



**CITY OF PLANO
COUNCIL AGENDA ITEM**

CITY SECRETARY'S USE ONLY				
<input type="checkbox"/> Consent <input type="checkbox"/> Regular <input type="checkbox"/> Statutory				
Council Meeting Date:		6/27/11		
Department:		Finance		
Department Head		Denise Tacke		
Agenda Coordinator (include phone #): Katherine Crumbley - 7479				
CAPTION				
A Resolution of the City Council of the City of Plano, Texas, approving the terms and conditions of an Economic Development Incentive Agreement by and between Internap Network Services Corporation and the City of Plano; authorizing its execution by the City Manager or his authorized designee; and providing an effective date.				
FINANCIAL SUMMARY				
<input checked="" type="checkbox"/> NOT APPLICABLE <input type="checkbox"/> OPERATING EXPENSE <input type="checkbox"/> REVENUE <input type="checkbox"/> CIP				
FISCAL YEAR: 2010-11	Prior Year (CIP Only)	Current Year	Future Years	TOTALS
Budget	0	12,179,503	0	12,179,503
Encumbered/Expended Amount	0	-3,138,575	-6,090,050	-9,228,625
This Item	0	-50,000	0	-50,000
BALANCE	0	8,990,928	-6,090,050	2,900,878
FUND(S): ECONOMIC DEVELOPMENT FUND				
COMMENTS: Strategic Plan Goal: Providing economic development incentives relates to the City's goal of strong local economy				
SUMMARY OF ITEM				
A request from Internap Network Services Corporation for an Economic Development Incentive to relocate its business and commercial activities to the City, thereby generating additional local sales tax revenues and increasing ad valorem tax values to the City. Internap agrees to occupy not less than 128,000 sq. ft of commercial space on or before 12/31/11.				
List of Supporting Documents: Economic Development Incentive Agreement			Other Departments, Boards, Commissions or Agencies	

A Resolution of the City Council of the City of Plano, Texas, approving the terms and conditions of an Economic Development Incentive Agreement by and between Internap Network Services Corporation and the City of Plano; authorizing its execution by the City Manager or his authorized designee; and providing an effective date.

WHEREAS, the City Council has been presented a proposed Economic Development Incentive Agreement by and between Internap Network Services Corporation and the City of Plano, a substantial copy of which is attached hereto as Exhibit "A" and incorporated herein by reference (hereinafter called "Agreement"); and,

WHEREAS, upon full review and consideration of the Agreement, and all matters attendant and related thereto, the City Council is of the opinion that the terms and conditions thereof should be approved, and that the City Manager or his authorized designee shall be authorized to execute it on behalf of the City of Plano.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF PLANO, TEXAS, THAT:

Section I. The terms and conditions of the Agreement, having been reviewed by the City Council of the City of Plano and found to be acceptable and in the best interests of the City of Plano and its citizens, are hereby in all things approved.

Section II. The City Manager or his authorized designee is hereby authorized to execute the Agreement and all other documents in connection therewith on behalf of the City of Plano, substantially according to the terms and conditions set forth in the Agreement.

Section III. This Resolution shall become effective immediately upon its passage.

DULY PASSED AND APPROVED this the 27th day of June, 2011.

Phil Dyer, MAYOR

ATTEST:

Diane Zucco, CITY SECRETARY

APPROVED AS TO FORM:

Diane C. Wetherbee, CITY ATTORNEY

ECONOMIC DEVELOPMENT INCENTIVE AGREEMENT

This Economic Development Incentive Agreement (“Agreement”) is made by and between the City of Plano, Texas (the “City”), and Internap Networks Services Corporation, a Delaware corporation, (“Company”), acting by and through their respective authorized officers and representatives.

WITNESSETH:

WHEREAS, Company is engaged in the business of providing internet solutions and plans to make \$10,000,000.00 of Real Property improvements and add \$5,000,000.00 of Business Personalty to the Property at 1221 Coit Road, Plano, Texas 75025; and

WHEREAS, Company agrees to occupy at least 128,000 square feet of Real Property and maintain a Data Center to be located on the Real Property for the term of this Agreement; and

WHEREAS, the Company has advised the City that a contributing factor that would induce the Company to locate its business and commercial activities in the City, thereby increasing ad valorem tax values for the City, would be an agreement by the City to provide an economic development grant to the Company; and

WHEREAS, the Council finds that the occupancy of at least 128,000 square feet of Property within the City will promote economic development, stimulate commercial activity and enhance the tax base and economic vitality of the City; and

WHEREAS, the City has adopted programs for promoting economic development; and

WHEREAS, the City is authorized by TEX. LOC. GOV’T CODE §380.001 *et seq.* to provide economic development grants to promote local economic development and to stimulate business and commercial activity in the City; and

WHEREAS, the City has determined that making an economic development grant to the Company in accordance with the terms and conditions set forth in this Agreement will further the objectives of the City, will benefit the City and its citizens and will promote local economic development and stimulate business and commercial activity in the City.

NOW THEREFORE, in consideration of the foregoing and the premises, mutual covenants and agreements contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties, intending to be legally bound, hereby covenant and agree as follows:

Article I Definitions

For purposes of this Agreement, each of the following terms shall have the meaning set forth herein unless the context clearly indicates otherwise:

“Company” shall mean Internap Network Services Corporation, a Delaware corporation.

“Data Center” shall mean a facility whose primary service is data processing and is used to house computer systems and associated components, such as telecommunications and storage systems, including but not limited to web hosting organizations and internet service organizations. A server farm, telecom hotel, carrier hotel, telco hotel, telehouse co-location center, or any other term applicable to facilities which are used for these specified purposes shall be deemed to be a data center.

“Development Permit Fees” shall mean those fees paid to the City of Plano by Company and are customarily charged by the City in order to receive a Certificate of Occupancy for the Property. These fees include site plan review, engineering, inspection, building permit, etc.

“Effective Date” shall mean the last date on which all of the parties hereto have executed this Agreement.

“Event of Force Majeure” shall mean any contingency or cause beyond the reasonable control of a party including, without limitation, acts of God or the public enemy, war, riot, civil commotion, insurrection, government or de facto governmental action (unless caused by the intentionally wrongful acts or omissions of the party), fires, explosions or floods, strikes, slowdowns or work stoppages any of which event(s) directly and significantly impact the Company’s business at the Property. An economic down turn shall not constitute an event of force majeure.

“Grant Payment” shall mean all payments made by the City to the Company pursuant to Section 4.01.

“Property” or “Real Property” shall mean 1221 Coit Road, Plano, Texas 75025.

Article II Term

The term of this Agreement shall begin on the Effective Date and continue until ten years following the Effective date unless sooner terminated as provided herein.

Article III Obligations of Company

In consideration for the grant of public funds as set forth in Section 4.01 below, the Company agrees to perform the following:

- (a) On or before December 31, 2011, occupy at least 128,000 square feet of commercial space on the Real Property and maintain that occupancy throughout the term of the Agreement; and,
- (b) During the term of this Agreement, Company agrees that the Property shall not be used for any purpose other than a Data Center. Company shall not allow the operation of the Property to cease for more than thirty (30) days except in connection with, and to the extent of an Event of Force Majeure or the termination of this Agreement; and,
- (c) Use reasonable efforts to place all Company-managed hotel room nights, related to the Company's business activities, at facilities located in the City of Plano.

Article IV Economic Development Grant

4.01 **Development Fee/Permit Reimbursement.** If Company complies with the requirements in Article III above, the Development Permit fees paid by the Company to the City of Plano will be reimbursed as follows:

The City agrees to reimburse Company up to Fifty Thousand Dollars (\$50,000.00) for Development Permit Fees that were paid to the City of Plano for the construction of improvements to the Property and which fees are incurred after the execution of this Agreement. In order to receive this reimbursement, the Company must submit a written request for reimbursement listing the nature of the fees paid and amount, provide all necessary documentation that supports the request, including receipts and invoices, all of which must be submitted to the City not later than December 31, 2011. If the information supporting the request is deemed reasonably satisfactory by the City, the reimbursement shall be made within thirty days of receipt and initial certification as required in below in Article V of this Agreement. **A failure to submit the request with all supporting documents including the initial certificate by December 31, 2011 shall result in a forfeiture of any reimbursement.**

Article V
Certification Requirements for Development Fee Reimbursement

5.01 (a) In addition to the documentation, the Company must submit the Initial Certification form attached hereto as Exhibit "A" certifying compliance with the obligations set forth in this provision not later than December 31, 2011.

City will make the Development Fee Reimbursement within thirty (30) days of receipt of the initial certification and the supporting documentation set forth in 4.01 unless the City reasonably objects to the submitted information.

(b) Beginning January 2013, Company must submit an annual certification on the form attached hereto as Exhibit "B" not later than January 31 of each year for the duration of this agreement verifying compliance with the terms and conditions of this Agreement. A failure to file the annual certification by the January 31 deadline during the remaining years of the Agreement shall result in a default and a right to a full refund of all Grant Funds previously paid.

(c) All certifications must be verified by the Company's chief executive or financial officer.

Article VI
Default/Termination

6.01 (a) At any time during the term of this Agreement if the Company and/or its wholly owned subsidiaries is convicted of a violation under 8 U.S.C. Section 1324a(f) regarding the unlawful employment of undocumented workers that shall constitute a default and Company shall reimburse the City all grant funds paid pursuant to this Agreement.

(b) If the Company breaches any term or condition of this Agreement, defaults on the payment of any refund, fails to provide any annual certification or files a certification indicating no-compliance, the full amount of the Grant Payment shall be refunded by Company to the City. City may use any efforts to collect such sums owed and Company agrees to pay any and all interest, and expenses, including reasonable attorney fees and costs incurred by City. This obligation shall survive termination of this Agreement.

6.02 This Agreement terminates upon any one or more of the following:

(a) By expiration of the term and where no defaults have occurred;

(b) If a party defaults or breaches any of the terms or conditions of this Agreement and such default or breach is not cured within thirty (30) days after written notice thereof by the non-defaulting party unless a longer period is provided. Any default

under this provision and right to recover any claims, refunds, damages and/or fees and expenses shall survive the termination of the Agreement as provided in 6.03.

The City Manager is authorized on behalf of the City to send notice of default and to terminate this Agreement for any default that is not cured.

6.03 **Effect of Termination/Survival of Obligations.** The rights, responsibilities and liabilities of the parties under this Agreement shall be extinguished upon the applicable effective date of termination of this Agreement, except for any obligations or default(s) that existed prior to such termination or as otherwise provided herein and those liabilities and obligations shall survive the termination of this Agreement, including the refund provision, maintenance of records, and access thereto.

Article VII Retention and Accessibility of Records

7.01 Company shall maintain the fiscal records and supporting documentation for expenditures of funds associated with this Agreement. Company shall retain such records, and any supporting documentation for the greater of: (1) Five years from the end of the Agreement period; or (2) the period required by other applicable laws and regulations.

7.02 Company on behalf of itself and its wholly owned subsidiaries gives City, its designee, or any of their duly authorized representatives, access to and the right to examine relevant books, accounts, records, audit reports, reports, files, documents, written or photographic material, videotape and other papers, things, or personal and real property belonging to or in use by Company and its wholly owned subsidiaries pertaining to the Grant Payment (the "Records") upon receipt of ten (10) business days written notice from the City. The City's access to books and records will be limited to information needed to verify that Company and its wholly owned subsidiaries are in compliance with the terms of this Agreement. Any information that is not required by law to be made public shall be kept confidential by City. In no event shall City's access to Records include any access to any personal and/or medical data of any employees. Company and its wholly owned subsidiaries shall not be required to disclose to the City any information that by law is required to keep confidential. Should any good faith dispute or question arise as to the validity of the data provided, the City reserves the right to require Company to obtain an independent firm to verify the information. This certified statement by an independent firm shall be provided at the sole cost of Company. The rights to access the Records shall terminate five (5) years after the termination or expiration of this Agreement. Failure to provide reasonable access to the Records to authorized City representatives shall give the City the right to suspend or terminate this Agreement as provided for in Section 5 above, or any portion thereof, for reason of default. All Records shall be retained by Company and its wholly owned subsidiaries for a period of five (5) years after all performance requirements are achieved for audit purposes until such audits or other administrative, civil or criminal matters including, but

not limited to, investigations, lawsuits, administrative inquires and open record requests are completed. Company agrees to maintain all Records in an accessible location.

Article VIII Assignment

8.01 **Assignment.** This Agreement may not be assigned without the express written consent of the non-assigning party, except that the Company may assign this Agreement without obtaining the City's consent (a) to one of its wholly owned affiliates, or (b) to any person or entity that directly or indirectly acquires, through merger, sale of stock, purchase or otherwise, all or more than ninety (90) percent of the assets of the Company as long as the Company gives sixty (60) days prior written notice to the City and the assignee executes an agreement with the City to be bound to all the terms and conditions of this Agreement and be responsible for any default(s) that occurred prior to or after the assignment.

For any assignment not covered by (a) or (b) above, the Company must obtain the prior approval of the City through its City Council and the assignee must agree to be bound to all the terms and conditions of this Agreement and to accept all liability for any default that occurred prior to and/or after the assignment.

Any assignment agreement must be furnished in a form acceptable to the City and be provided at least thirty days prior to the effective assignment date.

Article IX Miscellaneous

9.01 **No Joint Venture.** It is acknowledged and agreed by the parties that the terms of this Agreement are not intended to and shall not be deemed to create a partnership or joint venture among the parties. Neither party shall have any authority act on behalf of the other party under any circumstances by virtue of this Agreement.

9.01.1 **Notice of Bankruptcy.** In the event Company files for bankruptcy, whether involuntarily or voluntary, Company shall provide written notice to the City within three (3) business days of such event.

9.02 **Authorization.** Each party represents that it has full capacity and authority to grant all rights and assume all obligations that are granted and assumed under this Agreement.

9.03 **Notice.** Any notice required or permitted to be delivered hereunder shall be deemed received three (3) days thereafter sent by United States Mail, postage prepaid, certified mail, return receipt requested, addressed to the party at the address set forth below (or such other address as such party may subsequently designate in writing) or on the day actually received if sent by courier or otherwise hand delivered.

If intended for the City:
City of Plano, Texas
Attention:
City Manager
1520 Avenue K
P.O. Box 860358
Plano, TX 75086-0358

With a copy to:
City of Plano, Texas
Attention:
City Attorney
1520 Avenue K
P. O. Box 860358
Plano, TX 75086-0358

Company:
Internap Network Services Corporation
Mr. Mike Higgins
Senior Vice President
1099 New York Avenue, N.W. Suite #500
Washington, D.C. 20001

With a copy to:
Internap Tax Department
Attn: Danny Groves, Tax Director
250 Williams Street
Atlanta, GA 30303

9.04 **Entire Agreement.** This Agreement is the entire Agreement between the parties with respect to the subject matter covered in this Agreement. There is no other collateral oral or written Agreement between the parties that in any manner relates to the subject matter of this Agreement.

9.05 **Governing Law.** This Agreement shall be governed and construed in accordance with the laws of the State of Texas, without giving effect to any conflicts of law rule or principle that might result in the application of the laws of another jurisdiction. Venue for any action concerning this Agreement, the transactions contemplated hereby or the liabilities or obligations imposed hereunder shall be in the State District Court of Collin County, Texas.

9.06 **Amendment.** This Agreement may only be amended by the mutual written agreement of the parties.

9.07 **Severability.** In the event any one or more of the provisions contained in

this Agreement shall for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect other provisions, and it is the intention of the parties to this Agreement that in lieu of each provision that is found to be illegal, invalid, or unenforceable, a provision shall be added to this Agreement which is legal, valid and enforceable and is as similar in terms as possible to the provision found to be illegal, invalid or unenforceable.

9.08 **Recitals.** The recitals to this Agreement are incorporated herein.

9.09. **Authorized to Bind.** The persons who execute their signatures to this Agreement represent and agree that they are authorized to sign and bind their respective parties to all of the terms and conditions contained herein including those that apply to Company's wholly owned subsidiaries.

9.10 **Counterparts.** This Agreement may be executed in counterparts. Each of the counterparts shall be deemed an original instrument, but all of the counterparts shall constitute one and the same instrument.

EXECUTED on this _____ day of _____, 20__.

ATTEST:

CITY OF PLANO, TEXAS, a home rule municipal corporation

Diane Zucco, CITY SECRETARY

By:

Bruce D. Glasscock,
CITY MANAGER

APPROVED AS TO FORM:

Diane C. Wetherbee, CITY ATTORNEY

ATTEST:

INTERNAP NETWORK SERVICES CORPORATION,
a Delaware corporation

Title: _____

By:

Name: _____
Title: Chief Financial Officer

EXHIBIT "A"

INITIAL CERTIFICATE OF COMPLIANCE

Please select one of the options below before signing and returning the certification:

_____ a. I hereby certify that INTERNAP NETWORK SERVICES CORPORATION is entitled to receive Development Fee Reimbursement in accordance with Section 4.01 of that Agreement.

_____ b. I hereby certify that INTERNAP NETWORK SERVICES CORPORATION is not in compliance with the Agreement and is not entitled to receive Development fee reimbursement payment in accordance with Section 4.01 of that Agreement.

ATTEST:

INTERNAP NETWORK
SERVICES CORPORATION

Title: _____

By: _____
Name: _____
Title: Chief Financial Officer

Date

This Certification is due by December 31, 2011.

This Certificate of Compliance should be mailed to:

City of Plano
Finance Department
P.O. Box 860358
Plano, Texas 75086-0358

EXHIBIT "B"

ANNUAL CERTIFICATE OF COMPLIANCE

Please select one of the options below before signing and returning the certification:

_____ a. I hereby certify that for the prior year INTERNAP NETWORK SERVICES CORPORATION has been in continuous compliance with all terms of the Agreement.

_____ b. I hereby certify that for the prior year INTERNAP NETWORK SERVICES CORPORATION has failed to be in compliance with one or more terms of the Agreement.

ATTEST:

INTERNAP NETWORK
SERVICES CORPORATION

Title: _____

By: _____
Name: _____
Title: Chief Financial Officer

Date

This Certification is due by January 31 of each year beginning in 2013 while the Agreement is in effect.

This Certificate of Compliance should be mailed to:

City of Plano
Finance Department
P.O. Box 860358
Plano, Texas 75086-0358