

ORDINANCE NO. 4245

AN ORDINANCE OF THE CITY OF MESQUITE, TEXAS, AUTHORIZING THE CITY MANAGER TO FINALIZE AND EXECUTE AN AGREEMENT GRANTING A PRIVATE LICENSE TO UNION PACIFIC RAILROAD TO OCCUPY, MAINTAIN AND UTILIZE PORTIONS OF FORNEY ROAD RIGHT-OF-WAY LOCATED SOUTH OF THE INTERSECTION OF FORNEY ROAD AND CHASE ROAD WITHIN THE LIMITS HEREINAFTER MORE FULLY DESCRIBED, FOR THE PURPOSES OF INSTALLATION OF CONDUITS FOR IRRIGATION AND PRIVATE COMMUNICATION LINES; PROVIDING FOR THE TERMS AND CONDITIONS OF THIS LICENSE; PROVIDING FOR THE COMPENSATION TO BE PAID TO THE CITY OF MESQUITE; PROVIDING A REPEALER CLAUSE; PROVIDING A SEVERABILITY CLAUSE; AND PROVIDING AN EFFECTIVE DATE OF THIS LICENSE AND ORDINANCE.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF MESQUITE, TEXAS:

SECTION 1. That the City Manager is hereby authorized to finalize and execute an agreement and all other documents in connection therewith on behalf of the City of Mesquite ("City") according to the terms and conditions set forth in the agreement thereby granting a private license to Union Pacific Railroad Company ("UPRR"), a Delaware Corporation, its successors and assigns, hereinafter referred to as "GRANTEE" to occupy, maintain and utilize for the purpose set out herein below a 10-foot by 60-foot section of Forney Road, crossing Forney Road approximately 100 feet south of the intersection of Chase Road and Forney Road, Mesquite, Texas, in accordance with and subject to the restrictions and conditions of the proposed License Agreement, a copy of which is attached hereto as Exhibit "A" and made a part of this ordinance.

SECTION 2. That this license is granted for a term of 30 years unless sooner terminated according to other terms and provisions contained in this ordinance or the attached License Agreement.

SECTION 3. That GRANTEE shall pay to the City the sum of \$3,600.00 for the 30-year license, said sum to become due and payable upon the final passage of this ordinance. Such consideration shall be in addition to and exclusive of any other taxes or special assessments required by law to be paid by GRANTEE. Should GRANTEE fail to pay the above stated annual fee within 30 days of the due date, the City Manager or his designee ("City Manager") may terminate this license. All sums payable to the City shall be paid to the City Manager.

SECTION 4. That the licensed area shall be used by GRANTEE for the following purpose: The installation of two, four-inch PVC underground conduits for irrigation and two, four-inch conduits for communications to connect the UPRR irrigation and automated gate system installations adjacent to Forney Road at the Mesquite Intermodal Facility.

SECTION 5. That this license is subject to the requirements of all applicable City of Mesquite codes and ordinances, including but not limited to all terms and conditions of Chapter 15, Article III, Section 15-191 of the City of Mesquite Code, "Rights-of-Way Rules and Regulations."

SECTION 6. That all ordinances or portions thereof in conflict with the provisions of this ordinance, to the extent of such conflict, are hereby repealed. To the extent that such ordinances or portions thereof are not in conflict herewith, the same shall remain in full force and effect.

SECTION 7. That should any word, sentence, clause, paragraph or provision of this ordinance be held to be invalid or unconstitutional, the validity of the remaining provisions of this ordinance shall not be affected and shall remain in full force and effect.

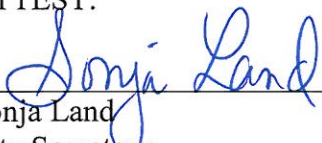
SECTION 8. That this ordinance shall take effect immediately from and after its passage in accordance with the provisions of the Charter of the City of Mesquite and it is accordingly so ordained.

DULY PASSED AND APPROVED by the City Council of the City of Mesquite, Texas, on the 19th day of November, 2012.



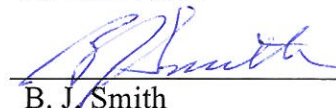
John Monaco
Mayor

ATTEST:



Sonja Land
City Secretary

APPROVED:



B. J. Smith
City Attorney

2. **Grant of license:** City hereby grants Licensee a revocable license for the purpose set out above, allowing Licensee to occupy, maintain and use a 10-foot by 60-foot section of Forney Road, crossing Forney Road approximately 100 feet south of the intersection of Chase Road and Forney Road, Mesquite, Texas, hereinafter referred to as "Licensed Area," as shown on attached Exhibit A.

3. **Conditions, terms and reservations:**
 - a. Licensee shall install no more than two four-inch PVC conduits for irrigation and two four-inch conduits for communications. The conduits shall be installed within 6 inch steel encasement pipe.

 - b. Licensee shall install the conduits by bore only under the pavement. An open cut is allowed within unpaved ROW, but no closer than two feet from the edge of pavement.

 - c. Licensee shall provide sufficient clearances to avoid interference with the use of the City's facilities and any other facility located in the right-of-way.

 - d. Licensee shall install and maintain signage at the right-of-way line on either side of Forney Road within the area of the improvements centered on the alignment, or within three feet, indicating the placement of an underground communications line, the depth of the line, owner's name and contact information as shown on attached Exhibit B.

4. **Consideration:** Licensee shall pay to the City the sum of THREE THOUSAND, SIX HUNDRED AND NO/100 (\$3,600.00) DOLLARS for the 30-year license herein granted, said sum to become due and payable upon the final passage of an ordinance approving this License. Such consideration shall be in addition to and exclusive of any other taxes or special assessments required by law to be paid by Licensee. Should Licensee fail to pay the above stated fee within thirty (30) days

of the date of passage of said ordinance, the City Manager or his designee ("City Manager") may terminate this license. All sums payable to the City hereunder shall be paid to the City Manager. As additional consideration for the grant of this License, Licensee agrees that the Improvements shall not be expanded, enlarged or altered in any way without the prior written approval of the City.

5. **Term:** This License is granted for a term of thirty(30) years unless sooner terminated according to other terms and provisions herein contained.

6. **Non-exclusive:** This License is nonexclusive and is made expressly subject and subordinate to the right of the City to use the Licensed Area for any public purpose; the right of any existing utility, drainage or communications facilities located in, on, under or upon an easement or property owned by City, any utility or communication company, public or private; all vested rights presently owned by any utility or communication company, public or private for the use of the City utility easement for facilities presently located within the boundaries of the easement; and the rights under any existing lease, license, or other interest in the Licensed Area granted or to be granted by the City to any individual, corporation or other entity, public or private. All communication companies and utilities, both public and private, shall have the full right to remove and keep removed all parts of any buildings, fences, trees, or other improvements or growths which in any way may endanger or interfere with the construction, maintenance and efficiency of its respective system and shall at all times have the full right of ingress and egress to or from and upon the Licensed Area for the purpose of constructing, relocating, inspecting, patrolling, maintaining and adding to or removing all or part of its respective systems without the necessity at any time of procuring the permission of anyone. The use of public rights-of-way by Licensee in the Licensed Area for any other purposes not expressly authorized, including the direct connection of customers or as a local distribution provider, providing cable services or operating a cable system as defined in the

Cable Communications Policy Act of 1984 or as recognized by the Federal Communications Commission, is prohibited.

7. **Mechanic's liens not permitted:** Licensee shall fully pay all labor and materials used in, on or about the Licensed Area and will not permit or suffer any mechanic's or material man's liens of any nature be affixed against the Licensed Area by reason of any work done or materials furnished to the Licensed Area at Licensee's instance or request.

8. **Future City use/modification:** This License is made expressly subject and subordinate to the right of City to use the Licensed Area for any public purpose whatsoever.
 - a. In the event that the City, at any time subsequent to the date of this License Agreement, at its sole discretion, determines that the relocation or removal of the Improvements is necessary or convenient for City's use of the Licensed Area, Licensee shall at its sole cost and expense make or cause to be made such modifications or relocate said Improvements so as to not interfere with the City's or City's assigns use of the Licensed Area. A minimum of thirty (30) days written notice for the exercise of the above action shall be given by City, and thereafter Licensee shall promptly commence to make the required changes and complete them as quickly as possible or reimburse City for the cost of making such required changes.

 - b. In the event that the City, at any time subsequent to the date of this License Agreement, at its sole discretion, determines that the grade of any street, sidewalk or parkway should be modified or changed, or that any other work should be done in connection with any public improvement which will affect the Licensed Area and/or any of Licensee's

installations and improvements thereon, any modifications or changes required by the City to Licensee's facilities in the Licensed Area or in construction or reconstruction of any public improvement attributable to Licensee's use of the Licensed Area and/or its installations and improvements thereon, shall be made at the sole expense of Licensee and to the satisfaction of the City Manager.

9. **Insurance:** Licensee shall procure and keep in full force and effect Commercial General Liability Insurance coverage issued by an insurance company authorized and approved by the State of Texas, acceptable to the City and issued in the standard form approved by the Texas Department of Insurance. The insured provisions of this policy must name the City, its officers and employees, as an additional insured protecting the City against any and all claims for damages to persons or property as a result of or arising out of the use, operation and maintenance by Licensee of the Licensed Area and Licensee's installations, improvements, landscaping and equipment in connection therewith and located therein. The commercial general liability coverage must provide combined single limits of liability for bodily injury and property damage of not less than \$1,000,000 for each occurrence, \$2,000,000 annual aggregate. The coverage must be on an "occurrences" basis and must include coverage for premises operations, independent contractors, products/completed operations, personal injury, contractual liability and medical payments. This insurance shall also include coverage for underground, explosion and collapse hazards. The City reserves the right to review the insurance requirements set forth herein during the effective term of the License and to adjust insurance coverages and their limits when deemed necessary and prudent by the City's Risk Management Department based upon changes in statutory law, court decisions, or the claims history of the industry as well as the City.

- a. Licensee agrees that with respect to the above required insurance, all insurance contracts and certificates of insurance will contain and state, in writing, that coverage shall not be canceled, non-renewed or materially changed except after thirty (30) days written notice by certificated mail to the City Manager.
- b. Licensee shall carry said insurance at its expense and shall furnish the City proof of such insurance. In the event said insurance should terminate during the licensing term hereof, or Licensee fails to furnish proof of insurance coverage in accordance with the specifications as required by this section, the City Manager, or designee, may terminate the License granted herein.

10. Compliance with laws:

- a. This License is subject to the provisions of the Charter of the City of Mesquite as it now exists, or may hereafter be adopted or amended, and the ordinances of the City now in effect or those which may hereafter be passed or adopted, including but not limited to all terms and conditions of Chapter 15, Article III, Section 15-191 of the City of Mesquite Code, "Rights-of-Way Rules and Regulations." Licensee agrees to abide by and be governed by all laws, ordinances and regulations of any and all governmental entities having jurisdiction over Licensee and shall provide satisfactory evidence of compliance upon the request of the City.
- b. Licensee shall not use the Licensed Area in any manner which violates Federal, State or local laws, regulations, rules and orders, regardless of when they become or became effective, including but not limited to those related to health, safety, noise, environmental protection, waste disposal and water and air quality, the comprehensive environmental response, compensation and liability act of 1980 ("CERCLA"), the

resource conservation and recovery act of 1976 ("RCRA"), the Texas Water Code and the Texas Solid Waste Disposal Act. Licensee warrants that the permitted use of the Licensed Area will not result in the disposal or other release of any hazardous substance or solid waste on or to the Licensed Area, and that it will take all steps necessary to ensure that no such hazardous substance or solid waste will ever be discharged onto the Licensed Area or adjoining the Licensed Area by Licensee. The terms "hazardous substance and waste" shall have the meaning specified in CERCLA and the term solid waste and disposal (or dispose) shall have the meaning specified in the RCRA; provided, however, that in the event either CERCLA or RCRA is amended so as to broaden the meaning of any term defined thereby, such broader meaning shall apply subsequent to the effective date of such amendment; and provided further, at the extent that the laws of the State of Texas establish a meaning for hazardous substance, release, solid waste, or disposal which is broader than that specified in the CERCLA or RCRA, such broader meaning shall apply. Licensee shall indemnify and hold City harmless against all costs, environmental clean up to the Licensed Area and surrounding the Licensed Area resulting from Licensee's use of the Licensed Area under this License.

- c. Should any discharge, leakage, spillage, emission or pollution of any type occur upon or from the Licensed Area due to Licensee's use and occupancy thereof, Licensee, at its expense, shall be obligated to clean up the Licensed Area to the satisfaction of the City and any governmental body having jurisdiction thereover. The City may, at its option, clean the Licensed Area. If the City elects to do so, Licensee agrees to promptly pay to the City the reasonable cost of such cleanup upon receipt of bills therefore. Licensee agrees that the indemnity provisions contained in

Paragraph 11 shall be fully applicable to the requirements of this paragraph, in event of Licensee's breach of this paragraph, or as a result of any such discharge, leakage, spillage, emission or pollution arising out of the Licensee's use of the Licensed Area.

11. **Indemnification:** Licensee agrees and is bound to the extent allowed by law to defend, indemnify and hold the City, its officers, agents and employees, harmless against any and all claims, lawsuits, judgments, costs and expenses for bodily injury (including death), property damage or other harm for which recovery of damages is sought, suffered by any person or persons, that may arise out of or be occasioned by the use, occupancy and maintenance of the Licensed Area or Licensee's installations, improvements, landscaping and equipment within the Licensed Area, from any act or omission of any representative, agent, customer and/or employee of Licensee, or by Licensee's breach of any of the terms or provisions of this License, or by any negligent or strictly liable act or omission of Licensee, its officers, agents, employees, customers or contractors in the use, occupancy and maintenance of Licensee's installations, improvements, landscaping and equipment within the Licensed Area; except that the indemnity provided for in this paragraph shall not apply to any liability resulting from the sole negligence or fault of the City, its officers, agents, employees or separate contractors, and in the event of joint and concurring negligence or fault of both the Licensee and the City, responsibility and liability, if any, shall be apportioned comparatively in accordance with the laws of the State of Texas, without, however, waiving any governmental immunity available to the City under Texas law and without waiving any defenses of the parties under Texas law. This obligation to indemnify and defend shall also include any claim for damage that any utility or communication company, whether publicly or privately owned, may sustain or receive by reason of Licensee's use of the Licensed Area or Licensee's installations, improvements, landscaping and equipment located thereon. In addition to the foregoing, Licensee covenants and agrees never to

make a claim of any kind or character whatsoever against the City for damage of any kind that it may suffer by reason of the installation, construction, reconstruction, operation or maintenance of any public improvement, utility or communication facility on the Licensed Area, whether presently in place or which may in the future be constructed or installed, including but not limited to, any water or wastewater mains or storm sewer facilities, regardless of whether such damage is due to flooding, infiltration, backflow or seepage caused from the failure of any installation, natural causes, City's negligence, or from any other cause whatsoever.

12. Termination:

- a. The Governing Body of the City reserves the right by resolution duly passed by said Governing Body, to terminate and cancel this License upon giving Licensee thirty (30) days notice of its intent to cancel. Upon termination, all rights granted hereunder shall thereupon be considered fully terminated and canceled and the City shall not be held liable by reason thereof. Said resolution shall be final and shall not be subject to review by the Courts.
- b. Licensee shall have the right of cancellation upon giving the City thirty (30) days written notice of its intention to cancel, and in either event upon the termination or cancellation by the City or Licensee, as the case may be, this License shall become null and void.
- c. The Governing body of the City reserves the right, at any time without notice, to terminate and cancel this License, by resolution, upon a finding by the Governing body that Licensee has failed to perform its obligations as set forth in this License Agreement; or that this License is inconsistent with the public use of the property; or whenever the purpose or use of the License is likely to become a nuisance. In these circumstances, the

parties agree that all rights granted hereunder shall be considered fully terminated and canceled and the City shall not be held liable by reason thereof. The parties agree that the decision of the Governing Body of the City in this matter shall be final and binding upon all parties insofar as the City's determination as to whether the Licensee's use of this License constitutes a nuisance or is inconsistent with the public use of the property and shall not be subject to review by the Courts.

- d. This License shall terminate and be of no further force and effect in the event Licensee discontinues or abandons the use of the Improvements or in the event Licensee removes the Improvements from the Licensed Area or upon termination by City whichever event first occurs.
- e. In the event that the City abandons the Licensed Area, then this License Agreement shall be of no further effect.

13. Removal of installations upon termination:

- a. If this License is terminated or canceled for any reason whatsoever, Licensee, upon orders issued by the City acting through the City Manager, or designee, shall remove, to the extent required by the City Manager, installations, improvements, encroachments and appurtenances owned by it situated in, under or attached to the Licensed Area, and shall restore the premises to its former condition in accordance with the requirements of the City Manager at the sole cost of Licensee. Upon termination, the City shall become immediately entitled to possession of the premises without giving any notice and without the necessity of legal proceedings to obtain possession thereof; that any fees paid in advance shall be returned to Licensee in the proportion which the unexpired part of the period bears to the payment period.

- b. If, upon termination of this License, Licensee fails to remove its installations, improvements and appurtenances and to restore the Licensed Area in compliance with orders issued by City, or such work is not done to the satisfaction of the City Manager, then in either event the City shall have the right to do all work necessary to restore said area to its former condition or cause such work to be done, and to assess the cost of all such work against Licensee; in neither event shall the City be liable to Licensee on account thereof.
14. **Assignment:** This License may not be assigned without prior written approval from the City Manager. Such assignment shall recite that that it is subject to the terms, restrictions and conditions contained in this License Agreement. The assignee shall deliver evidence of ownership of property abutting the Licensed Area and a copy of the assignment, along with the assignee's written acceptance of the provisions of this ordinance, to the City Manager within ten (10) days of such assignment. Should Licensee fail to obtain prior written approval for assignment of this License or fail to provide the City with the required written acceptance and a copy of the assignment, the City Manager may terminate this License.
15. **Notice:** When notice is permitted or required by this License Agreement, it shall be in writing and shall be deemed delivered when delivered in person or when placed, postage prepaid in the United States mail, certified return receipt requested, and addressed to the parties at the address set forth below their signature. Either party may designate from time to time another and different address for receipt of notice by giving notice of such change or address.
16. **Governing law:** This License Agreement is governed by the laws of the State of Texas; and exclusive venue for any action shall be in the State District Court of

16. **Governing law:** This License Agreement is governed by the laws of the State of Texas; and exclusive venue for any action shall be in the State District Court of Dallas County, Texas. The parties agree to submit to the personal and subject matter jurisdiction of said court.
17. **Exhibits:** The exhibits attached to this License Agreement are incorporated herein by reference.
18. **Binding effect:** This License Agreement shall be binding upon and inure to the benefit of the parties and their respective heirs, personal representatives, successors and assigns.
19. **Entire agreement:** This License Agreement embodies the entire agreement between the parties and supersedes all prior agreements, understandings, if any, relating to the Licensed Area and the matters addressed herein and may be amended or supplemented only by written instrument executed by the party against whom enforcement is sought.
20. **Recitals:** The recitals to this License Agreement are incorporated herein by reference.

EXECUTED this 12 day of DECEMBER, 2012.

CITY OF MESQUITE, TEXAS

By: 

Ted Barron, City Manager

ATTEST:

By: 

Sonja Land, City Secretary

APPROVED AS TO FORM:

By: Cynthia H. Palmer
City Attorney or his designee

EXECUTED this the 7 day of DECEMBER 2012.

UNION PACIFIC RAILROAD COMPANY

By: Tommy Love

Assistant Vice President – Real Estate

Title

CITY'S ACKNOWLEDGMENT

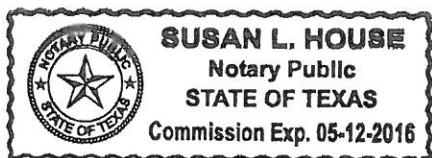
STATE OF TEXAS §
COUNTY OF DALLAS §

This instrument was acknowledged before me on the 12th day of December 2012, by Ted Barron, City Manager of the City of Mesquite, Texas, a Texas home rule municipality, on behalf of said municipality.

Susan L. House
Notary Public, State of Texas

My Commission Expires:

5.12.16



ACKNOWLEDGMENT

STATE OF NEBRASKA §
COUNTY OF DOUGLAS §

This instrument was acknowledged before me on the 7 day of DECEMBER, 2012, by Tony K. Love, Assistant Vice President of Union Pacific Railroad Company, a Delaware corporation, on behalf of said corporation.

[Signature]
Notary Public, State of Nebraska

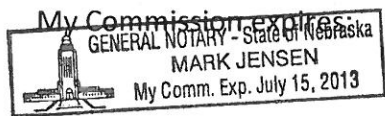
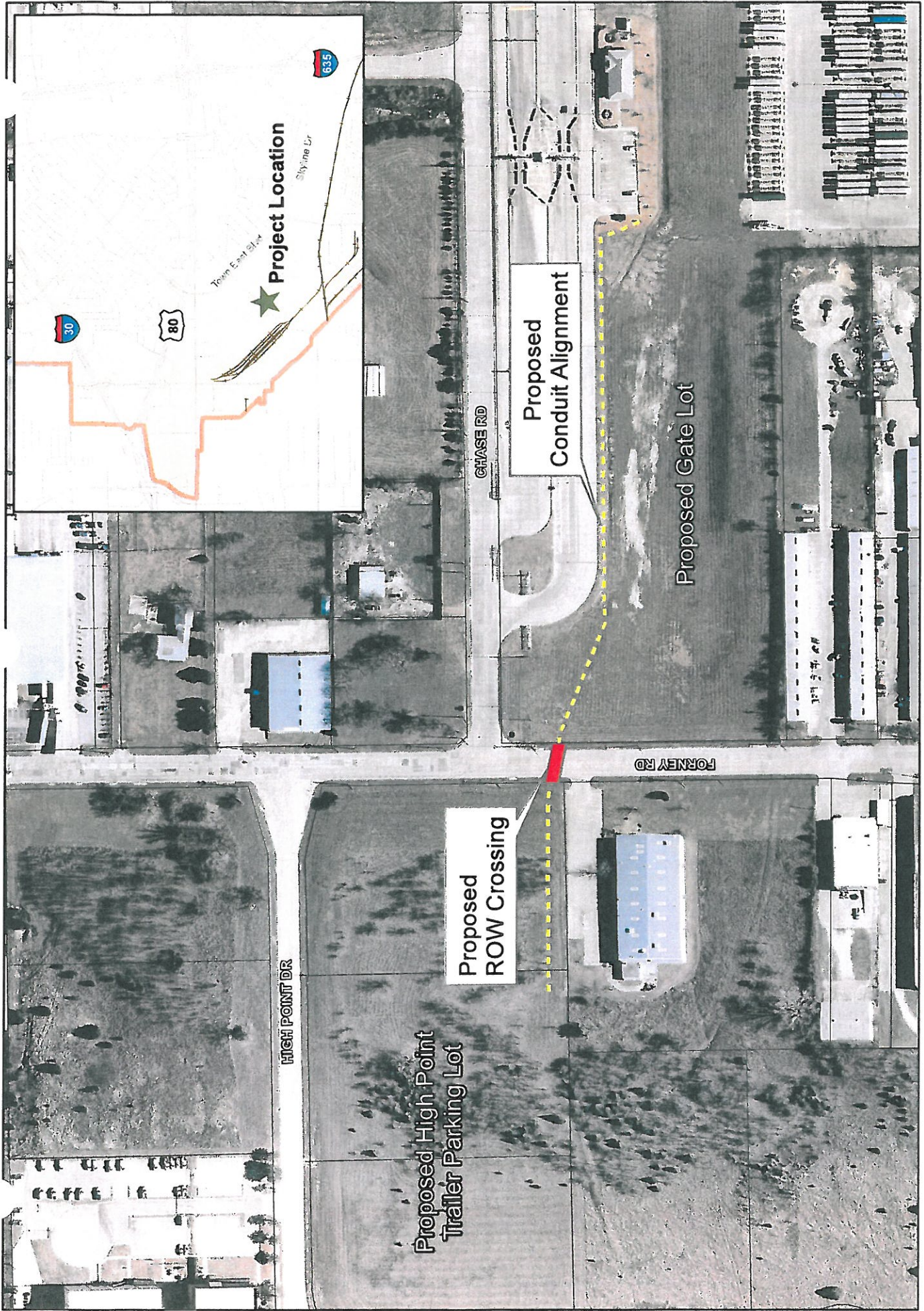


EXHIBIT B

Additional Installation Requirements

These requirements are specific conditions of the private communication and irrigation conduit installation at this location. These requirements do not alleviate or lessen any responsibility of the Licensee provided in this Agreement or by other laws, rules or regulations of the City or any other duly authorized regulatory authority.

- Two, four-inch PVC conduits for irrigation and two, four-inch PVC conduits for communications must each be installed within a 6-inch steel encasement pipe.
- Each of the four, 6-inch steel encasement pipes must be located at least two feet (2') below the bottom of the existing concrete pavement.
- All existing utility lines must be located by the Licensee and caution used to avoid hitting them.
- All construction crossing the pavement of Forney Road must be accomplished through underground boring. No street cuts are permitted within two feet (2') from the edge of pavement.
- Licensee must place flexible, plastic (non metal) location signs at the right-of-way line on each side of Forney Road within the area of improvements centered on the alignment or within three feet (3') of the improvements if obstructions prevent this, to indicate the placement of underground communication lines, the depth of the lines, owner's name and emergency contact number.



1 inch = 200 feet

Project Manager: Ted Chinn
 Drawn By: Lonnie Hill
 Engineering Map Date: 10/17/2012
 Aerial Photo Date: January 2009
 Path: J:\Projects\City_Manager\Chinn\UPRR ROW Exhibit