

# **City of Seward, NE**

**Tuesday, August 2, 2016**

**Regular Session**

## **Item G8**

### **CONSIDERATION OF REVISED POLE ATTACHMENT AGREEMENT - City Atty Hoffschneider**

**Administrative Report:** We have revised the existing pole attachment agreement for the City. Following review and discussion, a motion to approve the revised pole attachment agreement would be in order.

**Staff Contact:**

## **Pole Lease Agreement**

This Agreement made and entered into this \_\_\_\_ day of \_\_\_\_\_, 2016, by and between the City of Seward of the City of Seward, Nebraska, herein called "Licensor," and \_\_\_\_\_, a \_\_\_\_\_ organized under the laws of the State of Nebraska, herein called "Licensee,"

### **WITNESS**

That: Whereas Licensor owns, operates and maintains a system of poles, lines, and other facilities for the distribution and sale of electric power and energy in the City of Seward service area ("City Service Area") in Nebraska;

Whereas Licensee desires to attach and maintain aerial cables, wires, and associated appliances and equipment, herein after called "attachments," on certain poles of Licensor;

Whereas, to the extent that it may be lawful to do so, Licensor is willing to permit Licensee to place and maintain said attachments on Licensor's poles where, in Licensor's judgment, such use will not interfere with or affect Licensor's own service requirements or the service requirements of others using Licensor's poles including the consideration of economy and safety.

Now therefore, in consideration of the mutual covenants, terms, and conditions herein contained, the parties hereto do hereby mutually covenant and agree as follows: that Licensor, to the extent that it may lawfully do so will issue Permits to Licensee granting permission to install and maintain attachments upon such poles of Licensor located in City Service Area are specifically designated, in the manner hereinafter prescribed, and to the following terms and conditions:

1. As used in this Agreement, certain terms listed below shall have the following meaning:
  - "Licensor's poles" means poles owned and/or used by Licensor in City Service Area.
  - "Licensee's equipment" means aerial wires, cables, amplifiers, associated power supply equipment, cable attachment materials and other transmission apparatus necessary for the proper operation of Licensee's service.
2. Before installing attachments on any of Licensor's poles, Licensee shall make application and receive a permit therefore on Application — Permit for Pole Attachments, in the form of "Exhibit A" attached hereto, which shall specify, among other things, the location of the poles involved, a description of the proposed attachments and the amount of location space desired. Execution of such form by an authorized representative of Licensee shall constitute an application for license to install attachments on the poles specified therein, and such license shall be effectively granted only by written consent signed by Licensor's City Administrator or his designated representative at the City of Seward, Seward, Nebraska.

3. Licensor reserves the right to deny the application for any Permit, the granting of which, in the judgment of the Licensor, would interfere with Licensor's own service requirements or with the service requirements of others using said poles, including, without limiting the foregoing, considerations of economy and safety. The elimination from this license, from time to time, of poles included hereunder, shall be effected by execution of Application — Notice of Removal of Pole Attachments, in the form of Exhibit "B" attached hereto.
4. Executed forms for attachment authorizations and eliminations shall become a part of this Agreement as fully as though set out in this instrument at the time of its execution.
5. The attached Appendix details the administrative practices for handling attachment applications and elimination and shall also become a part of this Agreement.
6. In the event Licensee makes any attachments to Licensor's poles without first having received and accepted a Permit as provided in Paragraph 2 hereof, the Licensor shall have the right to summarily, and without notice to Licensee, remove such attachments at the cost and expense of Licensee and without any liability therefore.
7. Licensee shall, at its own expense, install said attachments in a good workmanlike manner and maintain them in a safe condition and good repair and in a manner suitable to Licensor and so as not to conflict with the use of said poles by Licensor or by others using said poles or interfere with the use of facilities thereon or which may from time to time, be placed thereon. Licensee shall, at its own expense and at such time or times as may be requested by Licensor, relocate, replace, renew or remove its attachments or transfer them to substituted poles or locations or perform any other work in connection with said attachments that may be required by Licensor; provided, however, that in cases of emergency or within a reasonable length of time herein established as 48 hours, Licensor may arrange to relocate, replace, renew or remove Licensee's attachments, transfer them to substituted poles or locations or perform any other work in connection with said attachments that may be required by Licensor in the maintenance, replacement, removal, or relocation of said poles, the facilities thereon or which may be placed thereon, or for the service needs of the Licensor and others using Licensor's poles, and Licensee shall on demand reimburse Licensor's for the expense thereby incurred. In the event Licensor grants access to a third party, which requires removal or relocation of Licensee's attachments, the third party shall be required by Licensor, as a condition of their attachment, to reimburse Licensee for the cost of removal or relocation.
8. Licensee's attachments in each and every location shall be installed, maintained and removed in accordance with the rules and regulations of Licensor as now in force or as hereafter adopted, amended or revised and with the requirements and specifications of the National Electric Safety Code and National Electric Code or any amendment to or revisions of said codes and in compliance with any rules, regulations or orders now in effect or hereafter issued by any governmental authority having jurisdiction of the jointly used facilities. All attachments shall be placed within the space and at the location designated by Licensor.

9. In the event that any pole or poles of Licensor to which Licensee desires to make attachments are inadequate to support the additional, Licensor may, if it is willing to consent to the use of poles hereunder at such locations, indicate on the Permit, in the form of Exhibit "A", the changes necessary to provide the adequate pole and the estimated cost thereof to Licensee and return it to Licensee, and if Licensee still desires to make the attachments and returns the form marked to so indicate, Licensee will replace such inadequate poles with suitable poles and Licensee will on demand reimburse Licensor for the entire cost and expense thereof, including the cost of larger poles, cost of removal and the expense of transferring Licensor's facilities from old poles to new poles. Any strengthening of poles (guying) required to accommodate the attachments of Licensee shall be provided by the Licensor at the expense of Licensee.

10. In the event that changes in the physical facilities, space and location requirements, or service requirements of Licensor or of others using Licensor's poles subsequently render any poles licensed hereunder inadequate to support the facilities of Licensee therefore permitted on such poles, Licensor may revoke and terminate Licensee's Permit as to such poles, but Licensee may request the substitution of suitable poles upon the same terms and conditions as would be applicable if the poles were inadequate at the time of Licensee's original application. Further, Licensor may, at any time, revoke and terminate Licensee's Permit to attach to any specific pole or poles, if in Licensor's sole judgment its service needs require full utilization of any poles permitted hereunder.

11. Licensor reserves to itself, its successors and assigns, the right to maintain its poles and to operate its facilities thereon in such manner as will best enable it to fulfill its own service requirements. Licensor shall not be liable to Licensee for any interruptions to service of Licensee nor for interference with the operation of Licensee's equipment arising in any manner out of the use of Licensor's poles hereunder.

12. As a condition precedent to the granting of any Permit hereunder, Licensee shall submit to Licensor evidence satisfactory to Licensor of Licensee's authority to erect and maintain facilities within public streets, highways, alleys and other thoroughfares and shall secure any and all necessary consents from state, federal, municipal or other public authorities or from the owners of private lands and property involved, to construct and maintain Licensee's attachments at the locations of Licensor's poles that it desires to use.

13. Licensor, because of the importance of its public service, reserves the right to inspect each new installation of Licensee's attachments on Licensor's poles and in the vicinity of its lines or appliances and to make periodic inspections or as often as conditions may warrant, of the entire plant of Licensee. Such inspections, whether made or not, shall not operate to relieve Licensee or Licensee's insurer of any responsibility, obligation or liability assumed under this Agreement.

14. Licensee shall pay to Licensor for attachments made to poles under this Agreement a rental at the rate of \$10.00 per pole per year for the first year of the term of this Agreement. After the first year and each year thereafter the pole rental fee may increase by two percent (2%) of the previous year's rental rate. Said rental shall be payable annually, in advance, on the 1<sup>st</sup> day of January of each year that this Agreement remains in effect. Annual rental payments shall be based upon the number of poles on which attachments are maintained on the 1st day in December. The parties hereto shall mutually agree on the date and time for the annual inventory count of poles based on previous year billing, plus or minus any Applications made during the year. If Licensee fails to make annual payment within 30 days of set date, Licensor may assess a penalty of one and one-third percent (1 1/3%) for overdue balance each month.

15. Licensee assumes all the risk of interruption of, damage to, or interference with its service to its customers from any and all causes whatsoever, including the negligence of Licensor, and shall indemnify, defend, protect and save harmless Licensor from and against any and all claims, demands, suits, judgments, liabilities, loss, damages, court costs and expenses, including attorney fees, in any manner arising from Licensee providing service to its customers.

16. Licensee assumes all the risk of liability for and shall indemnify, defend, protect and save harmless Licensor from and against any and all claims, demands, suits, judgments, liabilities, loss, damages, court costs and expenses, including attorney fees, of whatsoever kind or character arising out of any act or omission in the conduct of the Licensee's business or any claimed act or omission in the conduct of such business or for damage to or loss of any property whatsoever and injury to or death of any person or persons whomsoever, including but not limited to employees, agents, contractors, and customers of Licensee, Licensor and others using Licensor's poles which may in any manner arise out of or be caused by the installation, operations, maintenance, presence, use, rearrangement or removal of Licensee's attachments or by the proximity of the respective cables, wires, equipment, apparatus and appliances of Licensee, or by any reason of any negligence of Licensee on or in the vicinity of Licensor's poles, not to include any negligence by Licensor or others using Licensor's poles. Without limiting the foregoing, it is the general intent of Licensor and Licensee that Licensee shall save Licensor harmless from any liability or risk arising out of or in any manner connected with the operations of Licensee's business or with the facilities of Licensee installed thereunder whether or not due in whole or in part to any act, omission, or negligence of Licensor. It is not the intent of Licensor and Licensee that Licensee assumes any liability of Licensor that does not arise out of or is not connected with the operations of Licensee's business, or with the installation, operations, maintenance, presence, use, rearrangement or removal of Licensee's facilities.

17. Without limiting the scope or the extent of the protection afforded Licensor or the liabilities assumed by Licensee herein, Licensee shall obtain and maintain in effect at its own expense for the entire life of this Agreement, insurance at a minimum as shown below. The Licensee's insurance shall be primary for all claims related to their contractual obligations:

- General liability insurance on the premises and operations covered by this Agreement and specifically including contractual liability insurance to cover the liability assumed by Licensee under this Agreement of indemnity set forth in paragraphs 15 and 16:

**Commercial General Liability Coverage:**

- The minimum limits of liability should be:  
\$1,000,000 Aggregate  
\$1,000,000 Products and Completed Operations  
Aggregate \$1,000,000 Personal Injury & Advertising  
Injury  
\$1,000,000 Each Occurrence  
\$ 100,000 Fire Damage Liability  
\$ 5,000 Medical Expense
- The policy should be written on an occurrence basis, not a claims-made basis.

■ Auto liability insurance:

**Auto Liability Coverage:**

- The minimum limits of liability should be:  
Bodily Injury: \$1,000,000 per Person/\$1,000,000 per Occurrence  
Property Damage: \$1,000,000 each Occurrence,  
**OR** a Combined Single Limit: \$1,000,000
- Auto coverage should include: Any Auto, including Hired and Non-Owned

■ Workmen's Compensation insurance with statutory limits and employer's liability insurance:

**Workers' Compensation and Employer's Liability Coverage:**

- Workers' Compensation limits are to be statutory per applicable state and federal laws.
- Employer's Liability Coverage — Minimum Limits of:  
Bodily Injury by Accident: \$100,000 each Accident  
Bodily Injury by Disease: \$100,000 each Employee  
Bodily Injury by Disease: \$500,000 Policy Limit

■ Umbrella liability coverage:

**Umbrella Liability Coverage:**

- An umbrella liability policy may be used in conjunction with primary coverage limits to meet the minimum limits requirement for each line of coverage.

■ Prior to making any attachments to Licensor's poles, Licensee shall furnish Licensor with a **Certificate of Insurance** from an insurance carrier acceptable to Licensor stating that:

Policies of insurance have been issued by it to Licensee providing for the insurance coverage listed above with minimum limits as listed above and that such policies are in force.

Such certifications shall state that the insurance carrier will give Licensor sixty (60) days prior written notice of any cancellation or suspension of coverage or material changes in such policies.

The Certificate should identify the Licensor as an Additional Insured for relevant

coverages, except workers' compensation.

Insurance shall be placed with insurers with a current A.M. Best rating of no less than A:VII.

Failure to maintain such insurance at any time shall constitute a default of this Agreement but shall not relieve the Licensee from any liabilities assumed under this Agreement.

18. Licensee shall promptly notify Licensor of any damage caused to any facilities and shall notify Licensor of any claims for property damage, bodily injury or death indirectly or directly associated with Licensee's use of Licensor's poles. Notice shall be given promptly by Licensor of any damage caused to facilities of Licensee of any claims for property damage, bodily injury or death indirectly or directly associated with Licensee's use of Licensor's poles.

19. Licensee may, at any time, remove its attachments from any pole or poles of Licensor and Licensee shall give Licensor written notice within thirty (30) days of removal of any attachments on form in Exhibit "B". No refund of any rental will be due on account of such removal.

20. Upon notice from Licensor to Licensee that the use of any pole or poles is forbidden by governmental authorities or by property owners pursuant to contract, the Permit covering the use of such pole or poles shall immediately terminate and Licensee's attachments shall be removed from the affected pole or poles without delay and at the expense of Licensee.

21. If Licensee shall fail to comply with any of the provisions of this Agreement, including the specifications herein before referred to, or shall default in any of its obligations hereunder, including all payments to be made by it, or shall under the terms hereof breach this Agreement and shall fail within thirty (30) days after written notice from Licensor to correct such default, noncompliance or breach shall have occurred.

22. Bills for expenses and other charges under this Agreement, other than rentals, shall be payable within forty-five (45) days after presentation. Nonpayment of bill and rental on that date due shall constitute a default of this Agreement.

23. Failure of Licensor to enforce or insist upon compliance with any of the terms or conditions of this Agreement or to give notice or declare this Agreement or the attachment rights hereunder terminated shall not constitute a general waiver or relinquishment of any of the terms or conditions herein contained, but the same shall be and remain at all times in full force and effect.

24. Nothing herein contained shall be construed as affecting the rights or privileges previously conferred by Licensor, by contract or otherwise, to others not parties to this Agreement to use any poles covered by this Agreement; and Licensor shall have the right to continue and extend such rights or privileges. The attachment privileges herein granted shall at all times be subject to such contracts or arrangements.

25. This Agreement shall not inure to the successors of Licensee nor shall Licensee assign, transfer, or sublet the privileges hereby granted without written consent of Licensor. Notwithstanding the foregoing, no consent shall be required for any transfer or assignment of the Licensee to any entity controlling, controlled by or under the same common control as the Licensee. Licensee agrees that it will not grant, sell, rent, loan, or lease to others the use of all or any part of Licensee's equipment while attached to Licensor's poles. The parties do not intend this paragraph to, in any manner, impair the ability of the Licensee to procure financing through normal accepted facilities, and the parties expressly agree that nothing contained in said paragraph is intended to limit or restrict or impair Licensee's right to execute any mortgage or security agreement covering any part of its equipment whether attached to Licensor's poles or otherwise.

26. No use, however extended, of Licensor's poles under this Agreement shall create or vest in Licensee any ownership or property rights in said poles but Licensee's right therein shall be and remain a mere license. Nothing herein contained shall be construed to compel Licensor to maintain any of its poles for a period longer than necessary for its own service requirements.

27. This Agreement shall become effective upon its execution and shall remain in full force and effect for a period of ten (10) years and shall continue in force and effect from year to year thereafter. This Agreement is subject to termination after the end of three (3) years by either party giving six (6) months' written notice to the other party or thereafter prior to the termination of any yearly anniversary date of this contract by either party giving six (6) months' written notice to the other party. It being understood and agreed, however, that if the permission of the Licensee to use public streets and highways within the specified City Service Area shall at any time terminate, be canceled or for any reason cease to be in force or effect, then this Agreement shall automatically terminate and be canceled upon the happening of such event. Upon termination of the Agreement in accordance with any of its terms or the termination of any Permit hereunder, Licensee shall immediately remove its cables, wires, and appliances from all poles effective by such termination. If not so removed, Licensor shall have the right to remove them at cost and expense of Licensee and without any liability therefore and without any duty to account to Licensee for the property removal.

In the event the use of streets, alleys, and public places of the regulatory agency (ie: City, Village, County, etc.) shall be prohibited by said regulatory agency for the Licensor's facilities, then this pole license Agreement shall be terminated and of no further force and effect.

28. Licensee shall furnish security in the amount of not less than \$2,500.00 for each 500 poles, or fraction thereof, attached in form and with surety acceptable to Licensor, to secure the payment of any sums which may become due to Licensor for rentals or for work performed for Licensee or for the benefit of Licensee under the terms of this Agreement, including the removal of Licensee's attachments upon termination of this Agreement; however, if Licensee was previously participating in Pole Lease Agreement with the City and there have been no collection problems, this clause can be waived by Board approval.



29. This Agreement shall extend to and bind the successors and assigns of the parties hereto.

In witness whereof, the parties hereto have caused this Agreement to be duly executed the date and year first above written.

LICENSOR: CITY OF SEWARD

BY: \_\_\_\_\_  
Josh Eickmeier, Mayor

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

Attest:

\_\_\_\_\_  
Bonnie Otte, Clerk

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

LICENSEE:

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

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

TYPED NAME & TITLE: \_\_\_\_\_

Attest By:

\_\_\_\_\_

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

TYPED NAME & TITLE: \_\_\_\_\_

## Exhibit “A”

## Application - Permit for Pole Attachments

To: City of Seward Application No. \_\_\_\_\_  
537 Main  
Seward, NE 68434 Date: \_\_\_\_\_  
Attention: City Administrator \_\_\_\_\_

Application is hereby made for permission to make attachments to the following poles in Seward Nebraska, or vicinity, as indicated on the sketch attached hereto, listing pole number, location, etc.

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

Typed Name & Title: \_\_\_\_\_

Permission is granted to make the attachments described in the above application, subject to the acceptance of the obligation to pay the actual non-betterment cost (the estimated amounts of which are shown below) of the plant rearrangements and changes necessary to accommodate the above specified attachments.

**Non-betterment cost estimate: \$**\_\_\_\_\_ **Approved by Licensee:**\_\_\_\_\_

## Permit Granted by City of Seward

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

Typed Name & Title: \_\_\_\_\_

Poles Attached Licensor Previous Count: \_\_\_\_\_

Added by this Permit:

**New Count:**

**Exhibit "B"**

Application - **Notice of Removal of Pole Attachments**

To: City of Seward  
537 Main  
Seward, NE 68434

Applicant No. \_\_\_\_\_

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

Attention: City Administrator

Notice is hereby given that attachments have been removed from the following poles in Seward Nebraska, or vicinity, as indicated on the sketch attached hereto, listing pole number, location, etc.

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

Typed Name & Title: \_\_\_\_\_

**Notice Acknowledged by City of Seward**

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

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

Typed Name & Title: \_\_\_\_\_

Poles Attached Licensor Previous Count: \_\_\_\_\_

Deleted by this Permit: \_\_\_\_\_

**New Count:** \_\_\_\_\_

## **Appendix**

### **Administrative Practices**

#### **1. Application and Permit for Attachments**

- A. The Licensee shall prepare an **Application-Permit for Pole Attachments**, hereinafter referred to as Permit, on the form marked Exhibit "A" attached hereto and made part hereof, when applying for permission to make attachments to any pole or poles owned by the City of Seward, Seward, Nebraska hereinafter referred to as the "Licensor".
- B. The original and three copies of the Permit shall be forwarded to Licensor as far in advance of construction as possible. The information provided on said Permit shall show the location of the poles with respect to streets, alleys, addresses and other geographical markings with sufficient accuracy that the exact location and ownership of the poles can be readily determined.
- C. If permission to make the proposed attachments can be granted as provided in the Agreement, Licensor shall indicate on the Permit the estimated non-betterment cost of any work to be performed by Licensor and will sign it and forward the original and two copies to Licensee for further consideration.
- D. If acceptable to Licensee, two copies of the Permit shall be signed and returned to Licensor. The Permit, as thus approved, shall constitute approval for Licensee to make attachments to said pole or poles pursuant to the provisions of the Agreement. Licensor shall consider the accepted Permit as its authority to proceed with the rearrangements and/or pole replacements required to provide suitable space for Licensee's attachments. Licensor will advise Licensee when the poles are ready for occupancy.
- E. Billing for the actual costs of pole count changes covered by Permit will be issued, as soon as practical after completion of the work, to the Licensee by Licensor and the Licensee shall promptly reimburse Licensor for the amount of such billing.

#### **2. Effective Date of Attachments**

- A. The effective date of attachments to Licensor's poles for rental purpose shall be the date the Permit is accepted by Licensee or the date first attachment is made to said poles, whichever date is earliest.
- B. Licensee shall not attach to poles covered by this Agreement unless Permit has been fully executed.

### **3. Termination of Attachments by Licensee**

When all of Licensee's attachments have been removed from a pole or group of poles, Licensee shall prepare an **Application — Notice of Removal of Pole Attachments**, hereinafter referred to as Notice, on the form marked Exhibit "B", attached hereto and made a part hereof, and forward the original and two copies thereof to Licensor. The information provided on Notice shall show the location of the poles with respect to streets, alleys, addresses and other geographical markings with sufficient accuracy that the exact location and ownership of the poles can be readily determined.

### **4. Billing for Pole Rental**

- A. A tabulation of the poles on which the Licensee has attachments as of December 1st shall be made by Licensor in cooperation with the Licensee each year this Agreement remains in effect. This tabulation shall include all poles covered by accepted Permits on which Licensee's attachments are discovered by Licensor in connection with routine inspections of Licensee's facilities.
- B. The pole attachments records to be maintained by Licensor and the Licensee shall be verified from time to time by means of a complete field check of Licensee's pole attachments, which shall be made jointly by Licensor and the Licensee at least once every three (3) years.
- C. Billing for the pole rental shall be rendered to the Licensee annually as of January 1st from a billing summary to be prepared by Licensor and approved by Licensee. The summary shall be based on the joint tabulation of poles attached by Licensee provided for above.

### **5. Construction and Maintenance of Attachments**

Licensee's attachments shall be installed, maintained and removed in accordance with the requirements of the current National Electric Code and National Electric Safety Code or the requirements of any state or local authority having jurisdiction, whichever may be more stringent. All attachments will be placed within the space and at the location designated by Licensor.