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March 5, 2019

Mayor Andrew Miller
City of Bryan
301 S. Texas Ave.
Bryan, TX 77803

Ms. Janis K. Hampton
City Attorney
City of Bryan
301 S. Texas Ave.
Bryan, TX 77803

Re: *The City of Bryan, Texas, doing business as Bryan Texas Utilities v. Frontier Southwest Incorporated, GTE Southwest Incorporated, doing business as Verizon Southwest*

Dear Mr. Miller and Ms. Hampton:

We very much appreciate being asked to provide legal services to the City of Bryan, Texas, doing business as Bryan Texas Utilities (*BTU* or *you*) in this matter (the *Utility Pole Litigation*). The purpose of this letter and the attached Additional Terms of Engagement is to set out our respective roles and responsibilities in our attorney-client relationship. This engagement agreement shall be effective as of the date the Comptroller's office completes its review and approves this engagement agreement (*see infra* at 8).

(1) CLIENT

(1)(a) The client for this engagement is BTU. This engagement agreement does not create an attorney-client relationship with any other persons or entities, including any BTU affiliate, joint venturers, partners, agents, or employees, and there are no third-party beneficiaries to this agreement.

(1)(b) We understand that, to establish a clear line of authority and minimize uncertainty, BTU designates Janis Hampton as its authorized representative to direct the Firm's representation and serve as its primary point of contact with respect to the Utility Pole Litigation. We also understand, however, that this designation is not intended to preclude or limit communication between other employees or representatives of BTU and the Firm.

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(2) SCOPE OF ENGAGEMENT

(2)(a) We will represent BTU in prosecuting its claims under the Joint Use Contract between the City of Bryan, Texas and the Southeastern States Telephone Company, dated October 20, 1949 (as amended) against Frontier Southwest Incorporated, GTE Southwest Incorporated, doing business as Verizon Southwest Communications, Inc., and their affiliates or successors, including the defense of any compulsory counterclaims, any ancillary discovery proceeding (*i.e.*, a miscellaneous proceeding with respect to a subpoena), or appeal (including any mandamus proceeding) (hereafter, the *Utility Pole Litigation*).

(2)(b) This engagement letter does not supplant or otherwise affect the terms of our continuing engagement with respect to the other utility pole matters as set forth in our June 29, 2017, engagement letter.

(3) CITY COUNCIL ACTION AND COMPTROLLER APPROVAL

(3)(a) Before entering into this agreement, Section 2254.103(d) of the Texas Government Code requires that the City Council find that (1) there is a substantial need for these legal services; (2) these legal services cannot be adequately performed by the attorneys and supporting personnel of the City or BTU; and (3) these legal services cannot reasonably be obtained from attorneys in private practice under a contract providing only for the payment of hourly fees, without regard to the outcome of the matter, because of the nature of the matter for which the services will be obtained or because the City does not have appropriated funds available to pay the estimated amounts required under a contract providing only for the payment of hourly fees. Please attach the resolution or other written record of these findings with this signed letter so that we can submit them to the Comptroller's office.

(3)(b) This agreement is effective only after review and approval by the Comptroller.

(4) FEES AND OTHER CHARGES

(4)(a) Our compensation will consist of two components: (i) discounted hourly rates generally billed monthly; and (ii) a success fee payable upon the conclusion of the case.¹ The amount of the success fee—the contingent fee component of our compensation—and reimbursement of

¹ See TEX. GOV'T CODE § 2254.106(e) ("The [legal services] contract . . . may . . . provide that the amount or payment of only part of the fee is contingent on the outcome of the matter for which the services were obtained, with the amount and payment of the remainder of the fee payable on a regular hourly rate basis without regard to the outcome of the matter.").

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expenses under the contract will be paid and limited in accordance with subchapter C, chapter 2254, Texas Government Code.²

(4)(b) **Discounted Hourly Rates and the Firm’s Statements for Services.** Typically, our hourly rates are higher than those we have charged BTU. As the following table reflects, the hourly rates for the Utility Pole Litigation (the *Litigation Rates*) represent a fifty-percent discount from our 2017 customary rates (the *Customary Rates*) and are significantly lower than the rate for other utility pole matters under our June 29, 2017, engagement letter:

	CUSTOMARY	2017 ENGAGEMENT	LITIGATION
Partners	\$600	\$500	\$300
Counsel	\$400	\$350	\$200
Legal Asst.	\$200	\$175	\$100

On a periodic basis, generally monthly, we will bill BTU for (a) time devoted to the Utility Pole Litigation at the Litigation Rates, and (b) charges for out-of-pocket expenses we incur in the Utility Pole Litigation, such as outside photocopying, travel, deposition costs, parking, mileage, investigation expenses, consultants’ fees, expert witness fees and expenses, trial exhibit expenses, electronic discovery support, records retrieval, and filing fees (all such costs and expenses will be charged at our cost). For substantial costs, such as electronic discovery support, consultants’ fees, and expert witness fees, we may ask you to pay the vendor directly.

Where Ms. Hampton and the Firm agree that it would be efficient to engage contract lawyers or paralegals to work under the supervision of our partners or counsel, the charges for such work will be submitted directly to BTU for payment, rather than advanced by the Firm and reflected in our statements for services, and the fees associated with any such services will be accounted for in accordance with Chapter 2254 of the Texas Government Code.

Payment of the foregoing expenses and fees, whether paid directly by BTU or reimbursed to the Firm by BTU shall not be contingent upon the outcome of the Utility Pole Litigation.

As required by the Texas Government Code, the Firm will maintain current and complete written time and expense records that describe in detail the time and disbursements each day in the Utility Pole Litigation.³ Because these records, as well as our statements for services, are subject to

² See TEX. GOV’T CODE § 2254.105(5) (“The contract must: . . . state that the amount of the contingent fee and reimbursement of expenses under the contract will be paid and limited in accordance with this subchapter.”).

³ See TEX. GOV’T CODE § 2254.104(a) (“The contract must require that the contracting attorney or law Firm keep current and complete written time and expense records that describe in detail the time and money spent each day in performing the contract.”).

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review by the attorney general and state auditor, and generally deemed to be public information under Chapter 552 of the Texas Government Code,⁴ our descriptions of services will be sufficient to inform BTU about the nature and progress of the Firm's work, but not so detailed as to potentially compromise privileged information.

(4)(c) **Success Fee.** The following three capitalized terms shall have the meanings ascribed thereto in connection with determining the amount of the success fee:

- (1) **Base Fee** means the sum of the total hours of work performed by each of the Firm's partners, counsel, and legal assistants in the Utility Pole Litigation multiplied by their respective Customary Rates (defined above). Base Fee can be expressed as $(\$600)(\text{partners' hours}) + (\$400)(\text{counsel's hours}) + (\$200)(\text{paralegals' hours})$. In accordance with Section 2254.106(b), the Base Fee shall not include hours or costs attributable to work performed by any person who is not a partner, counsel, or employee of the Firm.⁵
- (2) **Net Recovery** means the total of all amounts received by BTU (whether characterized as damages, attorneys' fees, or interest) in the Utility Pole Litigation (whether by settlement, mediation, arbitration, judgment, or otherwise, and regardless of the stage at which the Utility Pole Litigation concludes) after deduction of expenses or costs BTU has paid directly or reimbursed to the Firm. If part or all of the consideration BTU receives is deferred, such as in the case of a structured settlement or periodic payments, such component of Net Recovery may, at the election of the Firm, be computed based on the present value of the future payments as of the time of the settlement. If all or part of the consideration BTU receives is in any form other than cash or involves a business contract, joint venture, partnership or other arrangement of any type or kind (collectively, the **Non-**

⁴ *Id.* § 2254.104(b) and (d) (“(b) The contracting . . . law Firm shall permit the governing body or governing officer of the state governmental entity, the attorney general, and the state auditor each to inspect or obtain copies of the time and expense records at any time on request. . . . (d) This subsection does not apply to the complete written statement required by Subsection (c). All time and expense records required under this section are public information subject to required public disclosure under Chapter 552. Information in the records may be withheld from a member of the public under Section 552.103 only if, in addition to meeting the requirements of Section 552.103, the chief legal officer or employee of the state governmental entity determines that withholding the information is necessary to protect the entity's strategy or position in pending or reasonably anticipated litigation. Information withheld from public disclosure under this subsection shall be segregated from information that is subject to required public disclosure.”).

⁵ *Id.* § 2254.106(b) (“The computation of the base fee may not include hours or costs attributable to work performed by a person who is not a contracting attorney or a partner, shareholder, or employee of a contracting attorney or law Firm.”).

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Cash Component), such Non-Cash Component shall be determined by (a) agreement between BTU and the Firm after meeting and conferring in good faith, or (b) failing agreement, then through a one-day “baseball” style arbitration held within forty days of the conclusion of the Utility Pole Litigation by BTU and the Firm each submitting a competing valuation to a mutually acceptable arbitrator, who shall choose one of the two valuations at the end of the arbitration session.

- (3) **BTU Non-Contingent Fee** means the aggregate amount paid to the Firm by BTU based on the hours its partners, counsel, and paralegals worked on the Utility Pole Litigation at their respective Litigation Rates (defined above). BTU Non-Contingent Fee can be expressed as $(\$300)(\text{partners' hours}) + (\$200)(\text{counsel's hours}) + (\$100)(\text{paralegals' hours})$.

Upon receipt of the written statement required by Section 2254.104(c) of the Texas Government Code,⁶ BTU agrees to pay the Firm a success fee (the **Success Fee**) in addition to the BTU Non-Contingent Fee equal to *the lesser of*:

- (a) $3(\text{Base Fee}) - \text{BTU Non-Contingent Fee}$, or
(b) $.30(\text{Net Recovery})$.⁷

BTU and the Firm have agreed upon the multiplier three (3) in (a) above based on their evaluation of the expected difficulties of the Utility Pole Litigation, particularly the anticipated effort and the potential delay in recovery.⁸ BTU and the Firm have agreed upon 30% of Net Recovery, as

⁶ *Id.* § 2254.104(c) (“On conclusion of the matter for which legal services were obtained, the contracting . . . law Firm shall provide the contracting state governmental entity with a complete written statement that describes the outcome of the matter, states the amount of any recovery, shows the contracting attorney's or law Firm's computation of the amount of the contingent fee, and contains the final complete time and expense records required by Subsection (a). The complete written statement required by this subsection is public information under Chapter 552 and may not be withheld from a requestor under that chapter under Section 552.103 or any other exception from required.”).

⁷ *Id.* § 2254.106(d) (“The contract must state that the amount of the contingent fee will not exceed the lesser of the stated percentage of the amount recovered or the amount computed under Subsections (a), (b), and (c) [the fee multiplier provisions].”).

⁸ *Id.* § 2254.106(c) (“Subject to Subsection (d), the contingent fee is computed by multiplying the base fee by a multiplier. The contract must establish a reasonable multiplier based on any expected difficulties in performing the contract, the amount of expenses expected to be risked by the contractor, the expected risk of no recovery, and any expected long delay in recovery. The multiplier may not exceed four without prior approval by the legislature.”).

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reflected in (b), based on BTU's agreement to pay the Firm's BTU Rates and their evaluation of the expected difficulties of the Utility Pole Litigation.⁹

(5) CONFLICTS OF INTEREST

(5)(a) We have performed a conflict check on (a) Frontier Southwest Incorporated, (b) GTE Southwest Incorporated, doing business as Verizon Southwest Communications, Inc., and (c) the affiliated entities potentially involved in this matter of which we are aware. Based on a check of these names and under the applicable standards in the governing rules of professional conduct, we believe that we are free to undertake this representation. If we subsequently identify a conflict, we will promptly notify you, and you agree to use reasonable efforts to help us resolve the conflict to the satisfaction of all parties.

(5)(b) Provided there is no adversity with BTU and the matter arises outside of the BTU service area, BTU acknowledges that the Firm may represent other business entities, municipalities, governmental agencies, or governmental subdivisions in other utility pole disputes or litigation, subject to the Texas Disciplinary Rules of Professional Conduct.

(6) TERMINATION

(6)(a) This engagement and the attorney-client relationship created by this matter will end when we have completed the legal services covered by this engagement letter.

(6)(b) You may terminate the engagement at any time and for any reason by informing us in writing. Similarly, we may terminate or withdraw from our representation of you at any time, provided we comply with the applicable rules of professional conduct. If we decide to withdraw for any reason, you agree to take all steps necessary to release us from any further obligation to represent you, including signing any documents necessary to complete our withdrawal.

(6)(c) In the event of a termination or our withdrawal, BTU agrees that the Firm will continue to be entitled to payment of a reasonable fee for the work performed on behalf of BTU, which shall be determined as of the time of termination or withdrawal as follows:

⁹ *Id.* § 2254.106(d) (“[T]he contract must limit the amount of the contingent fee to a stated percentage of the amount recovered. The contract may state different percentage limitations for different ranges of possible recoveries and different percentage limitations in the event the matter is settled, tried, or tried and appealed. The percentage limitation may not exceed 35 percent without prior approval by the legislature. The contract must state that the amount of the contingent fee will not exceed the lesser of the stated percentage of the amount recovered or the amount computed under Subsections (a), (b), and (c).”).

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- (i) If the parties have reached a settlement, then the reasonable fee shall be the sum of the BTU Non-Contingent Fee and Success Fee described above;
- (ii) If Frontier Southwest Incorporated, GTE Southwest Incorporated, doing business as Verizon Southwest Communications, Inc., or any other opposing party shall have offered settlement in an amount representing a Net Recovery (as defined above), but BTU has not accepted, then the reasonable fee shall be the sum of the BTU Non-Contingent Fee and Success Fee described above, even if the final settlement or judgment amount is less; and
- (iii) If no settlement offer has been made, the reasonable fee shall be the hours worked by the Firm's partners, counsel, and paralegals on the Utility Pole Litigation multiplied by the rates for other utility pole matters under our June 29, 2017, engagement letter (*see* 2017 Engagement Column in the Table *supra* at 3), less any amounts BTU has paid pursuant to bills up to the time of termination calculated at the Litigation Rates (defined above).

(7) OTHER

(7)(a) This letter, including the provisions in the attached Additional Terms of Engagement, sets forth the complete agreement between us. No other agreements, promises, understandings, or representations, except for our discussion about the Conflicts of Interest matters (discussed above), have been made or relied upon in reaching this agreement.

(7)(b) If this letter, including the provisions in the attached Additional Terms of Engagement, correctly reflects your understanding of the terms and conditions of our representation, please sign the enclosed copy of this letter in the space provided and return it to me.

(7)(c) We are pleased to have this opportunity to be of service, and we look forward to working with you to reach a successful conclusion of this matter. Please contact me if you have any questions.

Very truly yours,

EWELL, BROWN, BLANKE & KNIGHT LLP

By: _____
David F. Brown

Enclosure

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AGREED:

CITY OF BRYAN, TEXAS, DOING BUSINESS AS BRYAN TEXAS UTILITIES

Andrew Nelson
Mayor

Date: _____

APPROVED AS TO FORM:

Date: _____

Ms. Janis K. Hampton
City Attorney for City of Bryan, Texas

APPROVED:

OFFICE OF THE TEXAS COMPTROLLER OF PUBLIC ACCOUNTS:

Title: Deputy Comptroller or his designee

Date: _____

ADDITIONAL TERMS OF ENGAGEMENT

This attachment contains additional terms of engagement that are an integral part of our agreement with you. Please review these additional terms and contact us promptly if you have any questions. You should keep this attachment in your file with the engagement letter.

THE SCOPE OF OUR WORK

We provide only legal services. We do not provide investment, insurance, underwriting, accounting, financial, or technical advice, and you may not rely on us for such advice. Similarly, we do not make business decisions for you, and we do not investigate the character or credit of persons with whom you may be dealing.

You agree that we have no attorney-client relationship with and owe no duties to persons or entities not expressly identified by name as clients in the engagement letter, even if you might owe them fiduciary or other duties. This agreement has no third-party beneficiaries, including trust or estate beneficiaries, trustees, partners, limited partners, members, corporate shareholders and owners, successors, agency principals, agents, officers, directors, employees, representatives, your clients, and/or your insurers, insureds, indemnitors, or indemnitees.

You are engaging us to provide legal services in connection with the specific matter described in the Scope of Engagement paragraph in the engagement letter. After the end of the matter, circumstances might change, and changes might occur in the applicable laws or regulations that could affect your future rights and obligations. Unless you engage us after completion of the matter to provide additional legal services on issues arising from the matter, we have no obligation to advise you about future legal developments or your future rights and obligations.

COOPERATION AND NO GUARANTEES

To help us provide legal services, BTU agrees to cooperate fully with us, tell us the facts accurately and completely, give us the relevant documents and information, respond promptly to our requests, and inform us of all information and developments relating to this matter, and commit the resources necessary to calculating components of the damages it has suffered as a result of the actions and failures to act by Frontier Southwest Incorporated, GTE Southwest Incorporated, doing business as Verizon Southwest Communications, Inc., their predecessors, and their affiliates with regard to the Joint Use Contract between the City of Bryan, Texas and the Southeastern States Telephone Company, dated October 20, 1949 (as amended on June 11, 1979 and December 22, 1980). We necessarily rely on the accuracy and completeness of the information that you provide us, and we may rely on that information without independently verifying it. You also agree to make yourself or your representatives available to attend or participate in conference calls, meetings, conferences, discovery proceedings, hearings, and any other proceedings related to this matter. Recognizing that, for strategic, economic, and political reasons, opposing parties and others often challenge contingency fee arrangements between public entities and outside counsel, in the event of such a challenge, BTU shall defend the validity of this agreement and its compliance with Chapter 2254 of the Texas Government Code. Finally, BTU shall support the necessity and reasonableness of the attorneys' fees incurred in the Utility Pole Litigation in any motion, application, or other request for recovery of attorneys' fees and expenses filed on its behalf in the Utility Pole Litigation.

We will try to achieve a result in this matter that is satisfactory to you. But we make no promises or guarantees concerning the outcome, and we cannot assure you that the outcome will be favorable to you. Outcomes in litigation are especially hard to predict because of many factors that are beyond the control of clients or counsel. Any statements we make concerning possible outcomes of this matter, the legal significance of possible outcomes, or any other legal matters reflect our professional judgment at that time, but they are not guarantees. Those statements necessarily are limited by our knowledge of the facts and are based on the state of the law at the time they are made.

CONFIDENTIALITY

BTU agrees that we may disclose the existence of our attorney-client relationship and, subject to our confidentiality and professional responsibility obligations, certain other limited information about our representation of BTU in order to obtain consent or a conflicts waiver from another client.

We try to manage our own business efficiently so that we can deliver legal services to our clients in a cost-effective way while honoring our obligations to preserve client confidences. Like many organizations, we may outsource certain functions to operate our business more efficiently, including delivery, storage, duplicating, and information technology. We also use the services of consultants and hardware and software vendors to advise us on the efficient operation of the Firm and the effective use of our systems. These parties may have some access to client confidential information in performing their services; all are bound by duties of confidentiality so that their obligations to preserve confidentiality are the same as that of our own personnel. BTU consents to our allowing non-employees access to information as outlined in this paragraph.

ELECTRONIC COMMUNICATIONS

During the course of this engagement, we may exchange electronic documents and e-mails with you using commercially available software. Such communications are occasionally attacked by computer viruses, destructive electronic programs, or other methods. Our anti-virus scanning software may occasionally reject a communication that you send to us, or your system might reject something that we send you. We believe these infrequent occurrences are part of the ordinary course of business. If you would prefer or require that we not use electronic communications or that we follow special instructions or encrypt e-mail or other communications, you should promptly inform us in writing of your preferences or requirements so that we can determine if we can accommodate your request.

DOCUMENT RETENTION AND DESTRUCTION

We will keep the documents and materials that you give us in the files or folders that we will create for this matter. While representing you, we likely will receive or create documents and materials that are directly and substantively related to that representation, such as correspondence, research memoranda, pleadings, exhibits, transcripts, physical evidence, various agreements, transaction documents, and other documents and materials substantively related to the representation

(collectively, *Client Materials*). We may maintain some or all of those Client Materials solely in electronic form, and you agree that we may do so.

We also may create and maintain our own materials pertaining to this matter which will belong to and will be retained by us (*Firm Materials*). Firm Materials are prepared for our internal use and include, for example, Firm administrative records, conflicts and new business intake materials and reports, time and billing reports, personnel and staffing materials, credit, expense, and accounting records, administrative and routine internal documents, Firm form files (even if referred to in the course of this matter) and other materials and internal communications not directly related to the substance of the representation.

After the conclusion of the matter, upon your request, we will send you the Client Materials at your expense. You must tell us which Client Materials you wish to receive and you agree to cooperate with us regarding their delivery. We will send those materials after we receive payment of all outstanding fees and other charges, unless we are otherwise required by law to do so sooner. We reserve the right to retain a copy of the Client Materials. If you ask us to send you paper copies of documents that we maintain solely in electronic form, you agree to pay the costs of converting those documents to paper form or to any different electronic format that you request.

If you do not request the Client Materials when this matter ends, we will keep them for a period of time (currently seven years) after the conclusion of the matter. In so doing, we will follow our own records retention policy, not yours. Retaining those or other materials does not constitute the performance of legal services for you and does not create or revive an attorney-client relationship between us.

Ultimately, unless you request the Client Materials, we may destroy the Client Materials, without any additional notice to you, in accordance with our records retention schedule then in effect.

SECTION 81.079 DISCLOSURE

Under Section 81.079 of the Texas Government Code, Texas attorneys must provide notice to clients of the existence of the State Bar of Texas' grievance process. The State Bar of Texas investigates and prosecutes professional misconduct committed by Texas attorneys. Although not every complaint against or dispute with a lawyer involves professional misconduct, the State Bar's Office of Chief Disciplinary Counsel will provide information about how to file a complaint. The State Bar's Office of Chief Disciplinary Counsel's toll-free number is 1.800.932.1900.