

MEETING DATE: 01/22/07

AGENDA ITEM: Consideration of Adoption of a Resolution Approving an Encroachment Permit Agreement With AboveNet Communications, Inc. for Use of the Public Rights-of-Way on Portions of Centinela Avenue, Bristol Parkway, and Slauson Avenue and Including an Authorization to Enter Into an Agreement with AboveNet Communications, Inc. to Install Conduit for Fiber Optic Communications For the New Fire Station #3 Site.

ATTACHMENTS

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ENCROACHMENT PERMIT AGREEMENT

PARTIES: THE CITY OF CULVER CITY, a municipal corporation
9770 Culver Boulevard
Culver City, California 90232
Attn: City Attorney
("City")

ABOVENET COMMUNICATIONS, INC.
360 Hamilton Avenue
White Plains, New York 10601
Attn: General Counsel
("AboveNet")

RECITALS:

- A. **WHEREAS**, AboveNet desires to install, maintain and operate conduit, fiber optic cables, and appurtenances ("System") within portions of the City's rights-of-way, as shown in Exhibit A, for the purpose of providing telecommunications services;
- B. **WHEREAS**, this System will encroach under and across the public rights-of-way and may require trenching and/or boring within said public rights-of-way;
- C. **WHEREAS**, this System is covered by a Mitigated Negative Declaration pursuant to the California Environmental Quality Act;
- D. **WHEREAS**, AboveNet desires to secure the permission of the City to install, operate and maintain this System;
- E. **WHEREAS**, AboveNet is willing to construct one additional three-inch conduit and five (5) pull boxes, for the City's use and benefit ("City System"), at the same time that it constructs its System; and,
- F. **WHEREAS**, AboveNet is willing to construct and transfer the City System to the City in lieu of payment of permitting costs.

NOW THEREFORE, in consideration of the mutual promises and agreements hereinafter contained, the parties hereto agree as follows:

1. The City hereby gives AboveNet permission to encroach under and along its public rights-of-way for the purpose of the installation, maintenance and operation of

the System, as more specifically described in Exhibit A. The System shall conform to the renderings in Exhibit A.

2. AboveNet agrees that as compensation to the City for the time spent by its staff members in the processing of this encroachment permit and in lieu of the annual fee which would otherwise be due to the City for 2007, 2008 and 2009, AboveNet will install, at its cost, the City System consisting of one three-inch conduit and five (5) pull boxes required to connect the City's Fire Station # 3 (to be built at 6030 Bristol Parkway) to the System's terminus at 6025 Slauson Avenue. The parties hereby stipulate that the length of this extra conduit is approximately 1,340 feet. The parties agree that the provisions of Proposition 218, and its relating implementation legislation, are not applicable to the establishment or adjustment of any of these costs.

3. Upon the completion of the construction of the System and the City System, the parties shall execute documents to effectuate the transfer of title of the City System from AboveNet to the City. After such transfer of title, the City shall be responsible for all locating, maintenance, relocation and/or repair of the City System.

4. Effective March 15, 2010, and each March 15th thereafter, AboveNet agrees to pay the City an annual fee of \$12,440.00 as fair and reasonable compensation for AboveNet's use of the City's public rights-of-way. This fee may be changed by the City provided, however, that the City gives AboveNet 30 days' written notice of its obligation to pay any non-discriminatory increased fee. The parties agree that the provisions of Proposition 218, and its relating implementation legislation, are not applicable to the establishment or adjustment of this fee.

5. AboveNet has represented to the City that AboveNet has obtained a Certificate of Public Convenience and Necessity ("CPCN") for the provision of inter and intraLATA telephone services throughout California. AboveNet has represented that any construction activities it undertakes in the City's public rights-of-way shall be authorized by its CPCN. AboveNet has further represented that the System will be used solely for the purposes authorized in its CPCN. Finally, AboveNet has represented that it constitutes a "Telephone Corporation" within the meaning of the Public Utilities Code, that the System constitutes the construction and operation of "telephone lines" within the meaning of the Public Utilities Code and that the System will result in the carriage of telephone service.

The rights granted by this agreement are granted based upon these representations by AboveNet. If AboveNet uses the System for purposes other than the provision of telephone service or if the System is found not to be sanctioned by the CPCN, or if it is ultimately determined that the City is not precluded by Public Utilities Code Section 7901 or otherwise from imposing reasonable requirements upon this System other than those specified in this agreement and related permits, including, without limitation, additional compensation requirements, the City reserves the right to charge AboveNet non-discriminatory full and reasonable compensation consistent with

applicable law for the use of the City's rights-of-way. By entering into this agreement, neither the City nor AboveNet waives any rights reserved to either pursuant to Public Utilities Code Sections 7901 and 7901.1 or otherwise. In addition, neither party waives any rights reserved under the Telecommunications Act of 1996 including, but not limited to, those rights set forth in Section 253(c) of that act, reserving to municipalities the right to manage their public rights-of-way and to require fair and reasonable compensation from telecommunication providers for use of public rights-of-way.

6. All work and entry upon, over, under, or along the public rights-of-way relating to the System or the City System shall be done under the supervision of AboveNet in a good and skillful manner and shall comply with all reasonable standards imposed by the City including, but not limited to, those standards contained in the City's Rights-of-Way Management Plan & Standards (Culver City Municipal Code Section 9.08.307). To this end, an AboveNet representative shall be physically present at any construction site at all times that construction or excavation is being conducted pursuant to this agreement. Any excavations in connection with the System or the City System shall be monitored by AboveNet for any lateral movement.

7. Any and all damage to any City property resulting from the installation, maintenance, and operation of the System by AboveNet or the installation of the City System shall be repaired by AboveNet at no expense to the City and to the satisfaction of the City.

8. The permission granted hereunder shall not in any event constitute an easement on or an encumbrance against the public rights-of-way. No right, title or interest in the public rights-of-way, or any part thereof, shall vest or accrue in AboveNet or any other entity or person by reason of this agreement, the issuance of an encroachment permit or the exercise of the privileges given thereby.

9. The City may terminate this agreement in order to protect the public health, welfare, and/or safety at any time by providing one hundred eighty (180) days' written notice of said termination to AboveNet. When said termination occurs, AboveNet shall have no further right to utilize the System in any manner and AboveNet shall remove the System at its own expense and shall repair and restore all City property and all public rights-of-way which were affected by the placement, maintenance, and removal of the System to a condition satisfactory to the City. Whenever AboveNet incurs an obligation to remove the System pursuant to this paragraph, AboveNet shall comply with its obligation to remove the System within ninety (90) days of the effective termination date of this agreement.

10. Subject to the provisions of Paras. 12 and 20, below, AboveNet shall assume all responsibility for all damages to property (including the System) or injuries to persons (including accidental death) which may arise from or be caused by AboveNet's performance under this agreement or by the performance of any other

party which AboveNet directly or indirectly employs to perform under this agreement. The obligations of this paragraph apply regardless of whether such damage or injury accrues or is discovered before or after termination of this agreement.

11. During the life of this agreement, AboveNet shall pay for and maintain a commercial general liability policy (including contractual liability), an automobile liability policy and workers' compensation insurance. The commercial general liability policy shall be maintained in an amount not less than five million dollars (\$5,000,000) per occurrence for personal injuries (including accidental death) to any one person, in an amount not less than five million dollars (\$5,000,000) per occurrence for property damage and shall contain a combined single limit in an amount not less than five million dollars (\$5,000,000). The automobile liability policy shall be endorsed for all owned and non-owned vehicles, contain a combined single limit of at least five million dollars (\$5,000,000) per occurrence for personal injuries (including accidental death) to any one person and shall also cover property damage. The limits required of this paragraph may be satisfied with umbrella coverage. The worker's compensation insurance shall be in the statutorily required amount.

The commercial general liability policy shall contain or be endorsed to include: (i) a provision that the City of Culver City, its elected and appointed officials, officers, agents, employees and representatives are named as additional insured under this policy; (ii) a provision that this policy is primary to the coverage of the City of Culver City; (iii) a provision that neither the City of Culver City nor any of its insurers shall be required to contribute to any loss; (iv) a severability of interest clause; and (v) a provision that the issuing insurance company shall mail thirty (30) days' advance notice to the insured who shall be required to provide the City of Culver City (30) days advance notice of any policy cancellation, termination or reduction in the amount of coverage.

AboveNet shall furnish documentary proof of having complied with all of the requirements of this paragraph before the City issues any related permits and before AboveNet commences any construction or excavation pursuant to this agreement. After completion of installation of the System, AboveNet shall furnish the City with documentary proof of being in continuing compliance with the requirements of this paragraph every two years.

12. AboveNet agrees to and shall defend, indemnify and hold the City, its elected and appointed officials, officers, agents, employees and representatives harmless from all suits and causes of action, claims, charges, damages, demands, judgments, civil fines, and penalties or losses of any kind or nature whatsoever for all claims of any kind arising directly or indirectly from this agreement; provided that AboveNet's obligations to indemnify and hold harmless are only to the extent of AboveNet's negligent, intentional or willful acts or omissions. This indemnity and obligation to hold harmless shall apply regardless of whether or not the City prepared, supplied, or approved plans or specifications or inspected any of the work or improvements installed or constructed pursuant to this agreement.

13. Prior to starting any construction or excavation on this System or on the City System, AboveNet shall cause to be filed by its contractor with the City a performance and completion bond in the amount of one million dollars (\$1,000,000.00), in a form approved by the City's City Attorney, to ensure satisfactory completion of the System. The City shall release the performance and completion bond after the City's inspection and final acceptance of the construction or excavation pursuant to the terms of any permit(s) issued by the City.

14. Upon the issuance of all required permits to install the System and the City System, AboveNet shall work diligently and continuously to complete the required construction and restoration. AboveNet shall be in default of this provision and the facilities will be deemed abandoned if AboveNet fails to work on this project for a contiguous two week period.

15. Any excavation, installation, repair or maintenance requiring excavation in the public rights-of-way for the System shall be done under a permit issued by the Public Works Department. Such work shall be at the sole cost and expense of AboveNet and shall substantially conform and be limited to the System as described in Exhibit A.

16. If a legal action or proceeding is brought by a party because of default under this agreement, or to enforce a provision of this agreement, the prevailing party shall be entitled, in addition to any other relief, to recover reasonable attorneys' fees and court costs from the other party as determined by the court in which said action or proceeding is pending.

17. In the event AboveNet fails to perform any of its obligations under this agreement within a reasonable period after delivery of written notice of such failure and the City performs any work including, but not limited to, removing the System at the termination of this agreement, and/or repairing or maintaining the System, the City shall only be obligated to perform such work in a manner consistent with the standard practices of the City in performing street work and construction. The City shall not be obligated to repair or replace any materials or improvements in a form or manner consistent with Exhibit A or any other plans and specifications and the City shall not be responsible for any damages to AboveNet or any other company or person as a result of the City performing such work including, but not limited to, severance damages. AboveNet shall reimburse the City its full costs, including allocated overhead, of any work performed by City pursuant to this paragraph.

18. If AboveNet fails to maintain the System for a continuous period in excess of one-hundred and eighty (180) days, the City shall be entitled to serve written notice on AboveNet that it deems the System to be abandoned and that the agreement will be terminated within sixty (60) days pending a response from AboveNet indicating

that it is maintaining the System at which point the City shall withdraw its notice. Upon termination of this agreement pursuant to this paragraph, AboveNet shall remove, at its own expense, the System or any portion thereof, and return the public property to a condition satisfactory to the City or, if AboveNet so elects, abandon the System to the ownership of the City without payment of any compensation. For the purposes of this paragraph, however, any portion of the System reserved by AboveNet for future use shall not be considered abandoned or unused and this agreement shall not thereby be deemed to have terminated pursuant to the provisions of this paragraph.

19 Consistent with California law, AboveNet shall remove or relocate, without cost or expense to the City, the System and/or any portion thereof, if and when made necessary by a public works project, including but not limited to, the installation, abandonment, change of grade, alignment or width of any street, sidewalk or other public facility, including the construction, maintenance, or operation of any other underground or aboveground facilities (which may include, for purposes of illustration but not limitation, sewers, storm drains, conduits, gas, water, electric or other utility systems, or pipes owned by the City or another public agency). In the event all or any portion of the public rights-of-way occupied by the System is needed by the City or another public agency, is considered detrimental to the public health, safety, welfare, or convenience, is considered detrimental to governmental activities, interferes with City construction projects or conflicts vertically and/or horizontally with any proposed City installation, AboveNet shall remove and relocate, without cost or expense to the City, such portion of the System to such other location or locations as may be designated by the City or other involved public agency. Should the public works project provide for the reimbursement of utility relocation costs, the City shall reimburse AboveNet for its relocation costs. The City is solely responsible for the relocations costs associated with the City System. Said removal or relocation shall be completed within ninety (90) days of notification by the City or other public agency unless exigencies dictate a shorter period for removal or relocation. In the event the designated portion of the System whose removal or relocation is deemed necessary is not removed or relocated within said period of time, the City may cause the same to be done at the sole expense of AboveNet. Further, in the event of an emergency, the City may remove or relocate the System or any portion thereof without prior notice to AboveNet, provided that AboveNet is notified within a reasonable period thereafter.

20. AboveNet agrees to defend, indemnify and hold harmless and hereby releases the City, its elected and appointed officials, officers, agents, employees and representatives from the following damages or claims for damages: (1) any damage or claims for damage to the System caused by any excavation or work performed by the City; (2) any indirect, special, punitive or consequential damages (including, but not limited to, any claim for loss of service to AboveNet or any other person) arising from any damage to the System; and, (3) any damage or claims for damages resulting from damage to the System caused by third persons; except to the extent that the damage or claim arises out of the City's willful misconduct or gross negligence.

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21. Where AboveNet is required to provide legal services to the City under any provision of this agreement, and chooses to utilize joint counsel, the parties shall make a good faith effort to cooperate and agree upon litigation strategy and implementation thereof. In the event the City determines that AboveNet's litigation strategy and implementation decisions are unreasonable, or not in the City's best interest, or that separate counsel is necessary for the representation of the City, the City may obtain separate legal counsel, chosen by the City, at AboveNet's cost and expense. The City shall submit to AboveNet on a regular basis statements for attorney's fees which shall be paid to the City within sixty (60) days of AboveNet's receipt of said statements.

22. AboveNet acknowledges that it is presently a member of "Underground Service Alert of Southern California" and agrees to maintain and keep current its membership in said organization throughout the term of this agreement.

23. All notices required or provided for under this agreement shall be in writing, delivered in person or by certified mail, return receipt requested, addressed to the parties as indicated above on the first page of this agreement. Any notice so delivered shall be effective upon the date of personal delivery or, in the case of mailing, three (3) days after the date of mailing. Any party may change its address for notice by giving ten (10) days notice of such change in the manner provided for in this paragraph.

24. AboveNet may not sell, assign, transfer or lease any interest in the System, or in this agreement without the prior written consent of the City, which consent shall not be unreasonably withheld.

25. A waiver by the City of any breach of any term, covenant, or condition contained in this Agreement shall not be deemed to be a waiver of any subsequent breach of the same or any other term, covenant, or condition contained in this agreement whether of the same or different character.

26. The mutual obligations of this agreement are subject to force majeure which shall be defined as: any act of God, natural disaster, act of war, terrorist attack, or other cause or occurrence that prevents either party from performing its obligations hereunder that is beyond the party's reasonable control.

27. The parties agree that no possessory interest is created by this agreement. However, to the extent that a possessory interest is deemed created, AboveNet acknowledges that notice is and was hereby given to AboveNet pursuant to California Revenue and Taxation Code Section 107.6 that use or occupancy of any public property pursuant to the authorization herein set forth may create a possessory interest which may be subject to the payment of property taxes levied upon such interest. AboveNet shall be solely liable for, and shall pay and discharge prior to delinquency, any and all possessory interest taxes or other taxes levied against

AboveNet's right to possession, occupancy, or use of any public property pursuant to any right of possession, occupancy, or use created by this agreement.

28. AboveNet and the City shall comply with all applicable federal, state and local laws, rules and regulations.

29. If any part of this agreement is held invalid, the remaining terms and conditions shall not be affected unless their enforcement under the circumstances would be unreasonable, inequitable, or otherwise frustrate the purposes of this agreement.

30. This agreement, including the exhibits attached hereto, constitutes the entire agreement between the parties and supersedes any previous oral or written agreements with respect to the subject of this agreement.

"City"

"AboveNet"

CITY OF CULVER CITY,
a Municipal Corporation

ABOVENET COMMUNICATIONS, INC.

By: _____
Charles Herbertson
Public Works Director

By: _____
Name (Print): _____
Title: _____

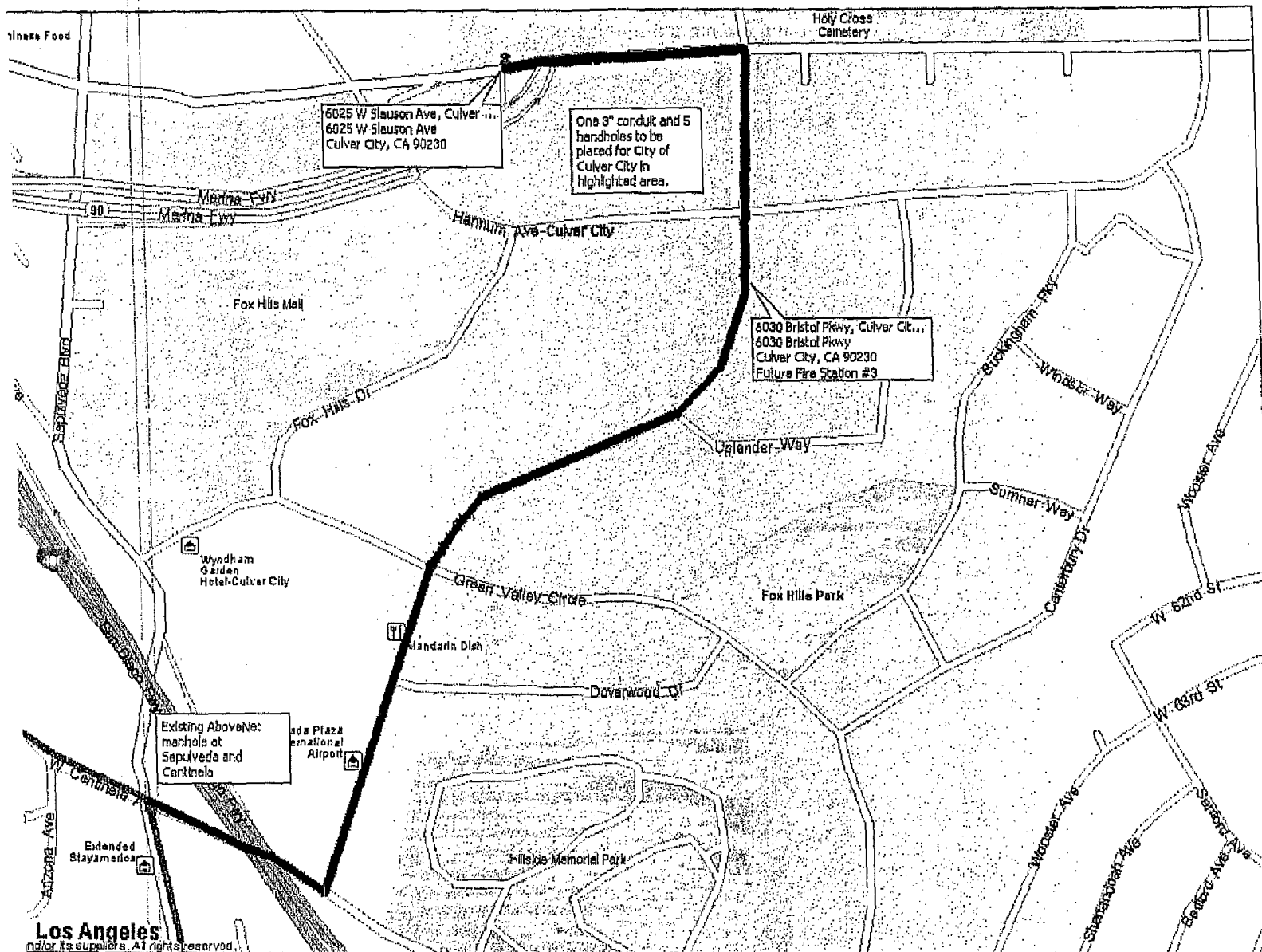
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Date: _____

Approved as to Form and Legal Content
Carol A. Schwab, City Attorney

By: _____
Roland Miranda, Deputy City Attorney

Date: _____



Initials (AboveNet Rep.): _____

Initials (Culver City Rep.): _____

EXHIBIT A
(to Encroachment Agreement
Culver City & AboveNet
Dated January, 2007)

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1 Encroachment Permit Agreement on behalf of the City of Culver City.

2 APPROVED and ADOPTED this ____ day of ____ 2007.

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5 GARY SILBIGER, MAYOR
6 City of Culver City, California

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8 ATTEST:

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10 APPROVED AS TO FORM:

11 CHRISTOPHER ARMENTA, City Clerk

12 CAROL A. SCHWAB,
13 City Attorney

14 A07-00033

VICINITY MAP

AboveNet Communications, Inc.,
Conduit Alignment

