

LICENSE AGREEMENT

This License Agreement (“Agreement”) is made by and between DALLAS AREA RAPID TRANSIT (“DART”), a regional transportation authority created, organized, and existing pursuant to Chapter 452, Texas Transportation Code, with offices at 1401 Pacific Avenue, Dallas, Texas 75202, and CITY OF LEWISVILLE (“Licensee”), a Texas municipality, acting herein by and through its duly authorized official, located at 151 West Church Street, Lewisville, Texas 75057.

DART and Licensee (individually referred to herein as a “Party” or collectively as “Parties”) agree as follows:

I. Definitions.

1.1 “Corridor” shall mean DART’s railroad corridor between Dallas and Denton, Texas.

1.2 “Effective Date” shall mean the date this Agreement is last signed by a Party.

1.3 “Permitted Improvement” shall mean:

- one (1) underground 12-inch PVC sanitary sewer pipe encased in an 18-inch steel casing pipe;
- one (1) underground 30-inch RCP drainage pipe;
- one (1) underground 18-inch RCP storm water pipe;
- one (1) underground 36-inch iron water line encased in a 48-inch steel casing pipe;

more particularly detailed in Exhibit A-1 through A-3, attached to this Agreement and fully incorporated herein.

1.4 “Permitted Use” shall mean designing, constructing, installing, operating, reconstructing, maintaining, repairing, replacing, and removing the Permitted Improvement at the Property.

1.5 The “Property” where the Permitted Improvement is located shall mean the tract of right-of-way on the Corridor located at:

Mile Post 735.39
Latitude: 33.059027 / Longitude: -97.001405
Lewisville, Denton County, Texas

Mile Post 735.41
Latitude: 33.058850 / Longitude: -97.001279
Lewisville, Denton County, Texas

Mile Post 735.45
Latitude: 33.058457 / Longitude: -97.000768
Lewisville, Denton County, Texas

1.6 “Railroad” shall mean “Railroad” shall mean:

- a. Dallas, Garland and Northeastern Railroad, Inc., which presently holds the right to conduct freight operations on the Corridor; and
- b. Denton County Transportation Authority, which presently holds the right to conduct passenger service on the Corridor;

- c. Rio Grande Pacific Corporation, Rio Grande Pacific Technology, Inc., and Stadler US, Inc., which presently provide passenger service and railroad maintenance on the Corridor; and
- d. Any future freight operators, passenger operators, and entities providing passenger service or railroad maintenance on the Corridor during the term of this Agreement pursuant to an agreement with DART.

II. Consideration.

- 2.1 License Fee. Licensee shall pay FIVE THOUSAND SIX HUNDRED FIFTY AND NO/100 DOLLARS (\$5,650.00) per annum. The License Fee shall be due on the Effective Date and then continuously thereafter on an annual basis. Licensee shall timely pay the License Fee regardless of whether Licensee receives an invoice or other reminder from DART.
- 2.2 Acceptance of License Fee. DART's acceptance of any License Fee after termination of this Agreement shall not reinstate or continue the terms of this Agreement. Likewise, DART's acceptance of the License Fee, or any portion of the Licensee Fee, shall not affect any provision of this Agreement or constitute a waiver of DART's right to enforce any term of this Agreement.
- 2.3 Late Fees. Any payment not received by DART by the 10th day after it is due, shall bear a late charge of \$50.00 to help offset the administrative cost involved in handling such late payment. For any payment not received by DART by the 15th day after it is due, such payment shall bear interest at the maximum rate permitted by law from the date it was due until it is paid, in addition to the late charge.
- 2.4 Annual Adjustment. The License Fee shall be adjusted annually: (a) by a three percent (3%) increase over the License Fee applicable to the prior year, or (b) in accordance with the Consumer Price Index ("CPI") described below, whichever is greater.
 - a. The CPI shall be calculated as the percentage change in the CPI during the twelve months preceding the date of change according to the cost-of-living changes in the Consumer Price Index for All Urban Consumers ("CPI-U") for Dallas-Fort Worth, Texas, "All Items," as published by the Bureau of Labor Statistics, U.S. Department of Labor.
 - b. If any time during the term hereof the U.S. Bureau of Labor Statistics shall discontinue the issuance of the CPI, Licensor shall provide Licensee with an alternative nationally recognized cost-of-living index for the Dallas-Fort Worth area then issued and available, which is published by the U.S. Government.
- 2.5 Fair Market Value Adjustment. In addition to the annual adjustment described above, DART may, in its sole discretion and with written notice to Licensee, adjust the License Fee from time to time to account for increases in the fair market value of the Property.

III. Purpose and Term.

- 3.1 Permitted Improvement. DART hereby grants a license to Licensee for the Permitted Use so long as the Permitted Use does not interfere with the operations of DART or Railroad, and Licensee otherwise complies with the requirements of this Agreement.
- 3.2 Limitations. Licensee's right to enter upon and use the Property shall be limited solely to the Permitted Use, for the term of this Agreement, and in accordance with the conditions of this Agreement. This Agreement is not intended to convey and does not convey to Licensee any real property interest in the Property or any portion of the Corridor. This Agreement may not be recorded in the real property records. The license

granted pursuant to this Agreement is non-exclusive and is subject to (a) any existing utility, drainage, or communication facility located in, on, under, or upon the Property; (b) all vested rights presently owned by any railroad, utility or communication company, or other entity located within the boundaries of the Property; and (c) any existing lease, license, easement, or other interest in the Property granted by DART or its predecessors in interest. The license granted by this Agreement is granted expressly subject and subordinate to DART's right to use the Property for any purpose whatsoever, except as expressly provided in this Agreement.

- 3.3 No Warranty. DART and Railroad make no representations as to the condition of the Property or its suitability for any particular purpose, including by example and not limitation, warranties regarding the Property's state of repair, use of the Property, access to the Property, or subsurface or aerial installations on or near the Property. The Property is available for Licensee's use on an "as is, where is, and with all faults" basis. Licensee shall, at its sole cost, conduct its own inspections of the Property and shall not rely on any information disclosed or not disclosed by DART, Railroad, or any of their respective employees, agents, or representatives.
- 3.4 Term. The term of this Agreement shall begin on the Effective Date and continue until terminated in accordance with this Agreement.

IV. Design, Construction, Operation, and Maintenance of the Permitted Improvement.

- 4.1 Construction Plans. During the design phase and prior to commencing any construction on the Property, a copy of the construction plans ("the Plans") for the Permitted Improvement showing the exact location, type, depth of the construction, the working area, and any cathodic protection measures shall be submitted for written approval to DART. No work shall commence on the Property until the Plans have been approved in writing by DART, which approval shall not be unreasonably withheld. To the extent necessary for construction of the Permitted Improvement, Licensee shall also coordinate with Railroad and obtain Railroad's approval of the Plans prior to the start of any work.
- 4.2 Safety. Licensee agrees to design, construct, and operate the Permitted Improvement in such a manner so as not to create a dangerous, unsafe, or otherwise hazardous condition on or near the Property. Licensee shall implement any cathodic protection, including stray current corrosion control measures, necessary to ensure the safety of the Permitted Improvement and maintain compliance with applicable laws, regulations, ordinances, and rules. If applicable to the Permitted Improvement, Licensee shall institute and maintain a continuous testing program to determine whether additional cathodic protection of its Permitted Improvement is needed.
- 4.3 Authority to Enter the Property. Licensee shall ensure that anyone working on the Property under Licensee's control possesses authority to be on the Property and can readily demonstrate such authority, either through photo identification issued by Licensee or Licensee's contractor ("Contractor") or immediate confirmation by the worker's on-site supervisor.
- 4.4 Foul Zone. Licensee shall not perform any activities, or permit Contractor to perform any activities, that could result in equipment, people, or materials entering within 25 feet of any railroad tracks (the "Foul Zone") unless:
- a. Flagger(s) qualified on DART and Railroad's operating and safety rules are present; and
 - b. Anyone working under Licensee's control and engaged in an activity that necessitates flaggers has, within the last 365 calendar days from the date the Work is to be performed, attended a creditable Roadway Worker Protection course, successfully passed all required examinations associated with that course, and can provide proof of course completion upon request from DART or

Railroad. DART and Railroad shall determine whether the Roadway Worker Protection course is creditable.

Licensee shall pay all costs associated with flaggers and Roadway Worker Protection courses.

- 4.5. Maintenance. Licensee shall maintain the Property and Permitted Improvement in a good, clean, and safe condition. Licensee shall use diligent care to avoid damaging any existing structures, equipment, and/or vegetation on or about the Property and any adjacent property. If Licensee, Contractor, or anyone under Licensee's control causes damage to the Property or an adjacent property, Licensee shall immediately replace or repair the damage at no cost or expense to DART or Railroad.
- 4.6. Costs and Reimbursement. Licensee agrees to pay for any damages, costs, or expenses that DART incurs by reason of Licensee's use of the Property. If Licensee fails to repair or replace damage to the Property or fails to properly maintain the Property or Permitted Improvement, DART and/or Railroad shall notify Licensee of such noncompliance with this Agreement. In the event Licensee has not remedied the failure within ten (10) days from the date of such notice, DART and Railroad, individually or collectively, shall have the right, but not the obligation, to remedy such failure at the sole cost and expense of Licensee. Licensee shall immediately reimburse DART and/or Railroad, as applicable, for all costs resulting from Licensee's failure to repair, replace, or maintain the Property and/or Permitted Improvement in accordance with this Agreement.
- 4.7. As-builts. Licensee shall provide certified final construction drawings ("As-Builts"), signed and sealed by a Texas professional engineer, to DART within ninety (90) days after the last date of construction work on the Property. The Parties agree that DART will suffer damages if As-Builts are not timely provided by Licensee and it is impossible to determine the amount of such damages in advance. Accordingly, the Parties agree, not as a penalty but as a measure of reasonable damages, that a fee of \$500 per month (prorated as applicable) until As-Builts are provided represents reasonable compensation for DART's actual damages suffered by the delay. DART shall comply with state and local laws, including Chapter 251 of the Texas Utilities Code, before performing work around the Permitted Improvement and shall not exclusively rely on As-Builts provided by Licensee pursuant to this Agreement.
- 4.8. Electrically Powered Equipment. DART and Railroad may, in compliance with applicable state and federal safety regulations, use electrically powered equipment on the Property or adjoining properties, which could result in live electrical current in proximity to the Permitted Improvement and produce corrosive effects to the Permitted Improvement. **Licensee WAIVES any claim against DART or Railroad arising from the use of electrically powered equipment pursuant to this paragraph.**
- 4.9. Governmental Approvals. Licensee, at its sole cost and expense, shall be responsible for obtaining any licenses, permits, or other approvals from any federal, state, or local agencies required to carry on any activity on the Property permitted by this Agreement.
- 4.10. Other Required Agreements. Prior to the start of any construction work on the Property, Licensee or Contractor, as applicable, shall execute any additional agreements that DART or Railroad determine are necessary in connection with such work, including but not limited to a contractor's right-of-entry agreement. Licensee shall be responsible for ensuring Contractor complies with the terms and conditions of this Agreement and any contractor's right-of-entry agreement or other agreement related to the Permitted Use. Licensee shall be responsible for obtaining a copy of any such agreement entered into by Contractor pursuant to this section.
- 4.11. Mechanic's Liens Not Permitted. Licensee shall fully pay for all labor and materials used in, on, or about the Property and, to the extent permitted by law, shall not permit or suffer any mechanic's or materialmen's

liens of any nature to be affixed against the Property by reason of any work done or materials furnished to the Property on behalf of Licensee. In the event a lien is attached to the Property, Licensee shall (at DART's option) immediately seek removal of the lien or provide a bond that discharges the lien in accordance with Texas law. Licensee shall pay all costs associated with such removal, including reasonable attorney's fees.

- 4.12. Compliance with Laws and Regulations. Licensee agrees to abide by all laws, ordinances, and regulations of any governmental entity or regulatory agency with jurisdiction over the Property and/or Licensee. Licensee shall also abide by all rules, policies, and operating procedures established by DART or Railroad that are communicated to Licensee in advance, so long as such rules, policies, or operating procedures do not conflict with any rules or guidance promulgated by a regulatory agency and applicable to Licensee.

V. Insurance

- 5.1. Required Insurance. Prior to entry onto the Property, Licensee shall procure and maintain, at its sole cost and expense, commercial general liability insurance in the following form and amount:
- a. Per occurrence limit of at least \$5,000,000
 - b. Primary and non-contributory endorsement
 - c. Endorsement naming DART, Railroad, and their respective directors, officers, representatives, contractors, agents, and employees as additional insureds with respect to ongoing and completed operations without qualifications or restrictions
 - d. Endorsement waiving the issuing insurance company's rights of recovery against DART and Railroad, whether by way of subrogation or otherwise
 - e. Endorsement removing exclusions for operations within fifty (50) feet of a railroad or, alternatively, purchase of a Railroad Protective Policy
 - f. Endorsement removing exclusions for XCU hazards
 - g. The form of coverage and insurer(s) must be satisfactory to DART.
- 5.2. Proof of Insurance. Licensee shall furnish Certificates of Insurance and copies of required endorsements to DART as evidence of the coverages required. Upon DART's request, Licensee shall also provide any additional documentation necessary to demonstrate the insurance coverage required. Licensee's insurance shall be primary and non-contributory coverage in all instances.
- 5.3. Notice of Cancellation or Nonrenewal. Licensee shall provide written notice to DART within fifteen (15) days of learning (through notice from Licensee's insurer or other means) that an insurance policy required by this Agreement will be cancelled, non-renewed, or modified in a manner that will result in Licensee's noncompliance with the terms of this Agreement.

VI. Environmental Protection

- 6.1. Licensee shall not use or permit the use of the Property for any purpose that may be in violation of any local, state, or federal laws pertaining to health or the environment, including but not limited to, the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), the Resource Conservation and Recovery Act ("RCRA"), the Clean Water Act ("CWA"), and the Clean Air Act ("CAA").
- 6.2. Licensee warrants that the Permitted Use of the Property will not result in the disposal or other release of any hazardous substance or solid waste on or to the Property, and that it will take all steps necessary to ensure that no such hazardous substance or solid waste will ever be discharged onto the Property by Licensee, Contractor, or any other person under Licensee's control.

- 6.3. The terms “hazardous substance” and “release” shall have the meanings specified in CERCLA and the terms “solid waste” and “disposal” (or “disposed”) shall have the meanings 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. To the extent that the laws of the State of Texas establish a meaning for “hazardous substance,” “release,” “solid waste,” or “disposal,” that is broader than that specified in either CERCLA or RCRA, such broader meaning shall apply.

VII. Termination and Relocation.

- 7.1. Methods of Termination. This Agreement shall terminate and be of no further force and effect: (a) if Licensee discontinues or abandons the use of the Permitted Improvement for ninety (90) days or more; (b) if either Party materially breaches this Agreement and fails to cure such breach within thirty (30) days’ after receiving written notice of the breach (provided, however, if the breach cannot be cured within 30 days, the period to cure shall be extended so long as the breaching Party is promptly and diligently pursuing the cure to completion); (c) if Licensee relocates the Permitted Improvement from the Property; or (d) if DART determines, in its sole discretion, that relocation of the Permitted Improvement is necessary or useful for DART or Railroad’s use of the Property and provides written notice to Licensee.
- 7.2. Restoration of the Property. Upon termination of this Agreement, Licensee shall remove all improvements and appurtenances owned by it, situated in, on, under or attached to the Property, regardless of whether or not such improvements were placed on the Property by Licensee, unless otherwise directed or permitted by DART. Licensee shall restore the Property to a condition satisfactory to DART at its sole cost (unless otherwise provided by this Agreement).
- 7.3. Relocation of the Permitted Improvement. If DART elects to terminate this Agreement by providing written notice to Licensee that relocation of the Permitted Improvement is necessary or useful for DART or Railroad’s use of the Property (as addressed above), DART shall work collaboratively with Licensee to identify another property site that, in DART’s sole discretion, is suitable for the relocation of the Permitted Improvement. If the Parties determine a mutually-acceptable property site owned by DART for the relocation of the Permitted Improvement, the Parties shall execute a new license agreement comprised of either the same terms and conditions contained in this Agreement or such other new terms and conditions agreed-to by the Parties at that time. Licensee shall promptly and diligently remove or relocate the Permitted Improvement within the period of time provided in DART’s relocation/termination notice (which shall be no shorter than 90 days).
- 7.4. Relocation Costs. Licensee shall pay all costs and expenses associated with any relocation of the Permitted Improvement. Licensee hereby **WAIVES** any claim that it may have regarding the payment of relocation benefits, including claims arising under Chapter 460 of the Texas Transportation Act.

VIII. INDEMNITY AND SHIFTING OF RISK.

- 8.1. Licensee and DART agree and acknowledge that each Party is responsible, in accordance with the laws of the State of Texas, for its own acts, forbearance, negligence, and deeds, and for those of its officers, agents, representatives, or employees in conjunction with the performance of work or other obligations covered under this Agreement. In the event of joint and concurrent negligence or fault of Licensee and DART, responsibility and indemnity, if any, shall be apportioned in accordance with the laws of the State of Texas, without waiving any governmental immunity available to either Party and without waiving any defenses available to the Parties under applicable law. The provisions of this paragraph are solely for the benefit of

the Parties hereto and are not intended to create or grant any rights, contractual or otherwise, to any third party. Notwithstanding the foregoing and to the extent permitted by law, Licensee hereby **WAIVES** and **RELEASES** any and all claims (present and future, whether known or unknown) that could be asserted against DART, Railroad or their respective directors, officers, employees, contractors, agents, and representatives arising out of, incident to, or resulting from Licensee's (including Licensee's employees, contractors, subcontractors, agents, or invitees) entry onto the Property, performance under this Agreement, or breach of any of the terms of this Agreement. Notwithstanding the foregoing, **Licensee shall pay all costs, expenses, claims, and liability related to any environmental contamination and related clean-up of the Property resulting from Licensee's use of the Property under this Agreement.**

- 8.2. In the event any of the provisions of this indemnification section are determined by statutory authority or judicial decision to be void or unenforceable, then this section shall not fail in its entirety, but will be enforceable to the greatest extent permitted by law. This indemnification section and all other indemnification and waiver provisions shall survive the termination of this Agreement.

IX. Miscellaneous.

- 9.1. Notice. Notices permitted or required by this Agreement shall be in writing and shall be deemed delivered when hand delivered or sent by certified mail, return receipt requested, and addressed to: Licensee at the address set out in the first paragraph of this Agreement; and DART at 1401 Pacific Avenue, Dallas Texas 75202, Attn: Railroad Management. Either Party may designate a different address for receipt of notice by giving written notice of such change of address.
- 9.2. Assignment. Licensee shall not, absent DART's prior written consent, assign or transfer its rights under this Agreement in whole or in part or permit any other person or entity to use the license granted pursuant to this Agreement.
- 9.3. Governing Law. This Agreement shall be construed under and in accordance with the laws of the State of Texas. Any action brought by a Party to enforce any provision of this License shall be commenced in a state district court of competent jurisdiction in Dallas County, Texas.
- 9.4. Entirety. This Agreement embodies the entire agreement between the Parties and supersedes all prior agreements and understandings, if any, relating to the Property and the matters addressed herein.
- 9.5. Amendments; Counterparts. This Agreement may be amended or supplemented only by a written instrument executed by the Parties. The Parties may execute this Agreement in multiple originals and when taken together, those originals constitute a whole.
- 9.6. Parties Bound; Third-Party Beneficiaries. This Agreement shall be binding upon and inure to the benefit of the Parties and their respective heirs, personal representatives, successors and assigns. There are no third-party beneficiaries to this Agreement.
- 9.7. No Joint Enterprise. The Parties do not intend that this Agreement be construed as finding that the Parties have formed a joint enterprise. The purposes for which each Party has entered into this Agreement are separate and distinct.
- 9.8. Severability. If any provision of this Agreement is determined to be illegal or unenforceable in any respect, such determination will not affect the validity or enforceability of any other provision, each of which will be deemed to be independent and severable.
- 9.9. No Waiver of Governmental Immunity. By entering into this Agreement, DART does not waive or

diminish any immunities, protections, or defenses available to it, including by example and without limitation, governmental immunity and statutory caps on damages, except as provided by Chapter 271 of the Texas Local Government Code.

9.10. Signature Authority. Each of the individuals signing this Agreement warrants that he or she is duly and properly authorized to execute this Agreement on behalf of his or her respective Party.

DALLAS AREA RAPID TRANSIT:

BY: _____
Caitlin Holland
Vice President, Real Estate & Economic Development
Development Department

Date: _____

LICENSEE:

CITY OF LEWISVILLE

BY: _____

Printed Name: _____

Title: _____

Date: _____

