



**CITY OF URBANA, ILLINOIS
DEPARTMENT OF PUBLIC WORKS**

ADMINISTRATION

MEMORANDUM

TO: Mayor Satterthwaite and Urbana City Council

FROM: Stephen Holz, Assistant City Attorney
William R. Gray, P. E., Public Works Director

DATE: October 30, 2002

RE: **Conxxus Agreement for Use of Right-of-Way
Ordinance No. 2002-10-124**

At the Committee meeting of September 9, 2002, the Committee of the Whole considered a proposed agreement between the City of Urbana and Conxxus, L.L.C., by which Conxxus would be allowed to install conduit in the City's right-of-way on Lincoln Avenue and Church Street for telecommunication purposes. That matter was approved by the Committee and forwarded to the Council meeting of September 16, 2002.

Shortly before the Council meeting of September 16, 2002, the proposed agreement was withdrawn from the Council Agenda at the request of Conxxus, in order to make some modifications.

Attached to this memorandum is a copy of the agreement. The essence of the agreement remains the same, except that it now allows access only to Lincoln Avenue right-of-way, not to Church Street right-of-way.

Other than that, the only significant changes are as follows:

- Paragraph B adds language providing that the City may not declare the agreement revoked upon the Company's violation of the agreement unless the City first gives the company notice of the violation and an opportunity to cure. Language is also added to make it clear that the agreement is only for underground installations.
- Paragraph D similarly adds a requirement that the City can not declare the company's facilities abandoned unless the City first gives the Company notice of its intent to declare the facilities abandoned.
- Paragraph K addresses the impact of the Illinois Simplified Municipal Telecommunications Tax Act on this agreement. If Conxxus were presently a retailer

of telecommunications services in the City of Urbana, that Act would preclude the City from requiring this license agreement. Instead, the Act would require the City to allow Conxxus into the right-of-way without a license agreement, and would require Conxxus to pay the Telecommunications Tax. This paragraph recognizes that if Conxxus becomes a telecommunications retailer in Urbana in the future, Conxxus' status will be governed by the Act.

The City's staff recommends approval of the agreement with the modifications.

WRG:klf
Attachments

ORDINANCE NO. 2002-10-124

AN ORDINANCE APPROVING AND AUTHORIZING THE EXECUTION OF AN AGREEMENT WITH
CONXXUS, LLC, FOR USE OF RIGHT-OF-WAY

(Lincoln Avenue Between Stoughton Street and Hill Street, and
Church Street Between Lincoln Avenue and Coler Avenue)

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF
URBANA, ILLINOIS, as follows:

Section 1. That an Agreement for Use of Right-of-Way between the City
of Urbana, Illinois and Conxxus, in substantially the form of the copy of
said Agreement attached hereto and hereby incorporated by reference, be and
the same is hereby authorized and approved.

Section 2. That the Mayor of the City of Urbana, Illinois, be and the
same is hereby authorized to execute and deliver and the City Clerk of the
City of Urbana, Illinois, be and the same is authorized to attest to said
execution of said Agreement as so authorized and approved for and on behalf
of the City of Urbana, Illinois.

PASSED by the City Council this _____ day of _____, _____.

AYES:

NAYS:

ABSTAINS:

Phyllis D. Clark, City Clerk

APPROVED by the Mayor this _____ day of _____, _____.

Tod Satterthwaite, Mayor

AGREEMENT FOR USE OF RIGHT-OF-WAY

(Lincoln Avenue Between Stoughton Street and Hill Street)

THIS AGREEMENT is made and entered into this _____ day of _____, 2002, by and between the CITY OF URBANA, a municipal corporation of the State of Illinois (hereinafter "City"), and Conxxus, L.L.C. (hereinafter "Company").

WITNESSETH:

FOR AND IN CONSIDERATION of the mutual covenants and agreements herein contained, the City and the Company do mutually covenant and agree as follows:

A. Lincoln Avenue is a roadway of at least a sixty feet of dedicated right-of-way (r.o.w.) between the north r.o.w. of Green Street and the south r.o.w. of Hill Street.

B. The Company is granted by the City a limited right to install up to three, one and one-fourth inch (1¼") conduits and one-1" conduit within the Lincoln Avenue r.o.w. (hereinafter "telecommunications facility"). This limited right is wholly dependent upon the Company, its successors and assigns, fully and faithfully performing and complying with all the terms, conditions, and covenants contained within this Agreement. The Company expressly acknowledges and agrees that such limited right is immediately revocable at the option of the City in the event that the Company, its successor or assign, fails to perform or comply with any term, condition or covenant set forth within this Agreement provided that Company shall have a period to cure any such failure as otherwise set forth herein. This Agreement may be terminated at any time without notice upon the express written consent of both Parties. Either Party may terminate this Agreement for cause by giving written notice to the other Party at least forty-five (45) days prior to the proposed termination. For the purposes of this section, "for cause" means the breach of any material provision of this Agreement, which remains uncured for a period of thirty (30) days after serving the written notice thereof. A notice of termination shall specify the "cause" upon which such termination is based. Further, it is expressly understood that regardless of the existence or not of any breach, the use by the Company of the hereinabove described r-o-w shall at all times be subordinate to the City's use of said r-o-w. This license does not authorize the placing of any conduit, wire, fiber, poles or other appurtenances above ground, except for markers and handholes or other appurtenances that are commonly associated with below-grade installations of conduit and fiber.

C. The construction and installation of said facility or any change thereof including extension, reduction or removal of the telecommunications facility shall be subject to the issuance of a permit therefore by the City's Director of Public Works (hereinafter referred to as "Director"). No telecommunications facility shall be laid or installed in or under any streets, alleys or other public way until a permit therefore is issued by the Director. Said permit shall indicate the time, manner and place of laying or installing each telecommunications facility. Permit approval shall be granted if the proposed improvements are consistent with the use of the

public way granted by this Agreement. Each application for a permit shall be accompanied by prints, plans and maps showing the proposed location of each telecommunications facility to be laid or installed, the location of each conduit to be entered, and the number and placement of manholes or other openings to gain access to said conduit. In the event of an emergency which the Company believes poses a threat of immediate harm to the public or to any of the Company's facilities, the Company shall be permitted access to the public way to mitigate the threatened harm without the benefit of a permit, provided however the Company shall advise the Municipality of the emergency at its earliest reasonable opportunity and seek a proper permit within a reasonable period of time thereafter.

D. The purpose of the herein permitted right to construct upon such r-o-w shall be limited solely to the installation, operation, and maintenance of the telecommunications facility in said r-o-w, which is shown on Exhibit A, which is attached to and incorporated into this agreement, and use thereof, and for incidental uses directly related thereto. Upon cessation of such use as determined by the Director, this Agreement shall immediately lapse and terminate. If the City believes that any facilities of the Company are no longer in use by the Company or are otherwise abandoned by the Company, the City may notify the Company in writing that the City is asserting its right to declare this agreement lapsed and terminated. Such notice must give the Company at least thirty (30) days to respond. If the Company demonstrates that the facilities are still in use by the Company and are not otherwise abandoned by the Company, this agreement shall remain in force and effect according to its terms. If the Company does not demonstrate within thirty days of the notice that the facilities are in use by the Company and are not otherwise abandoned by the Company, this agreement shall be deemed lapsed and terminated. Any additional use other than that specifically named, without the further express written consent of the City, shall be construed as a violation of this Agreement.

E. The Company, after doing any work shall, at its sole cost and expense, promptly repair and restore the site including all sidewalks, parkways or pavements disturbed by the Company to the condition in which they existed prior to the performance of the work, or nearly as practicable as determined by the City in the exercise of its reasonable discretion. In the event that any such sidewalk, parkway or pavement shall become uneven, unsettled, or otherwise requires repairing, because of such disturbance by the Company, then the Company, as soon as climatic conditions will reasonably permit shall promptly, and no more than fifteen days from receipt of notice from the City to do so, cause such sidewalk, parkway or pavement to be repaired or restored to the condition in which it existed before said sidewalk, parkway or pavement was disturbed by the Company. Such restoration shall be completed within ten (10) days after the date of commencement of such restoration work. In the event that the Company fails to commence and complete the restoration work in the manner and within the time periods prescribed herein, the City may, but shall have no obligation to, perform such work and recover from the Company any costs and expenses the City incurs. In the event that such public way or improvement cannot be so repaired, replaced or restored, the Company shall justly compensate the City. All excavations in lawns or grassy parkways shall be immediately backfilled, tamped and then restored within a reasonable time thereafter to the original condition with sod or hydroseed in accordance with the applicable provisions of this Agreement. The Company shall keep all structures which it shall construct by virtue of this Agreement, in a reasonably safe condition at all times, and shall maintain such traffic control and protection during the

construction, repair or renewal work performed hereunder as will reasonably avoid danger to life, limb and property. Any damage caused by the Company to any other utility including storm and sanitary sewers and their services, street lighting, traffic signals, field tiles or any facilities from any other utility company shall, at its sole cost and expense, promptly repair and restore said damaged facility.

F. In the event of an emergency, defined as imminent peril to person or property, or when the Company has inadequately complied with an order of the Director pursuant to Paragraph (B) above, or at any other time the Director or other responsible City official in good faith deems the procedures of Paragraph (B) impracticable under the circumstances present, the Company consents and agrees that the City or its duly authorized agent may remove the telecommunications facility, or any portion thereof, and charge all costs and expenses incurred in such removal, disposal, and restoration to the Company. Should the Company fail in any way to make timely payment to the City for such costs and expenses, the Company agrees to pay, in addition to any amount so owed, reasonable attorneys' fees and court costs incurred in the collection of such amount.

G. The Company agrees to defend the City from and against any claims, suits, or actions for death or injury to persons or damage to property or breach of the contract brought against the City arising from any alleged claims, acts, or omissions in connection with this Agreement, whether or not suit is filed unless such claim, suit, or cause of action was based solely upon the negligence of the City, its employees, agents, or contractors. Additionally, the Company shall indemnify the City for any sums the City becomes obligated to pay as damages arising out of such circumstances except to the extent such damages are due to the negligence of the City, its employees, agents, or contractors.

H. The Company acknowledges that it shall be fully responsible and bear all costs associated with any and all maintenance or repair of the telecommunications facility.

I. The Company shall provide as built plans to the City, upon completion of the installation of the telecommunications facility, in an electronic format compatible with the City's Geographic Information System.

J. Annual payments shall be made to the City in the amount of one dollar and fifty-seven cents (\$1.57) per lineal foot of licensed property. The amounts herein set for compensation shall, on January first of each year beginning January 1, 2003, be adjusted by the Consumer Price Index published by the United States Department of Labor, Chicago area, all items for all urban consumers, or other generally recognized index which succeeds the Consumer Price Index.

K. In the event that Company becomes a retailer of telecommunications services in the City by transmitting, supplying or furnishing of telecommunications, including without limitation internet services, data services, local telephone services or long distance services, as contemplated under the Illinois Simplified Municipal Telecommunications Tax Act, as amended from time to time, then Company shall provide written notice thereof to the City, and as soon as practicable thereafter commence collection of the taxes provided for under that Act, and any

other taxes that it may be required by law to collect. Upon commencing such activities as a retailer, the obligation of Company to make annual payments pursuant to Paragraph J of this Agreement shall cease, and all payments thenceforth shall be based upon the taxation requirements stated herein.

L. The license granted pursuant to this article may not be transferred without the express written consent of the City, provided that such consent shall not be unreasonably withheld.

M. The license shall be non-exclusive. No license granted under this authority shall confer any exclusive right, privilege, or license to occupy the rights-of-way for any purpose.

N. No license granted under this authority shall convey any right, title, or interest in rights-of-way but shall be deemed a license only to use and occupy the r-o-w for the limited purposes and term stated on the grant. No license granted under this authority shall be construed as any warranty of title.

O. This Agreement shall be expressly binding upon both parties, their successors and assigns. This Agreement shall be valid only upon being duly recorded with the Recorder of Deeds for Champaign County, Illinois.

P. Notices transmitted to either party to this agreement shall be addressed as follows. All notices required under this Agreement shall be in writing. Notices shall be personally hand delivered or mailed by certified U.S. mail, return receipt requested, addressed to the address of the respective Party as stated below, or to any changed address either Party may have fixed by notice. Notice shall be deemed effective upon actual receipt of the notice, or, if certified mail delivery is not accomplished, notice shall be deemed given on the date of the mailing.

<u>To the City:</u>	Mayor City of Urbana 400 South Vine Street Urbana, Illinois 61801	Chief Administrative Officer City of Urbana 400 South Vine Street Urbana, Illinois 61801
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<u>To the Company:</u>	Conxxus L.L.C. <i>Attention: Manager</i> 330 West Ottawa Road Paxton, Illinois 60957
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Either party may designate by written notice a different address to which notices shall be sent.

Q. The Company shall not be excused from complying with any of the terms and conditions of this Agreement by any failure of the City upon any one or more occasions to insist upon or to seek compliance with any such terms or conditions.

R. This agreement shall remain in effect for twenty (20) years.

S. The Company shall comply with all ordinances of the City of Urbana, including but not limited to all generally-applicable provisions regarding rights-of-way, as such ordinances are now or hereafter amended, except to the extent that such ordinances directly and irreconcilably conflict with an express provision of this agreement. The Company shall comply with all conditions of permits issued to it.

T. In the event any one or more of the provisions contained in this Agreement shall be determined to be invalid, illegal, or unenforceable in any respect by a Court of competent jurisdiction, such provision shall be deemed severed from this Agreement, and the validity, legality, or enforceability of the remaining provisions of this Agreement or any other application thereof shall not be affected or impaired thereby, and shall, therefore, remain in full force and effect.

U. This Agreement and any written exhibits or addenda to it constitute the entire Agreement between the Parties, and may be changed, modified or amended only by mutual written agreement executed by them.

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

CITY OF URBANA, ILLINOIS

By: _____
Tod Satterthwaite, Mayor

ATTEST:

Phyllis Clark, City Clerk

* * *

CONXXUS

By: _____
(Signature)

(Print Name & Title)

ATTEST:

Secretary *(Signature)*

(Print Name)

* * *

Prepared by and please return recorded copy to:

*Jack Waaler, City Attorney
City of Urbana, Illinois
400 South Vine Street
Urbana, Illinois 61801*

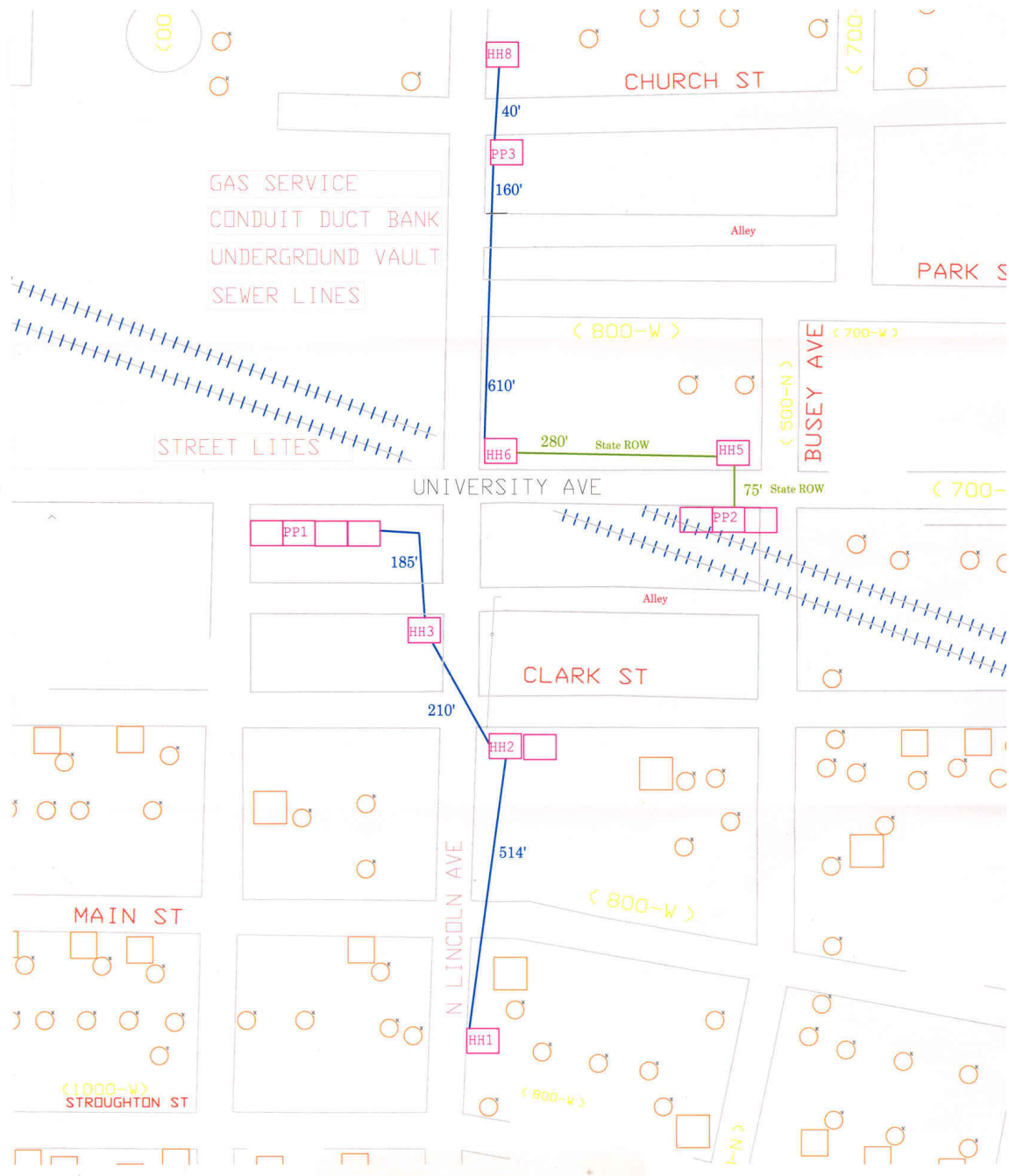


EXHIBIT A