either party to exercise any and all remedies available to it.

2. **Intentionally Omitted.**

3. **Notice.** Whenever the Towns or Provider shall desire to give or provide any notice, demand, request or other communication with respect to this Agreement, each such notice, demand, request, or other communication shall be in writing and shall not be effective for any purpose unless same shall be given or sent by personal delivery to the party or parties to whom such notice, demand, request or other communication is directed or by mailing the same to such party or parties by certified mail, postage prepaid, return receipt requested, or via a nationally recognized overnight courier service, addressed as follows:

If to the Towns:

Office of the Chilmark Board of Selectmen

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401 Middle Road  
Chilmark, MA 02535-0119

With a copy to:  
Office of the Aquinnah Board of Selectmen  
**[need address]**

With a copy to:  
Office of the West Tisbury Board of Selectmen  
**[need address]**

If to Provider:  
ATC Outdoor DAS, LLC  
116 Huntington Avenue  
Boston, MA 02116  
Attn: Law Department

With a copy to:  
ATC Outdoor DAS, LLC  
400 Regency Forest Drive  
Cary, NC 27518  
Attn: Director, DAS Solutions

Service may also be in the manner permitted for service of civil process. Any change in an address must include a valid street address in order for said change to be effective.

**Incorporation of RFP and Bid Package.** The RFP, the American Tower-Up Island Distributed Antenna System Business & Technical Proposal dated October 6, 2008 (the “Bid Package”) and the written communications between the Towns and Provider attached hereto as Exhibit F are incorporated herein by reference. In the event of a conflict between the Agreement, the RFP, the Bid Package and Exhibit F, this Agreement shall control.

**4. Rights Cumulative.** Unless expressly provided to the contrary in this Agreement, each and every one of the rights, remedies, and benefits provided by this Agreement shall be cumulative and shall not be exclusive of any other such rights, remedies, and benefits allowed by law or in equity.

5. **Non-Waiver.** The failure of Towns or Provider to enforce against the other any term, covenant, or condition of this Agreement shall not be deemed a waiver thereof, nor void or affect the right of the aggrieved party to enforce the same term, covenant, or condition on the occasion of any subsequent breach or default; nor shall the failure of either party to exercise any option in this Agreement upon any occasion arising therefore be deemed or construed to be a waiver of the right to exercise that same kind of option upon any subsequent occasion.

6. **No Joint Venture.** It is hereby acknowledged and agreed that nothing contained in this Agreement or the documents incorporated herein by reference shall be deemed or construed as creating the relationship of principal and agent, partnership or joint venture between the parties hereto, it being agreed that no provision herein contained nor any acts of the parties herein shall be deemed to create any relationship between the parties hereto other than the relationship of Towns and Provider.

7. **Warranties Regarding Execution.**

(a) In order to induce Provider to enter into this Agreement, the Towns each hereby warrant and represent to Provider as follows:

(i) each has the authority and legal right to make, deliver, and perform this Agreement and has taken all necessary actions to authorize the execution, delivery, and performance of this Agreement; and

(ii) the execution, delivery, and performance of this Agreement (a) is not prohibited by any requirement of law under any contractual obligation of each Town; (b) will not result in a breach or default under any agreement to which each Town is a party or to which each Town is bound; and (c) will not violate any restrictions, court order, or agreement to which each Town is subject; and

(iii) the party executing this Agreement on behalf of each Town has full authority to bind the Town to the obligations set forth herein.

(b) In order to induce each Town to enter into this Agreement, Provider hereby warrants and represents to Towns as follows:

(i) Provider has the authority and legal right to make, deliver, and perform this Agreement and has taken all necessary actions to authorize the execution, delivery, and performance of this Agreement; and

(ii) the execution, delivery, and performance of this Agreement (a) is not prohibited by any requirement of law under any contractual obligation of Provider; (b) will not result in a breach or default under any agreement to which Provider is a party or to which Provider is bound; and (c) will not violate any restrictions, court order, or agreement to which Provider is subject; and

(iii) the party executing this Agreement on behalf of Provider has full authority to bind Provider to the obligations set forth herein; and

(iv) Provider shall maintain the rights to operate in the Commonwealth of Massachusetts during the Term of this Agreement, and upon request of the Towns shall provide a Certificate of Legal Existence or Registration from the Office of the Massachusetts Secretary of State. Provider, at its sole cost and expense, shall maintain throughout the term of this Agreement all permits, licenses and approvals necessary or required for Provider to perform the work and services pursuant to this Agreement.

8. **Severability**. If any term, covenant, or condition of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remainder of the provisions hereof shall remain in full force and effect and shall in no way be affected, impaired, or invalidated thereby.

9. **Entire Agreement**. This Agreement shall constitute the entire agreement of the parties hereto; all prior agreements between the parties, whether written or oral, are merged herein and shall be of no force and effect.

10. **Successors and Assigns**. The terms, covenants, and conditions of this Agreement shall bind and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, successors, and assigns.

11. **Grammatical Usage and Construction**. In construing this Agreement, feminine or neuter pronouns shall be substituted for those masculine in form and vice versa, and plural terms shall be substituted for singular and singular for plural in any place in which the context so requires.

12. **Interpretation**. This Agreement shall be construed without regard to the identity of the party who drafted the various provisions hereof. Moreover, each and every provision of this Agreement shall be construed as though all parties hereto participated equally in the drafting thereof. As a result of the foregoing, any rule or construction that a document is to be construed against the drafting party shall not be applicable hereto.

13. **Headings**. The table of contents, heading, titles, and captions in this Agreement have been inserted only for convenience and in no way define, limit, extend, or describe the scope or intent of this Agreement.

14. **Amendments and Modifications**. This Agreement may not be modified, amended, discharged or supplemented except by written instrument executed by and delivered to each of the parties hereto.

15. **Counterpart Execution; Scanned Copy**. This Agreement may be executed in several counterparts, each of which, when executed, shall be deemed to be an original, but all of which together shall constitute one and the same instrument. The parties agree that a scanned or electronically reproduced copy or image of this Agreement bearing the signatures of the parties hereto shall be deemed an original and may be introduced or submitted in any action or proceeding as competent evidence of the execution, terms and existence of this Agreement notwithstanding the failure or inability to produce or tender

an original, executed counterpart of this Agreement and without the requirement that the unavailability of such original, executed counterpart of this Agreement first be proven.

**16. Calendar Days and Time.** Any reference herein to "day" or "days" shall mean calendar days and not business days. If the date for giving of any notice required to be given hereunder or the performance of any obligation hereunder falls on a Saturday, Sunday, or federal holiday, then said notice or obligation may be given or performed on the next business day after such Saturday, Sunday, or federal holiday.

**17. Transfer or Assignment.**

(a) This Agreement or control hereof shall not be transferred or assigned without the prior written consent of the Towns, which consent shall not be unreasonably withheld or delayed. Notwithstanding the foregoing, Provider may assign this Agreement to an affiliate upon prior notice to the Towns and upon demonstration that affiliate has adequate financial and other resources necessary to perform all the Provider's obligations pursuant to this Agreement.

(b) The Towns may not sell, transfer or assign their rights or delegate their duties under this Agreement without the prior written consent of Provider, which consent shall not be unreasonably withheld or delayed.

(c) Any transfer or assignment of Agreement shall by its terms be expressly subject to the terms and conditions of this Agreement and obligations, if any, arising from the award of this Agreement. Any transferee or assignee of this Agreement shall be subject to the terms and conditions of this Agreement.

**18. Delays.** Neither party will be liable to the other for any failure or delay in rendering performance arising out of causes beyond its control and without its fault or negligence. Date or times of performance will be extended to the extent of delays excused by this section, provided that the party whose performance is affected notifies the other promptly of the existence and nature of such delay.

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**19. Force Majeure.** "Force Majeure" shall mean acts of God; hurricanes; tornadoes; fires; epidemic; landslides; earthquakes; floods; strikes; lock-outs or other industrial disturbances; acts of public enemies; acts, failures to act or orders of any kind of any governmental authorities acting in their regulatory or judicial capacity; insurrections; prolonged inability of suppliers to provide essential materials; military action; war, whether or not it is declared; sabotage; riots; civil disturbances; explosions; or any cause or event, not reasonably within the control of the Party claiming *Force Majeure*; provided, however, that *Force Majeure* shall not include the financial inability of the Provider, whether or not caused by any of the foregoing factors. In any case where either Party is required hereby to do any act, delays caused by *Force Majeure* shall not be counted in determining the time during which such act shall be completed, whether such

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time be designed by a fixed date, a fixed time, or “a reasonable time,” and such time shall be deemed to be extended by the period of the delay; provided that (i) the non-performing Party, within five (5) business days after the occurrence of the *Force Majeure*, gives the other Party written notice describing the particulars of occurrence; (ii) the suspension of performance be of no greater scope and of no longer duration than is required by the *Force Majeure*; (iii) no obligations of either Party that arose prior to the occurrence causing the suspension of performance be excused as a result of the occurrence; and (iv) the non-performing Party shall use its best efforts to remedy with all reasonable dispatch the cause or causes preventing it from carrying out its obligations. Notwithstanding the foregoing, neither Party shall be required to settle strikes, lockouts or other industrial disturbances by acceding to the demands of the opposing party or parties when such course is, in its judgment, not in its best interest. In no event, however, shall any extension of time under this section exceed sixty (60) days.

**20. Subcontractors.** All sub-contractors must be approved in writing by the Towns, except in cases of emergency where seeking such approval would not be practicable. Provider will be responsible to the Towns for the acts and omissions of any sub-contractor and its employees. All responsibilities relating to the performance of this Agreement remain the responsibility of Provider.

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**21. Third Party Beneficiaries.** There are no third party beneficiaries to this Agreement.

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**22. Dispute Resolution.** This Agreement shall be construed under and governed by the laws of the Commonwealth of Massachusetts, without regard to its rules regarding choice of laws. The Parties agree to use their respective best efforts to resolve any dispute(s) that may arise regarding this Agreement. Unless otherwise expressly provided for in this Agreement, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under this Agreement between the Parties.

Any dispute that arises under or with respect to this Agreement shall in the first instance be the subject of informal negotiations between the Towns and the Provider, who shall use their respective best efforts to resolve such dispute. The period for informal negotiations shall not exceed fourteen (14) calendar days from the time the dispute arises, unless it is modified by written agreement of the Parties. The dispute shall be considered to have arisen when one Party sends the other a written notice that identifies with particularity the nature, and the acts(s) or omission(s) forming the basis of, the dispute.

In the event that the parties cannot resolve a dispute by informal negotiations, the parties involved in the dispute agree to submit the dispute to mediation. Within fourteen (14) days following the expiration of the time period for informal negotiations, the parties involved in the dispute shall propose and agree upon a neutral and otherwise qualified

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mediator. In the event that the parties fail to agree upon a mediator, the parties shall request that the American Arbitration Association, Boston, Massachusetts, appoint a mediator. The period for mediation shall commence upon the appointment of the mediator and shall not exceed sixty (60) days, unless such time period is modified by written agreement of the parties involved in the dispute. The decision to continue mediation shall be in the sole discretion of each party involved in the dispute. The parties will bear their own costs of the mediation. The mediator's fees shall be shared equally by all Parties involved in the dispute.

In the event that the Parties cannot resolve a dispute by informal negotiations or mediation, either Party may seek judicial enforcement. Notwithstanding the foregoing, injunctive relief may be sought without resorting to alternative dispute resolution to prevent irreparable harm that would be caused by a breach of this Agreement. In any judicial proceeding, the "Prevailing Party" shall be entitled to payment from the opposing party of its reasonable costs and fees, including but not limited to attorneys' fees and travel expenses, arising from the civil action. As used herein, the phrase "Prevailing Party" shall mean the party who, in the reasonable discretion of the finder of fact, most substantially prevails in its claims or defenses in the civil action. Venue for any judicial proceeding involving a dispute arising from this Agreement shall be Dukes County Superior Court, Massachusetts. This Section shall not be construed to limit any rights a Party may have to intervene or join in any action, whether litigation or alternative dispute resolution, wherever pending, relating to the Work in any way in which the other is a Party.

The Provider shall diligently carry on the its obligations under this Agreement during any dispute resolution proceedings, unless otherwise agreed to by the Towns in writing. No dispute under this Agreement shall give the Provider the right to terminate its obligations under this Agreement pending dispute resolution.

**IN WITNESS WHEREOF**, the parties have caused this Agreement to be made effective and executed as of the day and year first above written.

Provider  
ATC Outdoor DAS, LLC

**Town of Chilmark**  
**By its Board of Selectmen**

\_\_\_\_\_  
Name: \_\_\_\_\_  
Duly Authorized  
\_\_\_\_\_  
Date

\_\_\_\_\_  
Name: \_\_\_\_\_  
Duly Authorized  
\_\_\_\_\_  
Date

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**Town of Aquinnah  
By its Board of Selectmen**

\_\_\_\_\_  
Name: \_\_\_\_\_  
Duly Authorized

\_\_\_\_\_  
Date

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**Town of West Tisbury  
By its Board of Selectmen**

\_\_\_\_\_  
Name: \_\_\_\_\_  
Duly Authorized

\_\_\_\_\_  
Date

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**Exhibit A**  
**Description of the Municipal Fiber Network**

**TO BE PROVIDED BY ATC**  
**Exhibit B**  
**Technical Specifications of Municipal Fiber Network**

**TO BE PROVIDED BY ATC**

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**Exhibit C**  
**Public Safety System**

**TO BE PROVIDED BY TOWNS**

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**Exhibit D**

**Form of Hub Site Agreement**

(to be utilized if Provider selects property owned by Towns for the location of the DAS Hub)

**TO BE PROVIDED BY TOWNS UNDER SEPARATE COVER**

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**Exhibit E**  
**Written Communication between Towns and Provider**

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Form of New Pole Placement  
Agreement¶  
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**TO BE PROVIDED BY TOWNS  
UNDER SEPARATE COVER¶**  
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**Exhibit F¶**  
**Written Communication between  
Towns and Provider**

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**Right of Inspection of Licensed Areas.**

The Towns or their designee(s), may from time to time, conduct an inspection of part or all of the construction, installation and/or upgrade work performed subject to the provisions of this Agreement and to make such tests as it shall deem necessary to ensure compliance with the terms and conditions of this Agreement and all other applicable law. Any such inspection shall be conducted at reasonable times upon reasonable notice to Provider except that inspection of cable wires in plain view on a public way shall not require any such notice. Provider shall have the right to be present at any such inspection. Any such inspection shall not interfere with the Provider's operations.

Any tests conducted by the Towns shall be at the sole cost and expense of the Towns and shall have the prior written approval of the Provider, such approval shall not be unreasonably withheld. Should any tests conducted by the Towns disclose a condition of material non-compliance, the Provider shall reimburse the Towns for all incurred test costs.

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The cost to the Towns to deploy the Public Safety System will be the actual cost to Provider which will include Provider's internal labor cost, without mark-up for overhead, and Provider will obtain Towns' approval of such costs prior to installation. Towns will pay Provider such costs within 30 days of invoice by Provider. Except to the extent that maintenance of the Municipal Fiber Network under Section 8 hereof, Provider shall have no other obligations to maintain, repair or replace the Public Safety System. Provider agrees to keep the Public Safety System in good condition and in working order for the term of this Agreement, any damage proximately caused by the employees, licensees, contractors or agents of the Towns excepted. Provider shall supply any and all parts, mechanisms, devices and servicing required to the Public Safety System to keep it in good mechanical and working order.

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including, but not limited to, the right to locate new poles or support structures,

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Provider acknowledges that this non-exclusive license does not authorize the installation of any new pole placements within the Licensed Area. To the extent Provider's proposed DAS requires the addition of new pole placements for attachment of any or all of the DAS, the Provider shall observe and comply with all applicable laws, rules and regulations of the local government in which the new pole is to be placed, which may include, among other things, the Provider's execution of a New Pole Placement Agreement, in the form annexed hereto as Exhibit "E."

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as a result of the act or omission of Provider in the exercise of the rights granted by this Agreement.