

## REVIEW, INSPECTION AND PROCESS RIGHT-OF-WAY APPLICATION PERMIT REQUESTS AGREEMENT

This **REVIEW, INSPECTION AND PROCESS RIGHT-OF-WAY APPLICATION PERMIT REQUESTS AGREEMENT** ("Agreement") is made by and between the City of El Mirage, an Arizona municipal corporation (the "City"), and Wyverd Group LLC, a Delaware corporation, on behalf of its subsidiaries and related organizations, Wyverd Connect LLC and Accipiter Communications Inc. d/b/a Zona Wyverd (collectively, "Wyverd"). The City and Wyverd may each be referred to in this Agreement as a "Party" or collectively as the "Parties."

### RECITALS

**WHEREAS**, the City entered into a Wired Telecommunications License and Right-of-Way Use Agreement with Wyverd Connect LLC on or about October 19, 2021 (via El Mirage City Council) (the "Wyverd Connect License") (the "ROW License"), which is hereby incorporated by this reference;

**WHEREAS**, pursuant to the ROW License, Wyverd has submitted and will submit application requests to the City for right-of-way permits to construct its wired, fiber network within the City's right-of-way;

**WHEREAS**, given Wyverd's high volume of right-of-way permit requests, Wyverd has requested that the City approve the use of third party inspection consultant(s) ("Inspection Consultant(s)") to review, inspect, and process Wyverd's right-of-way application permit requests in accordance and compliance with the City's Code, policies, rules, engineering regulations, engineering guidelines, and/or engineering standards ("Work");

**WHEREAS**, Wyverd has agreed to directly and fully compensate the Inspection Consultant(s), for all fees, costs, and expenses associated with the Inspection Consultant and all work for, in response to, on behalf of, or related to Wyverd's right-of-way permit application requests; and

**WHEREAS**, it is the intent of this Agreement is to have the Inspection Consultant(s) be fully directly and fully compensated by Wyverd. In the event the City is required to pay any out-of-pocket costs associated with the Inspection Consultant, Wyverd shall immediately, within ten (10) business days of delivery of an invoice, reimburse the City for all out-of-pocket fees/costs incurred by the City.

**NOW, THEREFORE**, in consideration of the foregoing recitals, the mutual agreements contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the City and Wyverd agree as follows:

### TERMS AND CONDITIONS

1. **RECITALS.** The above Recitals are incorporated by this reference and are made a part of this Agreement as if fully set forth herein.
2. **TERM, TERMINATION, AND AMENDMENT.** This Agreement shall remain in full force and effect for a term of thirty-six (36) months from the date of the last signature hereto, unless terminated sooner as set forth herein. This Agreement is for the convenience of the City and the City may terminate this Agreement at any time, with or without cause, for any reason or no reason, without further penalty, damage, or obligation to Wyverd, by providing written notice of termination to Wyverd. This Agreement shall be deemed terminated five (5) business days after the City sends written notice to Wyverd. This Agreement may be modified only upon a written agreement signed by authorized representatives of the City and Wyverd.
3. **INSPECTION CONSULTANTS.**
  - a. Subject to paragraph 2.b. below, Wyverd shall submit to the City, for its consideration and approval, a list of no less than three (3) Inspection Consultants and/or companies that perform Inspection Consulting work. The City shall review Wyverd's list of Inspection Consultants and if acceptable, approve one or more Inspection Consultants. In the event that none of the proposed Inspection Consultants are deemed satisfactory to the City, Wyverd shall submit a second list of at least three (3) proposed Inspection Consultants for the City's consideration. (And so on, until the City selects at least one satisfactory Inspection Consultant.) Once approved by the City,

Wyverd shall contract directly with the approved Inspection Consultant(s), and said Inspection Consultants shall be tasked with inspecting, reviewing, and processing Wyverd's submitted fiber construction applications and associated City-requested permits related to the ROW Licenses. Any contract between Wyverd and any Inspection Consultant must contain the general requirements set forth herein, as well as identifying the City as an additional insured, with endorsement, on any insurance policy obtained by Wyverd or the Inspection Consultant(s) pursuant to this Agreement. Any proposed form of contract shall be submitted to, and approved by, the City to confirm these general requirements. The Inspection Consultants shall perform all such Work in a timely fashion and in compliance with all applicable laws, rules, and regulations and subject to the City's Code, engineering guidelines, engineering standards, and standard processes.

- b. Notwithstanding the foregoing, the City reserves the right at all times to conduct all inspection services and to review and process all right-of-way permit applications within the City's right-of-way. Additionally, the City may enter into separate agreement(s) directly with third party Inspection Consultant(s) for inspection consulting services related to inspection services and/or review and processing of City right-of-way permit applications submitted by Wyverd in connection with the ROW Licenses. Such Inspection Consultants may be tasked with inspecting, reviewing, and processing Wyverd's submitted fiber construction applications and associated City-requested permits related to the ROW Licenses; in addition to the foregoing, the Inspection Consultants will be tasked with performing all such Work in a timely fashion and in accordance with applicable industry standards. Wyverd shall not be deemed a third party beneficiary to any separate agreement between the City and an Inspection Consultant.
  - c. The selected Inspection Consultant shall fully cooperate with the City, its inspectors, engineers, officials, employees, and/or other designative representatives with respect to the Work herein.
  - d. Wyverd shall fully cooperate with the City, its officials, employees, other representatives, and the Inspection Consultant(s) with respect to the Work herein.
  - e. Wyverd acknowledges that the City's in-house officials and employees solely represent the City and its interest and do not represent Wyverd. Wyverd further acknowledges that the Inspection Consultant(s) solely represent the interest of the City and in no way represents Wyverd or its interests. Wyverd shall not apply any undue pressure to the Inspection Consultant, nor threaten in any way, including the withholding of payment, in order to induce the Inspection Consultant(s) to expedite its Work beyond industry standards, and/or in an effort, or in a manner, that could cause the Inspection Consultant to approve Work that is not in accordance with City standards.
  - f. Wyverd understands and acknowledges that the Inspection Consultant's Work must be done in compliance with all applicable laws, rules, and regulations and subject to the City's Code, engineering guidelines, engineering standards and the City's standard processes. The Inspection Consultant will be tasked with performing the Work up to the City's standards; accordingly, the City, in its sole discretion, will have the final say as to whether the Work is acceptable. The City may reject any Work that does not meet the City's standards or fails to comply with applicable laws, rules, regulations and/or guidelines, including the City's engineering guidelines, and any such rejection will not be deemed a breach or attempted breach of this Agreement or ROW License nor a delay within the City's control. Notwithstanding anything to the contrary in this Agreement, the City shall not be liable to Wyverd or deemed in breach or attempted breach of this Agreement or ROW License due to any delay or non-performance by any Inspection Consultant.
- 4. REIMBURSEMENT.** Wyverd shall directly and fully compensate the Inspection Consultant(s), for all fees, costs, and expenses associated with the Inspection Consultant and all Work for, in response to, on behalf of, or related to Wyverd's right-of-way permit application requests. In the event the City is required to pay any out-of-pocket fees, costs, or expenses associated with the Inspection Consultant, Wyverd shall immediately, within ten (10) business days of delivery of an invoice, reimburse the City for all out-of-pocket fees, costs, and expenses incurred by the City.
- 5. BREACH AND REMEDIES.** In the event of a breach or attempted breach of any of the terms or conditions of this Agreement by Wyverd, the City may terminate this Agreement or take any action at law or in equity. Wyverd shall pay any late fee(s) or surcharges assessed by the City or the Inspection Consultant(s). Wyverd hereby irrevocably waives all monetary damages under this Agreement and its sole remedy under this Agreement shall be an action for specific performance or injunctive relief.

6. **INDEMNIFICATION.** To the fullest extent permitted by law, Wyverd and its subsidiaries and related entities (the “Indemnifying Parties”) shall indemnify, defend and hold harmless the City and its council members, managers, officers, boards, commissions, officials, employees, or agents (collectively “Indemnified Party”), for, from, and against any and all losses, claims, damages, liabilities, costs, and expenses (including, but not limited to, reasonable attorneys’ fees, claims processing, investigation, court costs and the costs of appellate proceedings) to which any such Indemnified Party may become subject, under any theory of liability whatsoever (“Claims”), including negligence, insofar as such Claims (or actions with respect thereof) relate to, arise out of, or are caused by, or in connection with this Agreement. Such indemnification includes indemnifying, defending, and holding the City harmless from any and all claims brought by Wyverd or any third party pursuant to the Work of the Inspection Consultant(s).
7. **INSURANCE, BONDS, AND LETTERS OF CREDIT.** The Insurance, Performance Bond, and Letter of Credit provisions set forth in the ROW License is applicable to this Agreement and is incorporated by reference as if fully set forth herein. Wyverd shall take any and all action necessary to incorporate or otherwise apply said insurance, performance bond, and letter of credit to this Agreement.
8. **GOVERNING LAW.** In all respects, this Agreement and the obligations arising hereunder shall be governed by and construed and enforced in accordance with the laws of the State of Arizona. Any litigation initiated pursuant to this Agreement shall be commenced in a court of competent jurisdiction located in Maricopa County, Arizona.
9. **CONFLICTS OF INTEREST.** Wyverd acknowledges that this Agreement is subject to Ariz. Rev. Stat. § 38-511 and may be terminated in accordance therewith.
10. **REPRESENTATIONS AND WARRANTIES.** Wyverd represents and warrants that Wyverd Group, LLC has the full authority to enter into this Agreement on its own behalf and on behalf of its subsidiaries and other related entities, including Wyverd Connect, LLC and Accipter Communications, Inc. d/b/a Zona Wyverd, and to bind the foregoing to the terms and conditions of this Agreement.
11. **SUCCESSORS AND ASSIGNS.** This Agreement will be binding upon, and inure to the benefit of, each Party hereto and such Party’s permitted successors and assigns; provided, however, that Wyverd may not assign this Agreement without the prior written consent of the City.
12. **NO AGENCY.** Each Party hereto will act in its individual capacity. Nothing in this Agreement will be deemed to create the relationship of principal and agent, of partnership, agency, employer-employee, a joint venture, or an association among the Parties hereto.
13. **NO THIRD PARTY BENEFICIARY.** This Agreement is solely for the benefit of the Parties hereto and will not be deemed to be for the benefit of, or to create any rights in favor of, any third party.
14. **COMPLIANCE WITH LAWS.** The Parties hereto shall comply with all applicable federal, state, and local laws, rules and regulations in the performance of their duties under this Agreement.
15. **FORCE MAJEURE.** Except for payment for sums due, neither Party will be liable to the other nor deemed in default under this Agreement if and to the extent that such Party’s performance of this Agreement is prevented by reason of force majeure. The term “force majeure” means an occurrence that is beyond the control of the Party affected and occurs without its fault or negligence. Without limiting the foregoing, force majeure includes acts of God: acts of the public enemy; war; acts of terror, hate crimes affecting public order; riots; strikes; mobilization; labor disputes; civil disorders; plague; pandemics (including without limitation, the COVID-19 pandemic); epidemics; quarantine orders or directives by a governmental entity; outbreaks of infectious disease or any other public health crisis, including without limitation, quarantine or other employee restrictions; fire; floods; lockouts, injunctions-interventions-acts, or failures or refusals to act by government authority; events or obstacles resulting from a governmental authority’s response to the foregoing; and other similar occurrences beyond the control of the Party declaring force majeure which such party is unable to prevent by exercising reasonable diligence. The force majeure notifies the other Party of the existence of the force majeure and will be deemed to continue as long as the results or effects of the force majeure prevent the Party from resuming performance in accordance with this Agreement. Force majeure will not include the following occurrences: (A) Failure or delay resulting from general economic conditions or other market effects, foreseen or unforeseen, including any increase in the cost of materials, supplies, or services, or any decrease in profit or profit margins resulting therefrom; (B) Late delivery of equipment or materials caused by congestion at a manufacturer’s plant or elsewhere, an oversold condition of the market, inefficiencies, or similar occurrences; or (C) Late performance by a subcontractor unless the delay arises out of a force majeure occurrence in accordance with this section.

- 16. **SEVERABILITY.** If any provision of this Agreement shall be determined to be void by any court of competent jurisdiction, such determination shall not affect any other provision hereof, all of which other provisions shall remain in full force and effect.
  - 17. **CONFLICT.** If the terms and conditions of this Agreement conflict with any law or ordinance of the City or agreement between the Parties, the terms and conditions of this Agreement shall supersede, set, and control any other terms and conditions to the extent permitted by law.
  - 18. **ENTIRE AGREEMENT.** The City and Wyverd acknowledge and agree that no promises or representations have been made which do not appear written herein and that this Agreement contains the entire understanding of the Parties as to the subject matter contained in this Agreement.
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**SIGNATURES ON THE FOLLOWING PAGE.**

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the date the last party signs.

**"City"**

City of El Mirage, an Arizona municipal corporation

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

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

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

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

**"Wyverd"**

Wyverd Group LLC, a Delaware corporation, on behalf of its subsidiaries and related organizations, Wyverd Connect LLC and Accipiter Communications Inc. d/b/a Zona Wyverd

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

Printed Name: Travis Nance \_\_\_\_\_

Title: General Manager \_\_\_\_\_

Date: 4/15/22 \_\_\_\_\_

APPROVED AS TO FORM:

\_\_\_\_\_  
City Attorney's Office