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Doc#: 0916839029 Fee: \$60.00  
Eugene "Gene" Moore RHSP Fee:\$10.00  
Cook County Recorder of Deeds  
Date: 06/17/2009 01:30 PM Pg: 1 of 13

Property of Cook County Clerk's Office

**SUBORDINATION, NON-DISTURBANCE  
AND ATTORNMENT AGREEMENT  
IN FAVOR OF  
TEXAS CAPITAL BANK, NATIONAL ASSOCIATION**

Dated as of ~~April~~ <sup>May</sup> 4, 2009

13

Permanent Index Tax  
Identification No.: 17-09-419-001-000

Property Address:

221 North LaSalle Street  
Chicago, Illinois 60601

Prepared By and After Recording Return  
To:  
Christopher J. White, Esc.  
Thompson & Knight, L.L.P.  
1722 Routh Street, Suite 1500  
Dallas, Texas 75201

002615 000014 DALLAS 2479653.4

SA 292050-020 10/1 DEC

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## SUBORDINATION, NON-DISTURBANCE AND ATTORNMENT AGREEMENT

THIS SUBORDINATION, NON-DISTURBANCE AND ATTORNMENT AGREEMENT ("Agreement") is effective as of April \_\_\_\_, 2009, among TEXAS CAPITAL BANK, NATIONAL ASSOCIATION ("Bank"), ABOVE NET COMMUNICATIONS, INC., a Delaware corporation ("Tenant") and LAZ 221 N LASALLE GARAGE, LLC, a Delaware limited liability company ("Landlord").

### WITNESSETH

WHEREAS, Landlord (or Landlord's predecessor in title) and Tenant (f/k/a Metromedia Fiber Network Services, Inc., a Delaware corporation) entered into that certain Lease dated as of December 23, 1999 (as amended, the "Lease"), covering certain premises commonly known as Suite UG99, consisting of approximately 1,690 square feet in the building located at 221 North LaSalle Street, Chicago, Illinois (the "Premises") located on real property situated in Cook County, Illinois, more particularly described in Exhibit "A" attached to this Agreement and made a part hereof (the "Property"); and

WHEREAS, Bank has loaned to Landlord, and Landlord has borrowed from Bank a sum of money in excess of \$10.00 (the "Loan") as evidenced by that certain Promissory Note dated April \_\_\_\_, 2009 (the "Note"), executed by Landlord, payable to the order of Bank, secured by, among other things, a Mortgage and Security Agreement dated of even date with the Note (the "Mortgage") which creates a lien against the Property, and which has been or will be recorded in the Real Property Records of Cook County, Illinois; and

WHEREAS, Tenant has requested that Bank agree not to disturb Tenant's possessory rights in the Premises in the event Bank should foreclose the lien of the Mortgage, provided that Tenant is not then in default under the Lease and provided further that Tenant attorns to Bank or the purchaser at any foreclosure sale of the Property (each a "Foreclosure Transferee");

NOW, THEREFORE, in consideration of the covenants, conditions, provisions and agreements set forth in this Agreement, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Bank, Landlord and Tenant hereby represent, acknowledge, covenant and agree as follows:

1. Subordination and Non-Disturbance. Subject to the terms of this paragraph, Landlord and Tenant agree that the Lease is hereby made, and shall at all times continue to be, subject, subordinate and inferior in each and every respect to the Mortgage and to any and all renewals, modifications, extensions, substitutions, replacements and/or consolidations of the Mortgage and to all liens, assignments and security interests created thereby. Bank hereby agrees that (a) as long as no default (after any applicable cure periods) by Tenant exists under the Lease, the Lease shall not be terminated, nor shall Tenant's use, possession or enjoyment of the Property in accordance with the Lease, or any of Tenant's rights and privileges under the Lease be diminished or interfered with nor shall any renewal or expansion options under the Lease be impaired in any foreclosure or other action or proceeding pursuant to or in connection with the Mortgage or in the event that Bank, any successor-in-interest thereto or any Foreclosure Transferee takes possession of any part of the Property pursuant to such Mortgage or otherwise, and (b) Tenant shall not be joined in any such foreclosure or other action or proceeding, unless required by state law provisions. If any part of the Property is acquired by Bank, any successor-in-interest thereto or any Foreclosure Transferee, Bank or such successor shall take title to the Property or any part thereof subject to the terms of the Lease and this Agreement, and Tenant's use, enjoyment or occupancy of the Property in accordance with the terms of the Lease shall not be disturbed or otherwise affected except in accordance with the terms of the Lease and this Agreement. As between Bank and Landlord, nothing herein contained shall be deemed or construed as limiting or restricting the

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enforcement by Bank of any of the terms, covenants, provisions or remedies of the Mortgage, whether or not consistent with the Lease.

2. Attornment. If (a) any proceedings are brought for the foreclosure of the Mortgage, (b) the Property (or any part thereof) should be sold pursuant to a judicial decree, trustee's sale, or other foreclosure proceeding or (c) the Property is conveyed by deed in lieu or assignment in lieu of foreclosure, Tenant shall, if Bank or any successor-in-interest thereto, or a Foreclosure Transferee at such foreclosure sale or under a conveyance in lieu of foreclosure so elects, attorn to Bank or any successor-in-interest thereto, its nominee, or such Foreclosure Transferee, as the case may be, as the landlord under the Lease in accordance with the terms of the Lease, subject to the observance by Bank, any successor-in-interest thereto, or Foreclosure Transferee (as applicable) of the provisions of this Agreement. Such attornment shall be effective and self-operative without the execution of any further instrument on the part of any of the parties hereto. Tenant agrees, however, to execute and deliver at any time, and from time to time, upon the request of Landlord, Bank or of any other holder(s) of any of the indebtedness or other obligations secured by the Mortgage or any such nominee or Foreclosure Transferee, any instrument or certificate which, in its sole judgment, Landlord, Bank, such other holder(s), or such nominee or purchaser, as the case may be, deems to be necessary or appropriate in any such foreclosure proceeding or conveyance in lieu of foreclosure or otherwise to evidence such attornment, provided that the rights of Tenant under the Lease shall not be impaired or Tenant's obligations increased, as a result thereof.

3. Acknowledgment and Agreement by Tenant. Tenant acknowledges and agrees that:

(a) The existence of the Mortgage and the agreements evidencing and securing the Loan;

(b) From and after the date hereof, Tenant will not modify or amend the Lease without the prior written consent of Bank;

(c) It has notice that all of Landlord's rights under the Lease and the rent and all other sums due under the Lease have been assigned or are to be assigned to Bank as security for the Loan secured by the Mortgage. In the event that Bank notifies Tenant of a default under the Mortgage and demands that Tenant pay its rent and all other sums due under the Lease to Bank, Tenant shall honor such demand and pay its rent and all other sums due under the Lease directly to Bank or as otherwise required pursuant to such notice without regard to any contrary instructions from Landlord. Prior to the time that Bank shall succeed to the interest of Landlord in the Premises as described in Section 2 above, receipt of such payments by Bank shall not relieve Landlord of its obligations under the Lease, nor operate to make Bank responsible for the performance thereof, and Tenant shall continue to look solely to Landlord for performance of such obligations;

(d) It has no right or option of any nature whatsoever, whether pursuant to the Lease or otherwise, to purchase the Premises or the Property, or any portion thereof or any interest therein, and to the extent that Tenant has had, or hereafter acquires, any such right or option, the same is hereby acknowledged to be subject and subordinate to the Mortgage and is hereby waived and released as against Bank; and

(e) This Agreement satisfies any condition or requirement in the Lease relating to the granting of a nondisturbance agreement.

4. No Obligation of Bank. Without limiting Tenant's rights or remedies at law or under the Lease, Tenant agrees that Bank shall have no obligation or incur any liability:

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(a) With respect to the erection or completion of the improvements in which the Premises are located or for completion of the Premises or any improvements for Tenant's use and occupancy, either at the commencement of the term of the Lease or upon any renewal or extension thereof, or upon the addition of additional space, pursuant to any expansion rights contained in the Lease;

(b) With respect to any warranties of any nature whatsoever, whether pursuant to the Lease or otherwise; or

(c) Beyond Bank's equity interest, if any, in the Property and insurance proceeds received on account of the Premises, Tenant shall look exclusively to such equity interest of Bank, if any, in the Property and insurance proceeds received on account of the Premises for the payment and discharge of any obligations imposed upon Bank hereunder or under the Lease, and Bank is hereby released and relieved of any other obligations hereunder and under the Lease; or

(d) With respect to any representations, warranties or indemnities from Landlord, whether pursuant to the Lease or otherwise, respecting use, compliance with zoning, Landlord's title, landlord's authority, habitability or fitness for purpose or commercial suitability or hazardous wastes, hazardous substances, toxic materials or similar phraseology relating to the environmental condition of the Property or any part thereof.

Subject to the foregoing, if Bank, any successor-in-interest thereto, or a Foreclosure Transferee at any foreclosure sale of the Property, succeeds to the interest of Landlord under the Lease, Tenant shall have the same remedies against Bank, any successor-in-interest thereto, or any such Foreclosure Transferee, for the breach of any provision of the Lease as Tenant would or does have against Landlord; provided that Bank, any successor-in-interest thereto, or such Foreclosure Transferee, shall not (i) be bound by any amendments or modifications to the Lease made without Bank's consent, which shall not be unreasonably withheld, conditioned, or delayed, or (ii) be liable for any act or omission of Landlord, other than those acts or omissions relating to conditions that require cure in accordance with Landlord's obligations under the Lease, which conditions accrue from and after the date of any such foreclosure or conveyance, or (iii) be subject to the offsets or defenses which Tenant might have against Landlord which have accrued prior to the date on which Bank or the Foreclosure Transferee shall have become the owner of the Property, or (iv) bound by any rent or additional rent or advance rent which Tenant might have paid more than one month in advance to Landlord or any other party, and all such rent, upon Bank's, any successor-in-interest thereto, or Foreclosure Transferee's succession to Landlord's interest under the Lease, shall remain due and owing, notwithstanding such advance payments; or (v) bound by any security or advance rental deposit made by Tenant which is not delivered or paid over to Bank and with respect to which Tenant shall look solely to Landlord for refund or reimbursement.

Neither Bank nor any other party from whom time to time shall be included in the definition of Bank hereunder shall have any liability or responsibility under or pursuant to the terms of this Agreement after it ceases to own an interest in or to the Property.

5. Inconsistent Provisions. This Agreement supersedes any inconsistent provision of the Lease.

6. Notices. Any notice, demand or request permitted, required or desired to be given in connection with this Agreement shall be in writing and shall be deemed effective if hand delivered, or if sent by United States certified or registered mail, return receipt requested, postage prepaid, or if sent by private receipted courier guaranteeing same-day or next-day delivery, addressed to the respective party at its address provided below. If sent by U.S. certified mail in accordance with Section 6, such notices shall be deemed given and received on the earlier of (a) actual receipt at the above specified address of the named addressee, or (b) on the third (3rd) business day after deposit with

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the United States Postal Service. Notice given by any other means shall be deemed given and received only upon actual receipt at the herein specified address of the named addressee.

7. Time. Time is of the essence in all matters pertaining to the performance of this Agreement.

8. Authority. The parties to this Agreement warrant and represent to one another that they have the power and authority to enter into and perform their respective obligations under this Agreement in the names, titles and capacities herein stated and on behalf of any entities, persons, estates or firms represented or purported to be represented by such person, and that all formal requirements necessary or required by any state and/or federal law or private agreement in order for the parties to enter into and perform their respective obligations under this Agreement have been fully complied with.

9. Entire Agreement. This Agreement represents the entire agreement between Bank and Tenant regarding the subject matter dealt with herein, and it may not be modified, amended or discharged except by written amendment executed by the party against whom enforcement of such modification, amendment or discharge is sought.

10. Successors and Assigns. The terms and provisions of this Agreement shall be binding upon and inure to the benefit of the parties hereto and their successors and assigns; provided, however, that in the event of the assignment or transfer of the interest of Bank, all obligations and liabilities accruing after such assignment or transfer shall be the responsibility of Bank's transferee, and further provided that the interest of Tenant under this Agreement may not be assigned or transferred without the prior written consent of Bank, except to an assignee permitted under the Lease, in which case no consent of Bank shall be required.

11. GOVERNING LAW; VENUE. THE TERMS, PROVISIONS AND CONDITIONS OF THIS AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS EXCEPT TO THE EXTENT OF PROCEDURAL AND SUBSTANTIVE MATTERS RELATING TO THE PROPERTY THAT ARE REQUIRED TO BE GOVERNED BY THE LAWS OF THE STATE OF ILLINOIS. VENUE OF ANY ACTION BROUGHT IN CONNECTION WITH THIS AGREEMENT SHALL BE IN TARRANT COUNTY, TEXAS (TO THE EXCLUSION OF ALL OTHER VENUES), WHERE THIS AGREEMENT IS PERFORMABLE.

12. Attorney's Fees. Should any litigation or administrative proceeding be commenced by either of the parties hereto or their representatives, or should either party institute any proceeding in a court which has jurisdiction over any other party hereto or any or all of its property or assets, or should any litigation or proceeding be commenced concerning any provision of this Agreement or the rights and duties of any person or entity in relation thereto, then the party or parties prevailing in such litigation or proceeding shall be entitled, in addition to such other relief as may be granted, to a reasonable sum as and for such prevailing party's attorneys' fees and court costs in such litigation or proceeding, which shall be determined by the court (or presiding official) in such litigation or proceeding or in a separate action brought for that purpose.

13. Severability. If any provision of this Agreement shall, for any reason, be held to be violative of any applicable law, and so much of this Agreement is held to be unenforceable, then the invalidity of such specific provision shall not be held to invalidate any other provision of this Agreement, all of which other provisions shall remain in full force and effect.

14. Headings; Construction. The headings contained in this Agreement are for reference purposes only and shall not modify or affect this Agreement in any manner whatsoever. Wherever required by the context, any gender shall include any other gender, the singular shall include the plural, and the plural shall include the singular.

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15. Landlord Consent and Approval. Landlord hereby consents to and approves the terms of this Agreement, including, without limitation, the provisions of paragraph 3(c).

[signature pages follow]

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EXECUTED as of the date first written above.

**BANK:**

TEXAS CAPITAL BANK, NATIONAL ASSOCIATION

By: \_\_\_\_\_  
 Name: Jeffrey A. Moten  
 Title: SVP

Address for Notices and Deliveries:

500 Throckmorton, Suite 300,  
 Fort Worth, Texas 76102  
 Attention: Mr. Jeffrey A. Moten, Senior Vice President

**LANDLORD:**

LAZ 221 N LASALLE GARAGE, LLC, a  
 Delaware limited liability company

By: LPRI 221 N. LaSalle, LLC, a  
 Connecticut limited liability company,  
 its manager

By: \_\_\_\_\_  
 Name: \_\_\_\_\_  
 Title: \_\_\_\_\_

Address for Notices and Deliveries:

c/o LAZ Parking Realty Investors  
 745 Atlantic Avenue  
 Boston, Massachusetts 02111  
 Attention: Larry Stubbs

**TENANT:**

ABOVENET COMMUNICATIONS, INC.,  
 a Delaware corporation

By: \_\_\_\_\_  
 Name: \_\_\_\_\_  
 Title: \_\_\_\_\_

Address for Notices and Deliveries:

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

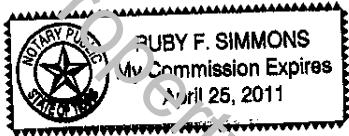


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STATE OF TEXAS )  
COUNTY OF TARRANT )

I, Ruby F. Simmons, a Notary Public in and for the said County, in the State aforesaid, DO HEREBY CERTIFY that Jeffrey A. Moten, as SVP of Texas Capital Bank, National Association, a national banking association, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument as such SVP of said national banking association, appeared before me this day in person and acknowledged that he/she signed and delivered the said instrument as his/her own free and voluntary act and as the free and voluntary act of said national banking association for the uses and purposes therein set forth.

GIVEN under my hand and notarial seal this 27 day of April, 2009.



Ruby F. Simmons  
Notary Public

STATE OF \_\_\_\_\_ )  
COUNTY OF \_\_\_\_\_ )

I, \_\_\_\_\_, a Notary Public in and for the said County, in the State aforesaid, DO HEREBY CERTIFY that \_\_\_\_\_ as \_\_\_\_\_ of LPRI 221 N. LaSalle, LLC, a Connecticut limited liability company, the manager of LAZ 221 N LaSalle Garage, LLC, a Delaware limited liability company, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument as such \_\_\_\_\_ of said limited liability company, appeared before me this day in person and acknowledged that he/she signed and delivered the said instrument as his/her own free and voluntary act and as the free and voluntary act of said limited liability company for the uses and purposes therein set forth.

GIVEN under my hand and notarial seal this \_\_\_\_\_ day of April, 2009.

\_\_\_\_\_  
Notary Public



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EXECUTED as of the date first written above.

**BANK:**

TEXAS CAPITAL BANK, NATIONAL ASSOCIATION

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

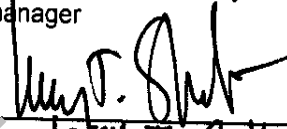
Address for Notices and Deliveries:

500 Throckmorton, Suite 300,  
Fort Worth, Texas 76102  
Attention: Mr. Jeffery A. Moten, Senior Vice President

**LANDLORD:**

LAZ 221 N LASALLE GARAGE, LLC, a  
Delaware limited liability company

By: LPRI 221 N. LaSalle, LLC, a  
Connecticut limited liability company,  
its manager

By:   
Name: Larry J. Stubbs  
Title: Authorized Representative

Address for Notices and Deliveries:

c/o LAZ Parking Realty investors  
745 Atlantic Avenue  
Boston, Massachusetts 02111  
Attention: Larry Stubbs

**TENANT:**

ABOVENET COMMUNICATIONS, INC.,  
a Delaware corporation

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

Address for Notices and Deliveries:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

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STATE OF \_\_\_\_\_ )  
COUNTY OF \_\_\_\_\_ )

I, \_\_\_\_\_, a Notary Public in and for the said County, in the State aforesaid, DO HEREBY CERTIFY that \_\_\_\_\_, as \_\_\_\_\_ of Texas Capital Bank, National Association, a national banking association, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument as such \_\_\_\_\_ of said national banking association, appeared before me this day in person and acknowledged that he/she signed and delivered the said instrument as his/her own free and voluntary act and as the free and voluntary act of said national banking association for the uses and purposes therein set forth.

GIVEN under my hand and notarial seal this \_\_\_\_ day of April, 2009.

\_\_\_\_\_  
Notary Public

STATE OF Massachusetts )  
COUNTY OF Suffolk )

I, Josephine Wiradja, a Notary Public in and for the said County, in the State aforesaid, DO HEREBY CERTIFY that Larry J. Stubbs, as manager of LPRI 221 N. LaSalle, LLC, a Connecticut limited liability company, the manager of LAZ 221 N LaSalle Garage, LLC, a Delaware limited liability company, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument as such NA officer of said limited liability company, appeared before me this day in person and acknowledged that he/she signed and delivered the said instrument as his/her own free and voluntary act and as the free and voluntary act of said limited liability company for the uses and purposes therein set forth.

GIVEN under my hand and notarial seal this 27<sup>th</sup> day of April, 2009.

\_\_\_\_\_  
Notary Public



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EXECUTED as of the date first written above.

**BANK:**

TEXAS CAPITAL BANK, NATIONAL ASSOCIATION

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

Address for Notices and Deliveries:

500 Throckmorton, Suite 300,  
Fort Worth, Texas 76102  
Attention: Mr. Jeffery A. Moten, Senior Vice President

**LANDLORD:**

LAZ 221 N LASALLE GARAGE, LLC, a  
Delaware limited liability company

By: LPRI 221 N. LaSalle, LLC, a  
Connecticut limited liability company,  
its manager

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

Address for Notices and Deliveries:

c/o LAZ Parking Realty Investors  
745 Atlantic Avenue  
Boston, Massachusetts 02111  
Attention: Larry Stubbs

**TENANT:**

ABOVENET COMMUNICATIONS, INC.,  
a Delaware corporation

By: Douglas M. Jendras  
Name: Douglas M. Jendras  
Title: Senior Vice President

Address for Notices and Deliveries:

Abovet Communications, Inc.  
300 Hamilton Ave 7th Flr  
White Plains, NY 10601  
Attn: President

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STATE OF New York )  
COUNTY OF New York )

I, Yvette Kitrosser a Notary Public in and for the said County, in the State aforesaid, DO  
HEREBY CERTIFY that Doug Tendras, as SVP of AboveNet Communications, Inc., a  
Delaware corporation, who is personally known to me to be the same person whose name is subscribed  
to the foregoing instrument as such \_\_\_\_\_ of said corporation, appeared before me this day in person  
and acknowledged that he/she signed and delivered the said instrument as his/her own free and  
voluntary act and as the free and voluntary act of said corporation for the uses and purposes therein set  
forth.

GIVEN under my hand and notarial seal this 4 day of May, 2009.

Yvette Kitrosser  
Notary Public

**YVETTE KITROSSER**  
Notary Public, State of New York  
No. 31-6008842  
Qualified in New York County  
Commission Expires Mar. 1, 2011.

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## Exhibit "A"

LOTS B1C1, B1P1, B2P1, B1C7, B1C2 AND B1C8 IN THE LASALLE-WACKER SUBDIVISION RECORDED WITH THE COOK COUNTY RECORDER OF DEEDS ON SEPTEMBER 4, 2008 AS DOCUMENT NUMBER 0824816018, BEING A SUBDIVISION OF PART OF LOTS 3 AND 4 IN BLOCK 18 IN ORIGINAL TOWN OF CHICAGO IN THE SOUTHEAST 1/4 OF SECTION 9, TOWNSHIP 39 NORTH, RANGE 14 EAST OF THE THIRD PRINCIPAL MERIDIAN IN COOK COUNTY, ILLINOIS.

Common Address: 221 North LaSalle Street, Chicago, Illinois 60601

Permanent Index Tax Identification No.: 17-09-419-001-000