

C. OCCUPANCY AND SURRENDER PROCEDURES:

1. Application for Occupancy:

- a. Tenant shall submit an Application for Occupancy for each Section of Conduit, or in the case of Co-Occupancy, for each Facility placed in each Section of Co-Occupied Conduits. Tenant shall submit Applications within ten (10) calendar days of each Occupancy. Tenant shall use the appropriate Application form for Single Occupancy or Co-Occupancy attached hereto in Exhibit A. ECS shall return any Application that contains errors or omissions, material or otherwise.
- b. Applications for Occupancy submitted by Tenant shall be deemed accepted by ECS unless rejected by return by ECS. If more than one Tenant applies for Occupancy of the same Spare Conduit, Innerduct or space in a Section of Conduit, whichever Tenant's Application was first received by ECS shall have prior rights to such space. If ECS cannot determine which Tenant's Application was received first, then the Tenant who first Occupies the Spare Conduit, Innerduct or space in the Conduit shall have prior rights to such Occupancy.

2. Application for Surrender:

- a. Tenant shall submit an Application for Surrender of Occupancy for each Section of Conduit, or in the case of Co-Occupancy for each Facility placed in the Section of Conduit, within ten (10) calendar days of the date its Occupancy has ceased or its Facilities have been cut and abandoned after reasonable attempts to remove the Facilities have failed. Tenant shall Surrender Conduits and Innerducts using the appropriate Application for Surrender of Occupancy form for Single or Co-Occupancy attached hereto in Exhibit A. ECS shall return any Applications for Surrender that contain errors or omissions, material or otherwise.
- b. Applications for Surrender of Occupancy shall be deemed accepted by ECS unless rejected by return by ECS. Tenant shall pay the Occupancy Rate for each Section of Conduit, or in the case of Co-Occupancy for each Facility placed in the Section of Conduit, for which it has submitted an Application for Occupancy from the initial date of Occupancy until the date that ECS receives an accepted Application for Surrender of Occupancy from Tenant. ECS shall not credit Tenant's account for any late or inaccurately filed Surrenders.
- c. Tenant shall not submit any Applications for Surrender of Occupancy unless Tenant shall have first removed its Facilities from that Section of the Conduit System, or having made reasonable efforts to remove its Facilities and failed, cut its Facilities at the Point of Entry at each end of the Conduit Section. The abandonment of Facilities shall not relieve Tenant of any liability for any personal injury, property damage or environmental conditions caused in whole or in part by the continued presence of its abandoned Facilities in the Conduit System.

3. Bonding:

- a. Tenant shall be responsible for paying the applicable Occupancy Rate for each Bonded Conduit or Bonded Innerduct for a period of ten (10) years from the date the Tenant is notified by ECS that the Bonded Conduit or Bonded Innerduct is available for Occupancy.
- b. After the expiration of the Bonding Period, each Bonded Conduit or Bonded Innerduct shall be reclassified as Non-Bonded, and may be Surrendered by Tenant in accordance with paragraph 2, above. If Tenant does not Surrender a Bonded Conduit at the end of the Bonding Period, ECS shall automatically convert the Bonded Conduit to Non-Bonded Conduit and continue to bill Tenant the Occupancy Rate until such time as Tenant Surrenders the Conduit.
- c. Except as otherwise allowed hereunder, Tenant shall not Occupy a Bonded Conduit or Bonded Innerduct of any Other Tenant without the prior written authorization of ECS, and only after a determination has been made that the Other Tenant does not have an Immediate Service Need for the Bonded Conduit or Innerduct. Such permission shall be subject to Tenant's assumption of the Other Tenant's remaining bonding obligation and receipt of the appropriate forms as described in subparagraph 3.c, above.

4. Unauthorized Occupancies:

- a. If ECS determines that the Tenant is Occupying any Section of the Conduit System without having submitted an Application for Occupancy thereof within ten (10) days of Occupancy, ECS shall, without prejudice to its other rights or remedies under this Agreement including termination, require Tenant, if it has not already done so, to submit an Application for Occupancy for such Conduit or Innerduct within ten (10) calendar days of receipt of written notice by ECS of the unauthorized occupancy. For each unauthorized Occupancy, ECS shall assess Tenant a charge equal to three (3) times the Occupancy Rate for the period of unauthorized Occupancy, which shall be liquidated damages due from the Tenant to ECS for an Unauthorized Occupancy because ECS's actual damages cannot be reasonably calculated.
- b. For the purpose of determining the period of unauthorized Occupancy, the period shall be deemed to be the lesser of: (i) a period of five (5) years prior to the date Tenant received written notification from ECS of the unauthorized Occupancy; or (ii) the actual period of unauthorized Occupancy which Tenant can reasonable prove based on written records kept at the time of the initial Occupancy.
- c. No act or omission by ECS shall be deemed as having otherwise legitimized an otherwise unauthorized Occupancy. If any authorization should be subsequently issued, such subsequent authorization shall not operate retroactively or constitute a waiver by ECS of any of its rights or privileges under this Agreement or otherwise, provided, however, that Tenant shall be subject to all liabilities,

obligations and responsibilities of this Agreement in regard to said unauthorized Occupancy from its inception.

- d. If ECS determines that Tenant has occupied ten (10) or more Sections of Conduit without authorization, or engaged in two (2) or more instances of unauthorized Occupancy involving three (3) or more Sections of Conduit within a period of three (3) years, ECS may, at its option, require Tenant to retain an independent auditing firm acceptable to ECS, at Tenant's sole expense, to conduct a comprehensive audit of Tenant's Occupancy of the Conduit System. For each ECS Conduit, or in the case of Co-Occupancy, each Innerduct, Occupied by Tenant, the audit shall identify the (i) Conduit System (i.e., the "to" and "from" Manhole locations); (ii) Duct position (i.e., wall and Duct number); (iii) Rental Length; (iv) date of initial Occupancy; (v) date vacated, if applicable; (vi) number of Innerducts, if applicable; (vii) type of Cable(s); and (viii) whether an Application for Occupancy was submitted by Tenant. In addition, the audit shall identify all Manhole Points of Entry made by Tenant associated with newly identified Cable runs or for any Cable runs where ECS has not previously been notified of the penetration, and provide sufficient information to identify the location of the penetrations in each Manhole. ECS may obtain, upon request, copies of any all documents, work papers, spread sheets, etc., reviewed or prepared by the auditor.