



Utility Committee Meeting

AGENDA

October 5, 2010

I. **CALL TO ORDER**

II. **MATTERS BEFORE COMMITTEE**

1. [Approval - Collocation Agreement](#)

III. **ADJOURN**



Utility Committee Meeting

AGENDA

October 5, 2010

Item:

Approval - Collocation Agreement

Department:

Additional Information:

Financial Impact:

Budgeted Item:

Recommendation / Request:

Viewing Attachments Requires Adobe Acrobat. [Click here](#) to download.

Attachments / click to download

 [Collocation Agreement](#)

CITY OF MONROE COLLOCATION AGREEMENT

This Co-Location Agreement (together with the Attachments and Schedules hereto, this "Agreement") is entered into by and between The City of Monroe, Georgia ("MONROE"), a Georgia Municipality and Dukenet Communications, LLC, a Delaware limited liability company ("DUKENET"), with offices located at 215 North Broad Street Monroe, Georgia 30655 and 400 South Tryon St/ST29B Charlotte, NC 28201, respectively; to be effective as of the _____ day of _____, 20____ (the "Effective Date"). The parties hereby agree as follows:

WHEREAS, MONROE and/or its affiliates currently own certain premises (the "Premises") described in the Collocation Schedule(s) and amendments thereto, if any, identified herewith and made a part hereof; and

WHEREAS, DUKENET desires access to a portion of the Premises to locate therein certain communications interconnection equipment and cabling for the purpose of interconnecting the Equipment with the MONROE communications network (the "MONROE Network"); and

WHEREAS, MONROE is willing to grant DUKENET a license to occupy a portion of the Premises upon the terms and conditions hereinafter set forth.

NOW, THEREFORE, in consideration of the mutual covenants contained herein, DUKENET and MONROE (collectively as the "Parties", individually as the "Party") hereby agree as follows:

1. License to Occupy and Permissible Use.

A. Subject to the terms provided below, MONROE hereby grants to DUKENET a license (the "License") to install, operate, maintain, and repair a communications system, associated equipment, lines and cables connected thereto (collectively, the "Equipment") in a portion of the Premises depicted in the Collocation Schedule attached hereto (the "Collocation Space"). As defined herein, the term "Equipment" shall include only optical switching, networking and transmission equipment, such as optical terminating equipment, a networking platform and multiplexes. DUKENET shall co-locate the Equipment with MONROE's communications facilities and associated equipment (the "Facilities") at the Premises.

B. DUKENET shall use the Collocation Space for the purposes of providing services to DUKENET's customers, installing, maintaining and operating DUKENET's equipment (to include testing and monitoring equipment) which is used to interconnect with telecommunications services and facilities provided by Monroe. DUKENET will use Monroe owned entrance facilities and is designated a "Service Interconnection." DUKENET's Collocation Space may be used for no other purposes except as specifically described herein or authorized in writing by Monroe.

C. DUKENET may not provide or make available space within the Collocation Space to any third party. Notwithstanding the foregoing, any wholly owned affiliate of DUKENET (i.e., DUKENET's Parent, subsidiary or any entity under common ownership and control with DUKENET) who elects to be made a party to this agreement may collocate within the Central Office in a separate Collocation Space pursuant to this agreement by completing the Application/Inquiry process provided for in this agreement. Any violation of this provision shall be deemed a material breach of this agreement.

D. DUKENET agrees there will be no fee, recurring or non-recurring to occupy the collocation space.

2. Term.

The term of this Amendment shall be for an initial period of three (3) years, beginning on the Interconnection Agreement date stated above and ending three (3) years later on the month and day corresponding to such date. The Parties agree that any renegotiation of this Agreement upon expiration of the term shall be pursuant to 47 U.S.C. (S)252. Until the revised agreement becomes effective, the Parties shall continue to abide by the rates, terms and conditions of this Agreement.

3. Renewal.

Following the expiration of the term as set forth in each Collocation Schedule, DUKENET's license shall automatically renew on a month to month basis in accordance with the same terms and conditions specified herein, unless terminated by either DUKENET or MONROE upon sixty (60) days prior written notice. DUKENET shall also have an option to renew the Term for an additional term, subject to agreement by the parties on the License Fee for the renewal period, which License Fee will be the then-current market rate for the License. DUKENET's option to renew the License for each Collocation Space shall be contingent on the election by MONROE to continue to own or lease the Premises in which the Collocation Space is located for the duration of the Renewal Period(s), such election to be exercised at the sole discretion of MONROE.

4. Commencement Date.

The "Commencement Date" shall be the first day after DUKENET's equipment becomes operational as described in Paragraph 5, following.

5. Occupancy.

Monroe will notify DUKENET when the Collocation Space is ready for occupancy. DUKENET must place operational telecommunications equipment in the Collocation Space and connect with Monroe's network within thirty (30) days after receipt of such notice. Monroe may consent to an extension beyond 30 days upon a demonstration by DUKENET that circumstances beyond its reasonable control prevented DUKENET from completing installation by the prescribed date. If DUKENET fails to place operational telecommunications equipment in the Collocation Space within 30 days and such failure continues for a period of thirty (30) days after receipt of written notice from Monroe, then and in that event DUKENET's right to occupy the Collocation Space terminates and Monroe shall have no further obligations to DUKENET with respect to said Collocation Space. Termination of DUKENET's rights to the Collocation Space pursuant to this paragraph shall not operate to release DUKENET from its obligation to reimburse Monroe for all costs reasonably incurred by Monroe in preparing the Collocation Space, but rather such obligation shall survive this Agreement. For purposes of this paragraph, DUKENET's telecommunications equipment will be deemed operational when cross-connected to Monroe's network for the purpose of service provision.

6. Early Termination.

If DUKENET chooses to end a license for any site prior to the end of the contracted term for the site, DUKENET will be responsible for a termination charge equal to the monthly recurring charges for the site multiplied by the number of months remaining in the contracted term.

7. Entrance Facilities.

DUKENET will use entrance facilities owned by Monroe to gain access into the Collocation Space. Monroe will designate the point of interconnection in proximity to the Network Operations Center building housing the Collocation Space, such as an entrance manhole, cable vault or aerial splice point. Monroe is responsible for maintenance of the entrance facilities. Dual entrance will be permitted where capacity exists.

8. DUKENET's Equipment and Facilities.

DUKENET is solely responsible for the design, engineering, testing, performance, monitoring, maintenance, and repair of the equipment and facilities used by DUKENET in the Collocation Space. Without limitation of the foregoing provisions, DUKENET will be responsible for servicing, supplying, repairing, installing and maintaining the following on its side of the demarcation point: (1) cable(s); (2) equipment; (3) point-of-termination cross-connects; (4) point of termination maintenance, including replacement fuses and circuit breaker restoration, if not performed by Monroe; and (5) connection cable(s) and associated equipment which may be required within the Collocation Space to the points of interconnection.

9. Easement Space.

From time to time Monroe may require access to the Collocation Space. Monroe retains the right to access such space for the purpose of making equipment and building modifications (e.g., running, altering or removing racking, ducts, electrical wiring, HVAC, and cables). Monroe will give reasonable notice to DUKENET when access to the Collocation Space is required. DUKENET may elect to be present whenever Monroe performs work in the Collocation Space. The Parties agree that DUKENET will not bear any of the expense associated with this work.

10. Access and Administration.

DUKENET shall have access to the Collocation Space twenty-four (24) hours a day, seven (7) days a week. A Monroe escort will be required where separate secured ingress and egress are not available and access would require DUKENET to traverse restricted areas. All employees, agents and contractors of DUKENET having access to the Collocation Space shall comply with Monroe's policies and practices pertaining to fire, safety and security, and each such employee, agent or contractor shall display an identification badge issued by DUKENET or certified vendor which contains a current photo, the individual's name and company name/logo. DUKENET agrees to comply with all laws, ordinances and regulations affecting the use of the Collocation Space. Upon expiration of this Amendment, DUKENET shall surrender the Collocation Space to Monroe in the same condition as when first occupied by the DUKENET except for ordinary wear and tear.

11. Interference or Impairment.

Notwithstanding any other provisions of this Agreement, equipment and facilities placed in the Collocation Space by DUKENET shall not interfere with or impair service provided by Monroe or by any other tenant located in the Central Office; shall not endanger or damage the facilities of Monroe or of any

other tenant, the Collocation Space, or the Central Office; shall not compromise the privacy of any communications carried in, from, or through the Central Office; and shall not create an unreasonable risk of injury or death to any individual or to the public. If Monroe reasonably determines that any equipment or facilities of DUKENET violate the provisions of this paragraph, Monroe shall give written notice to DUKENET, which notice shall direct DUKENET to cure the violation within twenty-four (24) hours or, at a minimum, to commence curative measures within 24 hours and to exercise reasonable diligence to complete such measures as soon as possible thereafter. If DUKENET fails to take curative action within 24 hours or if the violation is of a character which poses an immediate and substantial threat of damage to property, injury or death to any person, or interference/impairment of the services provided by Monroe, then and only in that event Monroe may take such action as it deems appropriate to correct the violation, including without limitation the interruption of electrical power to DUKENET's equipment. Monroe will endeavor, but is not required, to provide notice to DUKENET prior to taking such action and shall have no liability to DUKENET for any damages arising from such action, except to the extent that such action by Monroe constitutes gross negligence or willful misconduct.

12. Personality and its Removal.

Subject to requirements of this Agreement, DUKENET may place or install in or on the Collocation Space such facilities and equipment as it deems desirable for the conduct of business. Personal property, facilities and equipment placed by DUKENET in the Collocation Space shall not become a part of the Collocation Space, even if nailed, screwed or otherwise fastened to the Collocation Space, but shall retain their status as personality and may be removed by DUKENET at any time. Any damage caused to the Collocation Space by DUKENET's employees, agents or representatives during the removal of such property shall be promptly repaired by DUKENET at its expense.

13. Alterations.

In no case shall DUKENET or any person acting on behalf of DUKENET make any rearrangement, modification, improvement, addition, repair, or other alteration to the Collocation Space or the Monroe Central Office without the written consent of Monroe, which consent shall not be unreasonably withheld. DUKENET shall pay the cost of any such specialized alterations.

14. Alarm and Monitoring.

Monroe shall place environmental alarms in the Central Office for the protection of Monroe equipment and facilities. DUKENET shall be responsible for placement, monitoring and removal of environmental and equipment alarms used to service the Collocation Space, if DUKENET desires such equipment for the protection of its own equipment and facilities. Upon request, Monroe will provide DUKENET with applicable tariffed service(s) to facilitate remote monitoring of collocated equipment by DUKENET.

15. Reservation of Rights

MONROE reserves the right to grant, renew or extend similar licenses to others for locating equipment and facilities in the Premises. DUKENET acknowledges that it has been granted only a license to use and occupy the Space and that it has not been granted, nor does it possess, any real property interests in the Space. No use of the Space or MONROE Location by DUKENET or payment of any charges required under this Agreement shall create or vest in DUKENET any easements or other ownership or real property interest of any kind or nature. If this Agreement shall be construed by the landlord or the sub-landlord of the MONROE Location (if applicable) to be a violation of the lease or sublease under which

MONROE occupies the MONROE Location, then upon the request of MONROE, DUKENET shall either enter into an agreement approved by such landlord or sub-landlord, or immediately remove DUKENET's Equipment from the MONROE Location. MONROE agrees to use commercially reasonable efforts to cooperate with DUKENET in obtaining the approvals DUKENET may need to obtain from the landlord or sub-landlord.

16. DUKENET's Covenants and Warranties.

DUKENET hereby covenants and warrants:

- A. To keep the Collocation Space and the Equipment in good order, repair and condition throughout the Term and to promptly and completely repair all damage to the Premises caused by DUKENET;
- B. To comply with federal, state and municipal laws, orders, rules and regulations applicable to its activities and the Equipment; and
- C. Not to disrupt, adversely affect or interfere with other providers of services in the Premises or with any occupant's use and enjoyment of its leased premises or the common areas of the Premises.
- D. To pay its monthly license fee when due and to provide written notice to MONROE if such payment is disputed.
- E. DUKENET represents and warrants to MONROE that it has obtained or will obtain, at DUKENET's sole cost and expense and prior to the installation of any of DUKENET's Equipment, from all applicable public and/or private authorities, all leases, licenses, authorizations, permits, rights of way, building access agreements and easements necessary to install and operate DUKENET's Equipment within the Premises (collectively, the "Authorizations"). DUKENET further represents and warrants that it will maintain all such Authorizations throughout the term of this Agreement.

17. Insurance.

- A. DUKENET shall maintain such insurance, including through a blanket policy, as will fully protect both DUKENET and MONROE from any and all claims by employees of DUKENET under the Workers' Compensation Act or employer's liability laws, including any employers' disability insurance laws, and for any and all other claims of whatever kind or nature for any and all damage to property or for personal injury, including death to anyone whomsoever, that may arise from DUKENET's acts or omissions, including without limitation installation, operations, maintenance or repair services, in or around the Premises by DUKENET or by anyone directly or indirectly engaged or employed by DUKENET. DUKENET shall provide MONROE with certificates evidencing the required coverage before MONROE begins any installation work or services in or around the Premises and indicating that MONROE shall be notified not less than sixty (60) days prior to any cancellation or material change in any coverage. Such insurance shall also name MONROE as an additional insured party under the coverage.
- B. DUKENET's General Liability Insurance shall be a combined single limit of \$1,000,000.
- C. Insurance described in subsections (a) and (b) of this Paragraph 17 shall be maintained by DUKENET throughout the term of this Agreement and any period during which any claims arising from this Agreement are or may be outstanding. Upon DUKENET's default in obtaining or delivering any such policy or certificate of insurance or DUKENET's failure to pay the premiums therefore, MONROE may (but shall not be obligated to) secure or pay the premium for any such policy and charge DUKENET the cost of such premium, or MONROE may terminate this Agreement without liability to DUKENET.

18. Subcontractors.

DUKENET may subcontract any portion of work within the Premises contemplated by this Agreement to any entity competent to perform such work. DUKENET must obtain MONROE's written approval before utilizing any subcontractor to perform any activities under this Agreement, such approval not to be unreasonably withheld or delayed, and provide evidence that subcontractor maintains the same or additional insurance coverage as DUKENET. In no event shall such subcontract relieve DUKENET of any of its obligations or liabilities under this Agreement for its subcontractors.

19. Confidentiality.

The Parties agree that all documentation and information provided by the other shall be used solely in connection with the installation, operation, maintenance, and repair of the Equipment, that all such documentation and information shall be deemed proprietary to the disclosing party and shall be received and maintained in confidence. Each Party shall preserve the other Party's confidential information provided to it hereunder with at least the same degree of care in protecting its own confidential or proprietary information. Additionally, DUKENET shall not issue any press releases or make any statements concerning MONROE without the prior written approval of MONROE.

20. Termination.

A. Termination for Breach.

Either party may terminate the Agreement if the other party materially breaches any warranty, representation, agreement, or obligation contained or referred to in the Agreement, provided the non-breaching party has given the breaching party notice of such breach and there has been a failure to cure such breach within a 30 calendar day cure period, unless another cure period is noted below, after receipt of such notice, provided further, however, in the event of a material breach by DUKENET, MONROE may terminate the agreement immediately.

B. Events of Material Breach.

Events of material breach of a warranty, agreement, representation, or obligation include, but are not limited to:

I. Interference or damage caused to Facilities or other equipment or facilities at the Premises by the installation, operation, maintenance, replacement or repair of the Equipment, which breach must be cured within 24 hours;

II. Failure by DUKENET to pay the License Fee and interest as and when due, which breach must be cured within a ten calendar day period;

III. Breach by DUKENET of any material non-monetary provision of the Agreement;

IV. If DUKENET abandons or deserts the Equipment during the Term hereof or DUKENET removes from the Premises (and does not replace or substitute equipment for) all of the Equipment; and

V. DUKENET's failure to complete all installation activities within one month of the Effective Date.

VI. Failure to observe the use provisions set forth in Section 1 above.

VII. Cancellation of this Agreement either prior to or after DUKENET has taken possession of the Collocation Space and/or MONROE has begun the build-out of the requested space.

VIII. Violation of the confidentiality/press release provisions contained herein.

C. Early Termination

Notwithstanding anything contained herein to the contrary, in the event MONROE is required to construct and/or acquire special facilities or equipment in order to provide the Collocation Space to DUKENET, DUKENET acknowledges and agrees that MONROE may therefore incur significant costs and expenses in preparing such Collocation Space for DUKENET, including but not limited to costs associated with constructing and/or acquiring the Facilities necessary for delivery of the Collocation Space to DUKENET. In addition to any other rights and remedies MONROE may have at law, in equity or as provided herein, DUKENET agrees that if DUKENET cancels this Agreement or any individual Service order after signature but prior to the Requested Service Date, or if DUKENET terminates this Agreement or any individual Schedule prior to expiration of the term, DUKENET shall reimburse MONROE for all costs and expenses MONROE incurred in constructing and/or acquiring such Equipment.

21. Miscellaneous

A. Assignment. DUKENET shall not assign, transfer or otherwise encumber any interest it has hereunder or may have in the Collocation Space, this Agreement or delegate its duties hereunder without the prior, written consent of MONROE, which consent will not be unreasonably withheld or unduly delayed; provided, however, that MONROE's consent shall not be required with respect to an assignment, transfer or encumbrance of any interest in the Collocation Space, this Agreement or delegation of duties by DUKENET to an affiliate or subsidiary of DUKENET. In the event of a merger or acquisition or sale of all or substantially all of the assets of DUKENET, however, DUKENET will provide MONROE notice of its intent to assign this Agreement and request for consent from MONROE, such consent not to be unreasonably withheld or unduly delayed. This Agreement shall inure to the benefit of and be binding on all successors and assigns. Any assignment in contravention of these provisions shall be null and void.

B. Notice. Every notice required or permitted hereunder shall be in writing and shall be delivered to the Party's address set forth in the preamble of the Agreement. Either Party may change its address for the purpose of notice hereunder by providing the other Party with notice of the new address.

C. Governing Law. This Agreement shall be governed by and construed under the laws of the State of Georgia. Venue for any action between the Parties shall be in Georgia, and DUKENET agrees to accept personal jurisdiction of such courts.

D. Severability. If a court of competent jurisdiction shall to any extent hold any term or condition of the Agreement invalid or unenforceable, the remainder of the Agreement shall not be affected thereby, and each term and condition shall be valid and enforceable to the fullest extent permitted by law.

E. Nonwaiver. Any failure or delay by either Party to exercise or partially exercise any right, power or privilege under the Agreement shall not be deemed a waiver of any such right, power, or privilege under the Agreement.

F. Modifications. No modifications or amendments to the Agreement and no waiver of any provisions hereof shall be valid unless in writing and signed by duly authorized representatives of the Parties.

G. Binding Effect. The Agreement binds the named Parties and each of their employees, agents, independent contractors, representatives and persons associated with it.

H. Authorization. Both Parties have full power and authority to enter into and perform this Agreement. The representatives signing this Agreement on behalf of the Parties have been properly authorized and empowered to enter into this Agreement.

I. Regulatory and Legal Compliance. The Parties acknowledge that the respective rights and obligations of each Party as set forth in this Agreement are based on existing law and the regulatory environment as it exists on the date of execution of this Agreement. In the event of any effective legislative, regulatory or judicial order, rule, regulation, arbitration or dispute resolution or other legal action affecting the provisions of this Agreement which become effective after the date of execution of this Agreement, either Party may, by providing written notice to the other Party, require that the affected provisions of this Agreement be renegotiated in good faith. This Agreement shall be amended accordingly to reflect the pricing, terms and conditions of such Amendment.

J. Acknowledgment of Understanding. The Parties acknowledge that they have read the Agreement, understand it and agree to be bound by its terms and conditions. Further, the Parties agree that the Agreement is the complete and exclusive statement of the agreement between the Parties relating to the subject matter of the Agreement, and supersedes all protocols, letters of intent or prior agreements, oral or written, and all other communications and representations between the Parties relating to the subject matter of the Agreement.

K. Attorney's Fees and Costs. If any litigation is brought to enforce, or arises out of the Agreement or any term, clause, or provision hereof, the prevailing Party shall be awarded its reasonable attorneys' fees together with expenses and costs incurred with such litigation, including necessary fees, costs, and expenses for services rendered, as well as subsequent to judgment in obtaining execution thereof.

L. Independent Contractor Relationship. Nothing contained herein shall be construed to imply a joint venture, partnership, or employer and employee relationship between the Parties. Neither Party shall have any right, power or authority to create any obligation, express or implied, on behalf of the other except as defined in this Agreement or as mutually agreed to under the terms of this Agreement. The employees or agents of one Party shall not be deemed or construed to be the employees of the other Party for any purpose whatsoever.

M. Force Majeure. Neither Party shall be liable or responsible for delays or failures in performance resulting from events beyond the reasonable control of such Party. Such events shall include but not be limited to acts of God, strikes, lockouts, labor disputes, riots, acts of war, epidemics, acts of government, fire, power failures, nuclear accidents, earthquakes, unusually severe weather, or other disasters, whether or not similar to the foregoing. DUKENET shall be entitled to abate payment of the License fee during the pendency of any delays or failures in performance caused by or resulting from an event beyond the reasonable control of a party.

N. Authority. Neither Party shall have any authority to bind, obligate or commit the other Party by any representation or promise without the prior written approval of the other Party.

O. Remedies. Except as otherwise provided for herein, no remedy conferred by any of the specific provisions of the Agreement is intended to be exclusive of any other remedy. Each and every remedy shall be cumulative and shall be in addition to every other remedy given hereunder, now or hereafter existing at law or in equity or by statute or otherwise. The election of any one or more remedies by either party shall not constitute a waiver of the right to pursue other available remedies. If DUKENET commits a material breach or default of this Agreement as set forth in Paragraph 20 above, all monies due hereunder will become due and payable immediately.

P. Survival. The terms, conditions and warranties contained in the Agreement by their sense and context are intended to survive the performance hereof by the Parties hereunder shall survive the completion of the performance, cancellation or termination of the Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement to be effective as of the Effective Date.

The City of Monroe, Georgia

DUKENET COMMUNICATIONS, LLC

By: _____
Name:
Title:

By: _____
Name:
Title: