



**TOPPENISH CITY COUNCIL
REGULAR MEETING AGENDA
MARCH 27, 2023 – 7:00 P.M.**

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SPECTRUM CABLE CHANNEL 194

1. REGULAR SESSION CALL TO ORDER

Pledge of Allegiance/Roll Call/Welcome

2. APPROVE AGENDA

3. PUBLIC COMMENT

The City Council welcomes public attendance at Council meetings. This meeting is for the conduct of regular City business. At this time, citizen comments and inquiries about agenda business or general City matters are encouraged. If you wish to address the City Council, please stand or raise a hand so you can be called upon. After you are recognized, please come forward to the lectern, state your name, and address for the public record. Your remarks must be limited to three minutes or less. Please use the microphone.

4. CONSENT AGENDA

All matters on the consent agenda have been provided to each Councilmember for review and are considered to be routine or have been previously discussed and will be adopted by one motion and vote without discussion. However, if a Councilmember desires, any item on this agenda will be discussed before any action is taken on it.

- a. Approve Minutes of the March 13, 2023, Regular Meeting
- b. Approve Payroll Checks Numbers 36140 through 36152 and electronic transfers in the total amount of \$283,254.02 dated March 23, 2023
- c. Approve Claims Checks Numbers 96913 through 96974, EFTAP330 in the total amount of \$183,587.98 dated March 27, 2023, and void Check Numbers NR96824, NR96834, and NR96870

5. NEW BUSINESS

- a. AB 23-018: Ordinance 2023-03, Telecommunications Franchise Ordinance with LightSpeed Networks, Inc. – second reading
- b. AB 23-019: Resolution 2023-13, Approve Addendum No. 2 to Task Order 2021-01 for the Water Meter Replacement
- c. AB 23-020: Resolution 2023-14, Approve Purchase of Flock Safety Cameras
- d. AB 23-021: Consider Appointment of Planning Commission Member

6. COUNCIL MEETING REPORTS/COMMUNITY ANNOUNCEMENTS

7. CITY MANAGER REPORT

8. EXECUTIVE SESSION [RCW 42.30.140(4)(a)]

Purpose: To discuss collective bargaining with legal counsel

Time: 30 minutes

Action: No action anticipated

9. ADJOURNMENT

NEXT COUNCIL MEETING WILL BE HELD ON APRIL 3, 2023

**TOPPENISH CITY COUNCIL
Regular Meeting Minutes
March 13, 2023**

Mayor Saavedra called the meeting to order at 7:00 p.m.

ROLL CALL

Attendees: Mayor Elpidia Saavedra, Mayor Pro Tem Clara Jiménez, and Councilmembers Juan Ceja, Naila Duval, George Garcia, and Kyle Pettit
Absent: Councilmember Loren Belton
Staff: Assistant City Manager/Public Works Director Dan Ford (ACM/PWD Ford), City Attorney Gary Cuillier, Chief of Police John Clary (CP Clary), Administrative Services Director Heather Jobe, Public Works Superintendent Shaun Burgess, Information Services Manager Van Donley, City Clerk Heidi Riojas (CC Riojas), and Community Television Manager Sean Davido

CC Riojas conducted roll call for each City Councilmember to respond their attendance at the meeting. Mayor Saavedra, Mayor Pro Tem Jiménez, and Councilmembers Ceja, Duval, Garcia, and Pettit responded their attendance during roll call. Councilmember Belton was not present at the meeting.

Mayor Pro Tem Jiménez moved, seconded by Councilmember Ceja to excuse Councilmember Belton from the March 13, 2023, Regular Meeting. Motion carried unanimously.

NEW EMPLOYEE INTRODUCTION

CP Clary introduced Police Officer Albert Montelongo, Jr. to Council.

APPROVE AGENDA

Councilmember Pettit moved, second by Councilmember Ceja to approve the March 13, 2023, Agenda. Motion carried unanimously.

PROCLAMATION

Honoring Top-Hi Wildcats Boys & Girls Wrestling Teams, Team Coaches, and Volunteer Coaches for each team winning a 2023 State Wrestling Championship Title

Mayor Saavedra recited a Proclamation honoring the 2023 Top-Hi Wildcats Boys & Girls Wrestling Teams, Team Coaches, and Volunteer Coaches for each team winning a 2023 State Wrestling Championship Title. In recognition for the outstanding athletic achievements, the Mayor proclaimed March 13, 2023 through March 17, 2023 as Top-Hi Wildcats Boys & Girls Wrestling Week and encouraged the Toppenish community to congratulate the young men, young women, team coaches, and volunteer coaches for their successes and bringing these honors home.

PUBLIC COMMENT

LaDon Linde, Yakima County Commissioner, he resides in Sunnyside, Washington, shared with Council the two American Rescue Plan Act Recovery (ARPA) funding awards the Board of Yakima County Commissioners have agreed to award the City. First ARPA award, \$700,000.00 in for the Juniper Street and Jackson Street Water Improvements Project. Second ARPA award, \$80,028.00 in funding for the Flock Safety Camera system.

CONSENT AGENDA

Mayor Pro Tem Jiménez moved, seconded by Councilmember Pettit to approve Consent Agenda items a through e:

- a. Approve Minutes of the February 27, 2023, Regular Meeting
- b. Approve Minutes of the March 6, 2023, Study Session
- c. Approve Payroll Checks Numbers 36126 through 36139 and electronic transfers in the total amount of \$196,634.19 dated March 6, 2023
- d. Approve Amended Claims Checks Numbers 96665 through 96754, and EFTAP323 through EFTAP326 in the total amount of \$306,036.45 dated February 13, 2023, and void Check Numbers NR96572 and NR96632
- e. Approve Claims Checks Numbers 96819 through 96912, EFTAP328 through EFTAP329 in the total amount of \$1,268,831.08 dated March 13, 2023, and void Check Numbers NR88859 and NR948465

Motion carried unanimously.

NEW BUSINESS

Mayor Saavedra Requested CC Riojas Read Ordinance 2023-03 into the Record for the First Public Reading: An Ordinance of the City of Toppenish, Granting to Lightspeed Networks, Inc., the Right, Privilege, Authority, and Nonexclusive Franchise for Ten (10) Years, to Construct, Maintain, Operate, Replace, and Repair a Telecommunications Network Limited to Small Wireless Communication Facilities in, Over, Along, and Within Certain Designated Public Rights-of-Way of the City of Toppenish, Washington.

Councilmember Duval moved, seconded by Councilmember Pettit to set March 27, 2023, for the second public reading and potential adoption of Ordinance 2023-03. Motion carried unanimously.

Mayor Saavedra Read Ordinance 2023-04 into the Record: An Ordinance of the City of Toppenish, Washington, Amending Chapter 8.10 of the Toppenish Municipal Code to Clarify the Definition of “Residential Building;” Set Minimum Container Sizes for Apartments; to Standardize Garbage Service Billing and Amending Sections 8.10.010, 8.10.060, And 8.10.170; Provide for Severability, and Establish an Effective Date.

Councilmember Pettit moved, second by Councilmember Duval to adopt Ordinance 2023-04. Motion carried unanimously.

Resolution 2023-12: A Resolution Approving Change Order No. 1 to Contract With DW Excavating, Inc. for the Sewer Improvements Project Phase 2.

Councilmember Duval moved, second by Mayor Pro Tem Jiménez to approve Resolution 2023-12. Motion carried unanimously.

COUNCIL MEETING REPORTS/COMMUNITY ANNOUNCEMENTS

Councilmember Pettit had nothing to report.

Councilmember Duval requested the City Council submit a letter of support to the Federal Railroad Administration (FRA) sharing the positive impacts of bringing back passenger rail service to the area by increasing jobs, improving safety, and reducing pollution in the area.

Councilmember Duval moved, seconded by Mayor Pro Tem Jiménez for the City Council write a letter of support to the FRA Long-Distance Service Study sharing the positive impacts of bringing back passenger rail service to the area by March 17, 2023. Motion carried unanimously.

Mayor Pro Tem Jiménez had nothing to report.

Councilmember Ceja had nothing to report.

Councilmember Garcia had nothing to report.

Mayor Saavedra thanked the wrestling teams, coaches, and the parents for their support and investment in the Toppenish School District athletic programs.

CITY MANAGER REPORT

ACM/PWD Ford updated Council on the following:

- Temporary Police Building project status
- Feasibility Study for the Permanent Police Facility

ADJOURNMENT

There being no further business to come before the Council, the meeting adjourned at 7:36 p.m.

ELPIDIA SAAVEDRA, MAYOR

HEIDI RIOJAS, CMC, CITY CLERK

Payroll Check Register

Payroll for Period 03/01/2023-03/15/2023

Fund Number	Description	Amount
001-000-013	Executive	\$7,482.08
001-000-014	Finance, Record	\$25,122.16
001-000-018	Central Services, Personnel Services	\$16,503.22
001-000-021	Law Enforcement	\$71,646.58
001-000-022	Fire Services	\$37,956.21
001-000-024	Protective Inspections	\$5,301.23
001-000-058	Planning and Community Development	\$2,297.65
001-000-076	Pool, Park Facilities	\$5,873.09
030-000-021	Criminal Justice Fund	\$28,691.72
050-000-000	Special Projects Fund	\$1,910.92
101-000-000	Street Fund	\$8,982.36
108-000-000	Cemetery Fund	\$6,254.79
157-000-000	Cable TV Fund	\$5,061.19
401-000-000	Water Fund	\$20,219.37
403-000-000	Wastewater Fund	\$23,656.45
405-000-000	Solid Waste Fund	\$16,295.00
Grand Total:		\$283,254.02

Payroll Checks 36140-36152 and Electronic Transfers

I, the undersigned, do hereby certify under penalty of perjury that the materials have been furnished, the services rendered or the labor performed as described herein, that any advance payment is due and payable pursuant to a contract or is available as an option for full or partial fulfillment of a contractual obligation, and that the claim is a just, due and unpaid obligation against the City of Toppenish, and that I am authorized to authenticate and certify to said claim.

Elvia Cisneros acting as administrative services director 03/23/2023

Heather Jobe, Administrative Services Director Date:

Accounts Payable Check Register

March 27, 2023

Number	Vendor Name	Account Description	Amount
96913	Moon Security Service, Inc.	Alarm Monitoring	\$165.20
96914	ADT Security Services, Inc.	Alarm Monitoring - 50% of Rec Bldg & Pool	\$25.09
		Alarm Monitoring - 50% Rec Building	\$25.09
		Check Total:	\$50.18
96915	Alba Enterprises	Professional Services - Interpreting/Translation Services	\$160.00
96916	Amazon Capital Services	Office & Operating Supplies	\$668.10
		Operating/Maintenance Supplies - General	\$61.47
		Personal Protective Equipment	\$328.99
		Small Tools & Minor Equipment	\$440.28
		Uniforms & Clothing	\$160.81
		Check Total:	\$1,659.65
96917	Aramark Uniform Services Everett Lockbox	Rentals	\$32.38
96918	Astria Sunnyside Hospital	Medical Services	\$37.07
96919	Burrows Tractor Inc.	Operating/Maintenance Supplies - Vehicles	\$31.20
96920	Central Machinery Sales, Inc.	Operating/Maintenance Supplies - Vehicles	\$994.37
96921	CenturyLink	Telephone	\$52.87
96922	Chandler Distributing Co. Inc.	Fuel Consumed Vehicles	\$994.18
		Fuel Vehicles	\$7,209.51
		Fuel Vehicles - Street Sweeper	\$383.47
		Fuel Vehicles - WWTP	\$972.12
		Check Total:	\$9,559.28
96923	Charter Communications	Internet	\$615.00
96924	Cintas Corporation #605	Rentals	\$37.43
		Uniform Cleaning	\$300.93
		Check Total:	\$338.36
96925	City of Sunnyside - Finance Dept.	Corrections Services Sunnyside	\$8,730.00
96926	Connetix Engineering, Inc.	Professional Services	\$6,809.80
96927	Copper Hemp Electric LLC	Capital Improvements - Police Building	\$989.10
96928	Del Monte	Sewer Sales Residential	\$9,359.91
		Solid Waste Services	\$2,389.77
		Water Sales Residential	\$8,165.02
		Check Total:	\$19,914.70
96929	Fastsigns	Service Repair/Maintenance Vehicles	\$1,807.08
96930	FCS Group	Professional Services	\$650.00
96931	Federal Express Corporation	Postage	\$20.40
96932	Galls, Inc.	Small Tools & Minor Equipment	\$416.66
96933	Gray & Osborne, Inc.	Professional Services - Police Building	\$2,820.54
96934	Hanks, Michael E	Miscellaneous Fees & Charges	\$136.00
96935	HLA Engineering and Land Surveying, Inc.	Jackson Street - Eng Services	\$502.29

Number	Vendor Name	Account Description	Amount
		Jackson-Juniper - Eng Services	\$1,679.00
		Check Total:	\$2,181.29
96936	Howard's Tire Factory Inc	Service Repair/Maintenance - Vehicles	\$162.00
		Service Repair/Maintenance Vehicles	\$990.54
		Check Total:	\$1,152.54
96937	Jimenez, Clara	Memberships- Registrations - Subscriptions	\$30.00
96938	Mansfield Alarm Co. Inc.	Alarm Monitoring - City Hall	\$178.21
96939	Mary Goodale	Wellness Program Travel	\$72.00
96940	Moon Security Service, Inc.	Alarm Monitoring	\$80.94
96941	MT. Adams Fence Co.	Capital Improvements - Police Building	\$11,772.00
96942	Northwest Code Professionals	Professional Services	\$7,884.84
96943	ODP Business Solutions, LLC	Operating/Maintenance Supplies - General	\$197.29
96944	O'Reilly Auto Parts	Operating/Maintenance Supplies - Vehicles	\$667.62
		Service Repair/Maintenance Vehicles	\$141.83
		Shop Expenses - Share	\$282.31
		Check Total:	\$1,091.76
96945	OVS - Orchard & Vineyard Supply, LLC	Operating/Maintenance Supplies - General	\$95.89
96946	Pacific Office Automation	Photocopies	\$268.34
96947	Pacific Office Automation	Rentals	\$465.49
96948	Pacific Power & Light Co.	Electricity - City Hall	\$380.36
		Electricity - Fire	\$520.11
		Electricity - Police	\$793.40
		Electricity - Recreation	\$161.56
		Electricity - Swimming Pool	\$130.79
		Check Total:	\$1,986.22
96949	Pacific Power & Light Co.	Electricity	\$8,918.15
		Electricity - Cemetery	\$236.00
		Electricity - Parks	\$436.97
		Electricity - Street Lights	\$4,800.07
		Electricity - Traffic Signals	\$300.75
		Lift Station Electricity	\$1,517.88
		WWTP Electricity	\$7,704.49
		Check Total:	\$23,914.31
96950	Pitney Bowes Global Financial Services	Rentals	\$505.98
96951	Porfirio Garza	Sewer Sales Residential	\$84.94
		Solid Waste Services	\$24.01
		Water Sales Residential	\$75.71
		Check Total:	\$184.66
96952	Precision Ag Repair Inc.	Repair & Maintenance Equipment	\$411.45
		Service Repair/Maintenance Vehicles	\$822.92
		Check Total:	\$1,234.37
96953	Public Safety Psychological Services	Pre-Employment Services	\$695.00
96954	Rathbun Iron Works, Inc.	Operating/Maintenance Supplies - Vehicles	\$205.33

Number	Vendor Name	Account Description	Amount
96955	SHC Medical Center Toppenish	Medical Services	\$74.14
96956	Sholtys, John	LEOFF Out Pocket Medical	\$1,801.20
96957	Smith, Timothy	Travel	\$19.73
96958	Sound Uniform Solutions	Uniforms & Clothing	\$574.56
96959	The Janitor's Closet	Janitorial Services - Police Department	\$48.75
		Operating/Maint. Supplies	\$60.21
		Operating/Maint. Supplies - General	\$81.08
		Check Total:	\$190.04
96960	The Print Guys	Office & Operating Supplies	\$260.71
96961	Toppenish Chamber Of Commerce	Tourism Contract - Toppenish Chamber	\$2,363.51
96962	U.S. Bank Corporate Payment Systems	Advertising	\$385.00
		Capital Improvements - Police Building	\$1,002.44
		Capital Purchase - Police Vehicle	\$887.09
		Memberships- Registrations - Subscriptions	\$3,949.29
		Office & Operating Supplies	\$596.02
		Postage	\$5.24
		Professional Services	\$482.60
		Recycling & Shred Services	\$30.00
		Software Subscriptions	\$2,810.84
		Service Repair/Maintenance Equipment	\$346.54
		Service Repair/Maintenance Vehicles	\$14.31
		Small Tools & Minor Equipment	\$3,512.43
		Software Subscriptions	\$346.84
		Travel	\$1,997.26
		Check Total:	\$16,365.90
96963	U.S. Bank Safekeeping	Banking Fees & Charges	\$38.00
96964	Verizon Wireless	Small Tools & Minor Equipment	\$23.75
		Telephone	\$3,056.17
		Telephone - Utility Billing	\$42.15
		Check Total:	\$3,122.07
96965	Vics Auto and Supply	Service Repair/Maintenance Vehicles	\$24.90
96966	Vision Municipal Solutions, LLC	Postage	\$1,120.79
		Professional Services	\$480.33
		Check Total:	\$1,601.12
96967	Weinmann, Gene E.	Postage	\$9.93
		Professional Services	\$1,800.00
		Check Total:	\$1,809.93
96968	Wells Fargo Vendor Fin Serv	Photocopies	\$24.20
		Rentals	\$383.79
		Check Total:	\$407.99
96969	Yakima County Auditor	Election Costs	\$7,139.35
96970	Yakima County Department of Corrections	Corrections Services Yakima County	\$8,180.78
		Medical Services	\$2,493.28
		Check Total:	\$10,674.06
96971	Yakima County GIS	IT Services - Community Dev	\$70.00

Number	Vendor Name	Account Description	Amount
96972	Yakima Lock and Safe, LLC	Service Repair/Maintenance MVTV Bldg	\$281.58
96973	Yakima Regional Clean Air Agency	Clean Air Authority Assessment	\$887.00
96974	Yakima Valley Conference of Governments	Professional Services	\$2,722.11
		Professional Services - Developer Eng/Plan Review Services	\$819.96
		Check Total:	\$3,542.07
EFTAP330	Washington State Department of Revenue	Excise Taxes	\$22,417.99
		Sales Tax Remitted	\$121.52
		Check Total:	\$22,539.51
NR96824	Pacific Alliance Title	Sewer Sales Residential	(\$84.94)
		Solid Waste Services	(\$24.01)
		Water Sales Residential	(\$75.71)
		Check Total:	(\$184.66)
NR96834	Central Machinery Sales, Inc.	Operating/Maintenance Supplies - General	(\$41.82)
NR96870	Moon Security Service, Inc.	Alarm Monitoring	(\$159.21)
	Grand Total		\$183,587.98

Accounts Payable Checks 96913-96974, EFTAP330, Voided Checks NR96824, NR96834, and NR96870

I, the undersigned, do hereby certify under penalty of perjury that the materials have been furnished, the services rendered or the labor performed as described herein, that any advance payment is due and payable pursuant to a contract or is available as an option for full or partial fulfillment of a contractual obligation, and that the claim is a just, due and unpaid obligation against the City of Toppenish, and that I am authorized to authenticate and certify to said claim.

Elvia Cisneros acting as administrative services director
Administrative Services Director

March 23, 2023



CITY OF TOPPENISH
REQUEST FOR COUNCIL ACTION
Agenda Bill No.: 23-018

Agenda Item
5a

Meeting Date: March 27, 2023

Subject: Second Reading of Proposed Franchise Agreement with LightSpeed Corporation

Attachments: Proposed Franchise Agreement Ordinance 2023-03

Presented by: Dan Ford, ACM/Public Works Director

Approved For Agenda By: Debbie Zabell, City Manager

Discussion:

The City received a franchise application from the LightSpeed Corporation requesting a 10-year extension of their existing franchise to use the public right of way. LightSpeed's existing franchise was issued pursuant to Chapter 5.45 of the Toppenish Municipal Code (TMC).

LightSpeed provides telecommunication services through underground fiberoptic cable. While the franchise and the requested extension also include the right to install small wireless facilities, LightSpeed has not done so and has no current plans to install, small wireless facilities. They may lease their fiberoptic cable to telecommunications companies that are for use with small wireless facilities, but those entities would require a separate franchise from the City to use its right of way.

The franchise as negotiated with LightSpeed substantially complies with the requirements of Chapter 5.45 TMC. Substantially, meaning several terms have been revised during the course of negotiation from the City's standard format. Those changes primarily impact the indemnity requirements, (requiring an entity using the city's right of way to indemnify the city for liability incurred through its use of the right of way).

The city routinely requests a broader indemnification but cannot compel a party to indemnify the city for its own negligence. Accordingly, the provisions as negotiated comply with Washington laws, specifically RCW 4.24.115.

Consideration of a franchise is a legislative matter within the sound discretion of the City Council. Pursuant to RCW 35A.47.040, franchises for the use of the public right of way are required to be heard on two separate occasions. Accordingly, this matter is scheduled for an initial reading on March 13 and final consideration on March 27.

Because this is a telecommunication franchise, federal and state law prohibit a franchise fee beyond the cost of processing the applications for the use of a right of way. Compensation comes to the city from franchises through applicable sales taxes. Given the current use of the right of way for fiberoptic cable, no current taxes are anticipated.

Fiscal Impact: Estimated costs associated with negotiating the Franchise \$5,500.00

Recommendation: Motion to set March 27, 2023, for a second public reading of the LightSpeed Franchise Agreement and potential adoption of Ordinance No. 2023-03 approving the LightSpeed Franchise Agreement.

Alternatives: 1) Do not adopt. 2) Forward to Study Session for further review.

ORDINANCE NO. 2023-03

AN ORDINANCE OF THE CITY OF TOPPENISH, GRANTING TO LIGHTSPEED NETWORKS, INC., THE RIGHT, PRIVILEGE, AUTHORITY, AND NONEXCLUSIVE FRANCHISE FOR TEN (10) YEARS, TO CONSTRUCT, MAINTAIN, OPERATE, REPLACE, AND REPAIR A TELECOMMUNICATIONS NETWORK LIMITED TO SMALL WIRELESS COMMUNICATION FACILITIES IN, OVER, ALONG, AND WITHIN CERTAIN DESIGNATED PUBLIC RIGHTS-OF-WAY OF THE CITY OF TOPPENISH, WASHINGTON.

WHEREAS, Toppenish was incorporated as a city on April 29, 1907; and

WHEREAS, Article 11, Section 11 of the Washington State Constitution provides that the City of Toppenish “may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws”; and

WHEREAS, the Toppenish City Council, as provided in RCW 35.22.570, has any authority ever given to any class of municipality or to all municipalities of this state, and all powers possible for a city or town to have under the Constitution of this state, and not specifically denied to code cities by law, which may be exercised in regard to the regulation or use of public ways and property of all kinds and improvements thereto; and

WHEREAS, LightSpeed Networks, Inc. (hereinafter referred to as “Franchisee”) has applied to the City of Toppenish, Washington for a non-exclusive franchise (“Franchise”) to enter, occupy, and use public ways to construct, install, operate, maintain, and repair wireless communication facilities to offer and provide telecommunications services for hire, sale, or resale in the City of Toppenish (hereinafter referred to as the “City”); and

WHEREAS, the 1934 Communications Act, as amended by the 1996 Telecommunications Act, 47 USC § 151, et seq., relating to telecommunications providers, recognizes and provides state and local governments with the authority to manage the public rights-of-way and to require fair and reasonable compensation on a competitively neutral and nondiscriminatory basis; and

WHEREAS, Washington’s Telecommunications Services Act, codified as Chapter 35.99 RCW and relating to telecommunications providers, recognizes and provides Washington cities with authority to require franchises and use permits for constructing, installing, operating, maintaining, repairing, or removing telecommunication facilities in public rights-of-way; and

WHEREAS, a franchise is a legislatively approved master permit, as defined in Chapter 35.99 RCW and Toppenish Municipal Code (TMC) Chapter 5.45, granting general permission to a service provider to enter, use, and occupy the public ways for the purpose of locating facilities, subject to requirements that a franchisee must also obtain separate use permits from the City for use of each and every specific location in the public ways in which the franchisee intends to construct, install, operate, maintain, repair or remove identified facilities; and

WHEREAS, a franchise does not include, and is not a substitute for, any other permit, agreement, or other authorization required by the City, including, without limitation, permits required in connection with construction activities in public ways which must be administratively approved by the City after review of specific plans; and

WHEREAS, the City Council finds that the franchise terms and conditions contained in this ordinance are in the public interest.

NOW, THEREFORE, BE IT ORDAINED by the City Council of the City of Toppenish as follows:

Section 1. Definitions. For the purposes of this Ordinance, the following terms, phrases, words, and their derivations will have the meanings given herein, regardless of whether or not they are capitalized herein. When not inconsistent with the context, words used in the present tense include the future, words in the plural include the singular, and words in the singular include the plural. Words not defined will have the meaning ascribed to those words in the Toppenish Municipal Code, or elsewhere, unless inconsistent herewith.

"Cable Television Service" means the one-way transmission to subscribers of video programming and other programming service and subscriber interaction, if any, that is required for the selection or use of the video programming or other programming service.

"Conduit" means fiber optic cable housing, jackets, or casing, and pipes, tubes, or tiles used for receiving and protecting wires, lines, cables, and communication and signal lines.

"Costs" means costs, expenses, and other financial obligations of any kind whatsoever.

"Effective Date" means the thirty-first day following the publication of this Franchise (or a summary thereof) occurs in an official newspaper of the City as provided by law.

"Existing" means a physical structure or facility in existence prior to the effective date of this Franchise.

"Force Majeure Event" is defined for purposes of this Franchise as strikes, lockouts, sit-down strike, unusual transportation delays, riots, floods, washouts, explosions, earthquakes, fire, storms, weather (including inclement weather which prevents construction), epidemic casualty, acts of the public enemy, wars, terrorism, insurrections, and any other similar act of God event.

"Incremental Costs" means the actual and necessary costs incurred which exceed costs which would have otherwise been incurred. Incremental costs shall not include any part, portion, or pro-ration of costs, of any kind whatsoever, including, without limitation, overhead or labor costs, which would have otherwise been incurred.

"Information" means knowledge or intelligence represented by any form of writing, signs, signals, pictures, sounds, or any other symbols.

"Public Way(s)" or "Right-of-Way(s)" means land acquired or dedicated for public roads and streets, but does not include: WSDOT managed state highways; land dedicated for roads, streets, and highways not opened and not improved for motor vehicle use by the public; federally granted trust lands or forest board trust lands; lands owned or managed by the state parks and recreation commission; or federally granted railroad rights-of-way acquired under 43 U.S.C. Sec. 912 and related provisions of federal law that are not open for motor vehicle use. Rights-of-Way, for the purpose of this Franchise, do not include: buildings, other City-owned physical facilities, parks, poles, conduits, fixtures, real property or property rights owned by the City, or similar facilities or property owned by or leased to the City.

"Street Tree" means any tree located in, or that portion over-hanging, any Public Way and any tree planted on private property near a Public Way at the direction of the City.

"Underground Facilities" means facilities located under the surface of the ground, other than underground foundations or supports for overhead facilities.

"Utility Poles" means poles, and crossarms, devices, and attachments directly affixed to such poles which are used for the transmission and distribution of electrical energy, signals, or other methods of communication. Utility Poles also includes metal light standards.

"Small Wireless Facilities" or "Facilities" means small wireless facilities as defined in 47 CFR Section 1.6002, as may be amended. Small Wireless Facilities shall also include all necessary cables, transmitters, receivers, equipment boxes, backup power supplies, power transfer switches, electric meters, coaxial cables, wires, conduits, ducts, pedestals, antennas, electronics, and other necessary or convenient appurtenances used for the specific wireless communications facility. Equipment enclosures with equipment generating noise that exceeds the noise limits allowed in the Codes, or associated permit, are excluded from "Small Wireless Facilities."

Section 2. Franchise.

- A. The City grants to Franchisee, subject to the terms and conditions of this Franchise, a non-exclusive franchise and master permit to enter, occupy, and use the Public Ways throughout the City of Toppenish ("Franchise Area") for constructing, installing, operating, maintaining, repairing, and removing Small Wireless Facilities necessary to provide telecommunications services, including but not limited to VOIP telephone service. Except as expressly provided herein, Franchisee shall construct, install, operate, maintain, repair, and remove its Facilities at its expense.
- B. Nothing in this Franchise grants authority to Franchisee to enter, occupy, or use public ways for constructing, installing, operating, maintaining, repairing, or removing those personal wireless services and associated facilities that fall outside of the definition of Small Wireless Facilities (i.e., macro facilities). Further, nothing in this Franchise grants authority to Franchisee to enter, occupy, or use public ways for constructing, installing, operating, maintaining, repairing, or removing wireline facilities (e.g., wireline backhaul, wireline, broadband transmission services, or any other wire-based services, whether provided by a third-party provider, Franchisee, or a corporate affiliate of Franchisee).

- C. Nothing in this Franchise grants authority to Franchisee to enter, occupy, or use City property, including any City-owned conduit, pole(s), or structure(s). A separate lease or pole attachment agreement is necessary prior to such attachment.
- D. Any rights, privileges, and authority granted to Franchisee under this Franchise are subject to the legitimate rights of the police power of the City to adopt and enforce general ordinances necessary to protect the safety and welfare of the public, and nothing in this Franchise excuses Franchisee from its obligation to comply with all applicable general laws enacted by the City pursuant to such power. Any conflict between the terms or conditions of this Franchise and any other present or future exercise of the City's police powers will be resolved in favor of the exercise of the City's police power.
- E. Nothing in this Franchise excuses Franchisee of its obligation to identify its facilities and proposed facilities, and their location or proposed location, in the public ways and to obtain use and/or development authorization and permits from the City before entering, occupying, or using public ways to construct, install, operate, maintain, repair, or remove such facilities.
- F. Nothing in this Franchise excuses Franchisee of its obligation to comply with applicable codes, rules, regulations, and standards subject to verification by the City of such compliance.
- G. Nothing in this Franchise shall be construed to limit any taxing authority or other lawful authority to impose charges or fees, or to excuse Franchisee of any obligation to pay lawfully imposed charges or fees.
- H. Nothing in this Franchise grants authority to Franchisee to impair or damage any City property, Public Way, other ways or other property, whether publicly or privately owned.
- I. Nothing in this Franchise shall be construed to create a duty upon the City to be responsible for construction of facilities, or to modify public ways to accommodate Franchisee's facilities.
- J. Nothing in this Franchise grants authority to Franchisee to provide or offer a Cable System or Cable Services as those terms are defined in 47 U.S.C. § 522(6).
- K. Nothing in this Franchise shall be construed to create, expand, or extend any liability of the City to any third-party user of Franchisee's facilities or to otherwise recognize or create third party beneficiaries to this Franchise.
- L. Nothing in this Franchise shall be construed to permit Franchisee to unlawfully enter or construct improvements upon the property or premises of another.
- M. Nothing in this Franchise authorizes Franchisee to enter or construct improvements on, in, under, over, across, or within any property or right-of-way of any third party without that third party's permission.

- N. Franchisee is authorized to place its Facilities in the Rights-of-Way only consistent with this Franchise, the Toppenish Comprehensive Plan, the Design and Construction Standards and the Toppenish Municipal Code (collectively the “Codes”).
- O. The terms, conditions, and provisions of TMC Chapter 5.45, as currently written or hereinafter modified, are incorporated herein by reference. All rights granted hereunder are subject to the terms, conditions, and requirements of TMC Chapter 5.45 unless this Franchise specifically provides to the contrary. In the event that a conflict exists between the terms of this Franchise and the terms of TMC Chapter 5.45, the terms of this Franchise shall control.

Section 3. Term. Authorization granted under this Franchise shall be for a period of ten (10) years from the Effective Date of this Franchise. Each of the provisions of this Franchise shall become effective upon the Effective Date and shall remain in effect for ten (10) years thereafter.

Section 4. Location of Facilities.

- A. Franchisee must place its facilities underground, except as otherwise expressly provided herein. Franchisee shall not be permitted to erect poles, unless permitted by the City pursuant to Section 13.C and the Codes. Franchisee acknowledges and agrees that the City may, at any time in the future, require the relocation at Franchisee's expense if the existing poles on which Franchisee's Facilities are located are designated for removal. This Franchise does not place an affirmative obligation on the City to allow the relocation of such Facilities on public property or in the Rights-of-Way, nor does it relieve Franchisee from any Code provision related to the siting of wireless facilities. Franchisee shall not be required to place underground any portion of the Facility that must, for technological reasons, remain above-ground to operate. If the City requires undergrounding of wires (either telecommunications or electrical) and allows Franchisee's Facilities to remain above ground, then Franchisee shall cooperate with the City and modify the affected Facilities to incorporate the placement of wireline services underground (and internal to the pole if the replacement pole is hollow, for example electrical and fiber) or otherwise consistent with a design plan agreed to by the City and Franchisee, at no cost to the City.
- B. Franchisee shall not remove any underground Facilities that require trenching or other opening of the Rights-of-Way, except as provided in this section. Franchisee may remove any underground Facilities from the Right-of-Way that have been installed in such a manner that it can be removed without trenching or any other opening of the Right-of-Way, or if otherwise permitted by the City. When the City determines, in the City's reasonable discretion, that Franchisee's underground Facilities must be removed in order to eliminate or prevent a hazardous condition, then Franchisee shall remove such Facilities at Franchisee's sole cost and expense. Franchisee must apply and receive a permit, pursuant to Section 12, prior to any such removal of underground Facilities from the Right-of-Way and must provide as-built plans and maps pursuant to Section 6.K.
- C. Franchisee's facilities shall not unreasonably interfere with the use of public ways or City property by the City, the general public, or other persons authorized to enter, occupy, or use public ways or City property.

- D. Franchisee shall provide the City with information in such form requested by the City which accurately reflects the horizontal and vertical location and configuration of all of Franchisee's facilities. Franchisee shall provide the City with updated information annually, or upon request by the City.
- E. To the extent that any Rights-of-Way within the Franchise Area are part of the state highway system ("State Highways"), are considered managed access by the City, are governed by the provisions of Chapter 47.24 RCW and applicable Washington State Department of Transportation (WSDOT) regulations, Franchisee shall comply fully with said requirements in addition to local ordinances and other applicable regulations. Without limitation of the foregoing, Franchisee specifically agrees that:
- (1) any pavement trenching, and restoration performed by Franchisee within State Highways shall meet or exceed applicable WSDOT requirements;
 - (2) any portion of a State Highway damaged or injured by Franchisee shall be restored, repaired and/or replaced by Franchisee to a condition that meets or exceeds applicable WSDOT requirements; and
 - (3) without prejudice to any right or privilege of the City, WSDOT is authorized to enforce, in an action brought in the name of the State of Washington, any condition of this Franchise with respect to any portion of a State Highway.
- F. Franchisee shall maintain all above ground improvements that it places on City Rights-of-Way pursuant to this Franchise. In order to avoid interference with the City's ability to maintain the Rights-of-Way, Franchisee shall provide a clear zone to meet the City's Design and Construction Standards. If Franchisee fails to comply with this provision, and by its failure property is damaged, then Franchisee shall be responsible for all damages caused thereby, including restoration.
- G. Franchisee must obtain written approval from the owners of utility poles, structures and property not owned by Franchisee prior to attaching to, or otherwise using, such poles, structures or property, and provide proof of such approval to the City. The City makes no representation, and assumes no responsibility, for the availability of utility poles, structures, and property owned by third-parties for the installation of Franchisee's facilities. The City shall not be liable for the unavailability of utility poles, structures, and property owned by the City or third-parties for any reason whatsoever. The installation of facilities by Franchisee on or in the poles, structures, or property owned by others shall be subject to and limited by the owner's authority to enter, occupy, and use public ways. In the event that the authority of the owner of poles, structures, or property to enter, occupy, and use the public ways either expires, terminates, or is cancelled, Franchisee may no longer be permitted to continue to use that specific pole, structure or property, unless expressly authorized by the City. The City shall not be liable for the costs for removal of Facilities arising from expiration, termination, or cancellation of any pole owner's authority to enter, occupy, or use public ways for any reason whatsoever.

Section 5. Relocation.

- A. The City may require Franchisee, and Franchisee covenants and agrees, to protect, support,

relocate, remove and/or temporarily disconnect its Facilities within the Right-of-Way when reasonably necessary for construction, alteration, repair, or improvement of the Right-of-Way for purposes of and for public welfare, health, or safety or traffic conditions, dedications of new Rights-of-Way and the establishment and improvement thereof, widening and improvement of existing Rights-of-Way, street vacations, freeway construction, change or establishment of street grade, and/or the construction of any public improvement or structure by any governmental agency acting in a governmental capacity or as otherwise necessary for the operations of the City or other governmental entity, provided that Franchisee shall have the privilege to temporarily bypass in the authorized portion of the same Rights-of-Way upon approval by the City, which approval shall not unreasonably be withheld or delayed, any Facilities required to be temporarily disconnected or removed. For the avoidance of doubt, such projects shall include any Right-of-Way improvement project, even if the project entails, in part, related work funded and/or performed by or for a third party, provided that such work is performed for the public benefit, but shall not include, without limitation, any other improvements or repairs undertaken by or for the primary benefit of third-party private entities. Collectively, all such projects described in this Section 5.A shall be considered a "Public Project". Except as otherwise provided by law, the costs and expenses associated with relocations or disconnections ordered pursuant to this Section 5.A shall be borne by Franchisee unless the City requires Franchisee to move or relocate the same facilities within a three year period, at which point the City will bear the costs of relocation. Franchisee shall complete the relocation of its Facilities at no charge or expense to the City.

- B. If the request for relocation from the City originates due to a Public Project, in which structures or poles are either replaced or removed, then Franchisee shall relocate or remove its Facilities as required by the City, and at no cost to the City, subject to the procedure in Section 5.E. Franchisee acknowledges and agrees that the placement of Small Wireless Facilities on third-party-owned structures does not convey an ownership interest in such structures. Franchisee acknowledges and agrees that, to the extent Franchisee's Small Wireless Facilities are on poles owned by third parties, the City shall not be responsible for any costs associated with requests arising out of a Public Project.
- C. The cost of relocation of any Franchisee owned poles or structures shall be determined in accordance with the requirements of RCW 35.99.060(3)(b), provided, however, that the Franchisee may opt to pay for the cost of relocating its Small Wireless Facilities in order to provide consideration for the City's approval to site a Small Wireless Facility on Franchisee owned structures or poles in a portion of the Right of Way designated or proposed for a Public Project. For this Section 5.C, designation of the Right of Way for a Public Project shall be undertaken in the City's Comprehensive Plan in accordance with the requirements of Ch. 36.70A RCW. The Comprehensive Plan includes, but is not limited to, the Transportation element or Transportation Improvement Plan (TIP), Capital Facilities element, utilities element, and any other element authorized by RCW 36.70A.070 and RCW 36.70A.080. The parties acknowledge that this provision is mutually beneficial to the parties, as the City may otherwise deny the placement of the Small Wireless Facility at a particular site because of the cost impact of such relocation and the conflict with the City's Comprehensive Plan.

- D. Upon request of the City (or of a third party performing work in the Right-of-Way), and in order to facilitate the design of City street and Right-of-Way improvements, Franchisee agrees, at its sole cost and expense, to locate, and, if reasonably determined necessary by the City, to excavate and expose its Facilities for inspection so that the Facilities' location may be taken into account in the improvement design. The decision as to whether any Facilities need to be relocated in order to accommodate the Public Projects shall be made by the City upon review of the location and construction of Franchisee's Facilities. The City shall provide Franchisee at least fourteen (14) days' written notice prior to any excavation or exposure of Facilities.
- E. Notice and Relocation Process. If the City determines that the project necessitates the relocation of Franchisee's existing Facilities, the City shall provide Franchisee in writing with a date by which the relocation shall be completed (the "Relocation Date") consistent with RCW 35.99.060(2). In calculating the Relocation Date, the City shall consult with Franchisee and consider the extent of Facilities to be relocated, the services requirements, and the construction sequence for the relocation (within the City's overall project construction sequence and constraints), to safely complete the relocation. Franchisee shall complete the relocation by the Relocation Date, unless the City or a reviewing court establishes a later date for completion, as described in RCW 35.99.060(2). To provide guidance on this notice process, the City will make reasonable efforts to engage in the following recommended process, absent an emergency posing a threat to public safety or welfare, or an emergency beyond the control of the City that will result in severe financial consequences to the City:
- (1) The City will consult with the Franchisee in the predesign phase of any Public Project in order to coordinate the project's design with Franchisee's Facilities within such project's area.
 - (2) Franchisee shall participate in predesign meetings until such time as (i) both parties mutually determine that Franchisee's Facilities will not be affected by the Public Project, or (ii) until the City provides Franchisee with written notice regarding the relocation as provided in subsection (4) below.
 - (3) Franchisee shall, during the predesign phase, evaluate and provide comments to the City related to any alternatives to possible relocations. The City will give any alternatives proposed by the Franchisee full and fair consideration, but the final decision accepting or rejecting any specific alternative shall be within the City's sole discretion.
 - (4) The City will provide Franchisee with its decision regarding the relocation of Franchisee's Facilities as soon as reasonably possible, endeavoring to provide no less than ninety (90) days prior to the commencement of the construction of such Public Project; provided, however that in the event that the provisions of a state or federal grant require a different notification period or process than that outlined in Section 5.E, the City will notify the Franchisee during the predesign meetings and the process mandated by the grant funding will control.
 - (5) After receipt of such written notice, Franchisee shall relocate such Facilities to accommodate the Public Project consistent with the timeline provided by the City,

and at no charge or expense to the City. Such timeline may be extended by a mutual agreement.

- (6) In the event of an emergency posing a threat to public safety or welfare, or in the event of an emergency beyond the control of the City which will result in severe financial consequences to the City, that necessitates the relocation of Franchisee's Facilities, Franchisee shall relocate its Facilities within the time period specified by the City.
- F. The provisions of this Section 5 shall in no manner preclude or restrict Franchisee from making any arrangements it may deem appropriate when responding to a request for relocation of its Facilities by any person or entity other than the City, where the facilities to be constructed by said person or entity are not or will not become City-owned, operated, or maintained facilities, provided that such arrangements do not unduly delay a City construction project.
- G. Franchisee shall be solely responsible for the actual costs incurred by the City for delays in a Public Project to the extent the delay is caused by or arises out of Franchisee's failure to comply with the final schedule for the relocation (other than as a result of a Force Majeure Event or causes or conditions caused by the acts or omissions of the City or any third party unrelated to Franchisee). Franchisee vendors and contractors shall not be considered unrelated third parties). Such costs may include, but are not limited to, payment to the City's contractors and/or consultants for increased costs and associated court costs, interest, and attorney fees incurred by the City to the extent directly attributable to such Franchisee's cause of delay in the Public Project.
- H. Franchisee will indemnify, hold harmless, and pay the costs of defending the City (in accordance with the provisions of Section 14), against any and all claims, suits, actions, damages, or liabilities for delays on City construction projects caused by, or arising out of, the failure of Franchisee to remove or relocate its Facilities as provided in this Section 5; provided, that Franchisee shall not be responsible for damages due to delays caused by circumstances beyond the control of Franchisee or the sole negligence, willful misconduct, or unreasonable delay of the City or any unrelated third party.
- I. If Franchisee fails, neglects, or refuses to remove or relocate its Facilities as directed by the City following the procedures outlined in Section 5.A through Section 5.E, then upon at least fourteen (14) calendar days written notice to Franchisee, the City may perform such work (including removal), or cause it to be done, and the City's costs shall be paid by Franchisee pursuant to Section 18, and the City shall not be responsible for any damage to the Facilities.
- J. The provisions of this Section 5 shall survive the expiration or termination of this Franchise during such time as Franchisee continues to have Facilities in the Rights-of-Way.

Section 6. Construction and Installation Requirements.

- A. Except as to emergency repairs, Franchisee shall, prior to excavating within any street, alley or other public place, or installing any conduit, overhead facilities or equipment

therein, or relocating, constructing, or performing maintenance within the Rights-of-Way, file with the Public Works Director plans and specifications thereof showing the work to be done, the location and nature of the installation to be made, repaired or maintained, as well as a schedule showing the times of beginning and completion and shall secure a permit from the City before proceeding with any such work. The Franchisee shall comply with the permit requirements and conform to all requirements of TMC Chapter 17.85 regarding the installation of small wireless facilities within the public right-of-way, as it currently exists or as it may be amended.

- B. The technical performance of the Facilities must meet or exceed all applicable technical standards authorized or required by law, regardless of the transmission technology utilized. The City has the full authority permitted by applicable law to enforce compliance with these technical standards.
- C. All installations of Facilities will be durable, and installed in accordance with good engineering, construction, and installation practices.
- D. All Facilities shall be constructed and installed in such a manner and at such points so as not to inconvenience public use of the Public Ways (or to adversely affect the public health, safety or welfare) and in conformity with plans approved by the City, except in instances in which deviation is requested in writing by the Franchisee and approved by the City.
- E. The construction plans shall conform to all federal, state, local, and industry codes, rules, regulations, and standards. Franchisee must cease work immediately if the City determines that Franchisee is not in compliance with such codes, rules, regulations, or standards, and may not begin or resume work until the City determines that Franchisee is in compliance. The City shall not be liable for any costs arising out of delays occurring as a result of such work stoppage.
- F. Neither approval of plans by the City nor any action or inaction by the City shall relieve Franchisee of any duty, obligation, or responsibility for the competent design, construction, and installation of its facilities. Franchisee is solely responsible for the supervision, condition, and quality of the work done, whether it is performed by itself or by its contractors, agents, or assigns.
- G. In the event of an emergency requiring immediate action by Franchisee for the protection of the Facilities, City's property or other persons or property, Franchisee may proceed without first obtaining the normally required permits. In such event, Franchisee must (1) take all necessary and prudent steps to protect, support, and keep safe from harm the Facilities, or any part thereof; City's property; or other persons or property, and to protect the public health and safety; and (2) as soon as possible thereafter, must obtain the required permits and comply with any mitigation requirements or other conditions in the after-the-fact permit.
- H. The City retains the right and privilege to cut, move, or remove any Facilities located within the Rights-of-Way of the City, as the City may determine to be necessary, appropriate, or useful in response to any public health or safety emergency. The City shall not be liable to

Franchisee for any direct, indirect, or any other such damages suffered by any person or entity of any type as a direct or indirect result of the City's actions under this subsection, except to the extent caused by the sole negligence, intentional misconduct, or criminal actions of the City, its employees, contractors, or agents.

- I. Unless such condition or regulation is in conflict with a federal or state requirement, the City may condition the granting of any permit or other approval that is required under this Franchise, in any manner reasonably necessary for the safe use and management of the public right-of-way or the City's property, including, by way of example and not limitation, maintaining proper distance from other utilities, protecting the continuity of pedestrian and vehicular traffic, and protecting Rights-of-Way improvements, private facilities and public safety.
- J. Whenever necessary, after construction or maintaining any of Franchisee's Facilities within the Rights-of-Way, the Franchisee shall, without delay, and at Franchisee's sole expense, remove all debris and restore the surface disturbed by Franchisee as nearly as possible to as good or better condition as it was in before the work began. Franchisee shall replace any property corner monuments, survey reference, or hubs that were disturbed or destroyed during Franchisee's work in the rights-of-way. Such restoration shall be done in a manner consistent with applicable codes and laws, and to the City's satisfaction, and, where applicable, to City specifications.
- K. Following any construction, excluding modifications that meet the same or substantially similar dimensions of the Small Wireless Facility, Franchisee shall provide the City with accurate copies of as-built plans and maps prepared by Franchisee's design and installation contractors for all existing Small Cell Facilities in the Franchise Area. These plans and maps shall be provided at no cost to the City and shall include hard copies and digital files in AutoCAD or other industry standard readable formats that are acceptable to the City and delivered electronically. Further, Franchisee shall provide such maps within thirty (30) days following a request from the City. Franchisee shall warrant the accuracy of all plans, maps, and as-builts provided to the City. Franchisee shall be solely and completely responsible for workplace safety and safe working practices on its job sites within the Franchise Area, including safety of all persons and property during the performance of any work.
- L. Franchisee shall, at all times, keep up-to-date maps and records showing the location and sizes of all Franchisee's facilities installed by it in the Franchise Area. Franchisee shall provide, at the City's request, a copy of facilities maps for the City's use. All books, records, maps, and other documents maintained by Franchisee, with respect to its facilities within the Rights-of-Way, shall be made available for inspection by the City at reasonable times and intervals; provided, however, that nothing in this Section shall be construed to require Franchisee to violate state or federal law regarding customer privacy, nor shall this Section be construed to require Franchisee to disclose proprietary or confidential information without adequate safeguards for its confidential or proprietary nature.
- M. All Franchisee's underground Facilities shall be placed in accordance with current City regulations and project permit requirements. Unless otherwise approved by the Public

Works Director, underground Facilities must maintain (parallel) five (5) feet separation from City water and sewer mains. Franchisee shall restore the Public Way to pre-construction condition or better. Franchisee agrees to pay all costs and expenditures required on Rights-of-Way as a result of settling, subsidence, or any other need for repairs or maintenance resulting from excavations made by Franchisee for a period of five (5) years after the excavation. Favorable weather conditions permitting, Franchisee agrees to repair Rights-of-Way as a result of settling, subsidence, or other needed repairs or maintenance resulting from excavations made by the Franchisee within the prior five (5) years upon forty-eight (48) hours' notice excluding weekends and holidays. If Franchisee fails to undertake such repairs as herein provided, the City may perform the repairs at Franchisee's expense.

- N. The City reserves the right to limit or exclude Franchisee's access to a specific route, Right-of-Way or other location when, in the judgment of the Public Works Director, there is inadequate space (including, but not limited to, compliance with ADA clearance requirements and maintaining a clear and safe passage through the Rights-of-Way), a pavement cutting moratorium, unnecessary damage to public property, public expense, interference with City utilities, or for any other reason determined by the Public Works Director.
- O. Franchisee may trim trees which are upon and/or overhang on Public Ways and other public places of the City so as to prevent the branches of such trees from coming in contact with Franchisee's Facilities. The right to trim trees in this way shall only apply to the extent necessary to protect above ground Facilities. Franchisee shall ensure that its tree trimming activities protect the appearance, integrity, and health of the trees to the extent reasonably possible. Franchisee shall be responsible for removal of all debris resulting from such activities. All trimming, except in emergency situations, is to be done after the explicit prior written notification and approval of the City and at the expense of Franchisee. Franchisee may contract for such services. However, any firm or individual so retained must first receive City permit approval prior to commencing such trimming. Nothing herein grants Franchisee any authority to act on behalf of the City, to enter upon any private property, or to trim any tree or natural growth encroaching into the Rights-of-Way. Franchisee shall be solely responsible and liable for any damage to any third parties' trees or natural growth caused by Franchisee's actions. Franchisee shall indemnify, defend and hold harmless the City from third-party claims (of any nature) arising out of any act or negligence of Franchisee with regard to tree and/or natural growth trimming, damage, and/or removal. Franchisee shall reasonably compensate the City or the property owner for any damage caused by trimming, damage, or removal by Franchisee. Except in an emergency situation, all tree trimming must be performed under the direction of an arborist certified by the International Society of Arboriculture, and in a manner consistent with the most recent issue of "Standards of Pruning for Certified Arborists" as developed by the International Society of Arboriculture or its industry accepted equivalent (ANSI A300), unless otherwise approved by the Public Works Director or his/her designee.

Section 7. Coordination of Construction and Installation Activities and Other Work.

- A. Franchisee shall coordinate its construction and installation activities and other work with the City and other users of the Public Ways at least annually or as determined by the City.
- B. All construction or installation locations, activities and schedules shall be coordinated, as ordered by the City, to minimize public inconvenience, disruption or damages.
- C. If required by permit, at least twenty-four (24) hours prior to entering a Public Way to perform construction and installation activities or other work, Franchisee shall give notice, at its cost, to owners and occupiers of properties adjacent to such Public Ways indicating the nature and location of the work to be performed. Such notice shall be physically posted by door hanger or by other form reasonably acceptable to the City. Franchisee shall make a good faith effort to comply with the property owner or occupier's preferences, if any, on location or placement of underground facilities, consistent with sound engineering practices.
- D. If technically feasible, Franchisee shall make available, and accept, the co-location of property of others within trenches excavated or used by Franchisee in the public ways, provided the costs of the work are fairly allocated between the parties. By February 1 of each year, Franchisee shall provide the City with a schedule of its proposed construction or installation activities and other work in, around, or that may affect the public ways or City property, to the extent that such information is available or known to Franchisee.
- E. The City shall give reasonable advance notice to Franchisee of plans to open Public Ways for construction or installation of facilities. When such notice has been given, Franchisee shall provide information requested by the City regarding Franchisee's future plans for use of the Public Way to be opened. When notice has been given, Franchisee may only construct or install facilities during such period that the City has opened the Public Way for construction or installation.

Section 8. Temporary Removal, Adjustment or Alteration of Facilities.

- A. Upon thirty (30) days' notice, Franchisee shall temporarily remove, adjust, turn off, or alter the position of its Facilities (at its cost), at the request of the City for public projects, events, or other public operations or purposes. City shall provide notice to Franchisee immediately upon completion of the public project, event, or other public purpose so that Franchisee may return its Facilities to the original location.
- B. Prior to doing any work in the Rights-of-Way, Franchisee shall follow established procedures, including contacting the Utility Notification Center in Washington and complying with all applicable State statutes regarding the One Call Locator Service pursuant to Chapter 19.122 RCW. Further, upon request, by the City or a third party, Franchisee shall locate the precise horizontal and vertical location of its underground facilities by excavating its Facilities consistent with the requirements of Chapter 19.122 RCW and shall complete this service within fourteen (14) days from the date of the City or third party's request, at no cost to the City. If the City's request is in support of a third party's project, Franchisee shall be entitled to recover its cost from the project sponsor. The City shall not be liable for any damages to Franchisee's Facilities, or for interruptions

in service to Franchisee's customers, that are a direct result of Franchisee's failure to locate its Facilities within the prescribed time limits and guidelines established by the One Call Locator Service regardless of whether the City issued a permit.

- C. If any person requests permission from the City to use a Public Way for the moving or removal of any building or other object, the City shall, prior to granting such permission, require such person or entity to make any necessary arrangements with Franchisee for the temporary removal, adjustment or alteration of Franchisee's facilities to accommodate the moving or removal of said building or other object. In such event, Franchisee shall, at the cost of the person desiring to move or remove such building or other object, remove, adjust or alter the position of its Facilities which may obstruct the moving or removal of such building or other object, provided that:
- (1) The moving or removal of such building or other object which necessitates the temporary removal, adjustment or alteration of Facilities shall be done at a reasonable time and in a reasonable manner so as to not unreasonably interfere with Franchisee's business, consistent with the maintenance of proper service to Franchisee's customers;
 - (2) Where more than one route is available for the moving or removal of such building or other object, such building or other object shall be moved or removed along the route which causes the least interference with the operations of Franchisee, as determined in the sole discretion of the City;
 - (3) The person obtaining such permission from the City to move or remove such building or other object may be required to indemnify and hold Franchisee harmless from any and all claims and demands made against it on account of injury or damage to the person or property of another arising out of, or in conjunction with, the moving or removal of such building or other object, to the extent such injury or damage is caused by the negligence of the person moving or removing such building or other object or the negligence of the agents, servants or employees of the person moving or removing such building or other object; and
 - (4) Completion of notification requirements by a person who has obtained permission from the City to use a Public Way for the moving or removal of any building or other object shall be deemed to be notified by the City.
- D. The City may require Franchisee to temporarily remove, adjust or alter the position of Franchisee's Facilities as the City may determine to be necessary, appropriate or useful in response to any public health or safety emergency. The City shall not be liable to Franchisee or any other party for any direct, indirect, or other damages suffered as a direct or indirect result of the City's actions except to the extent damages are caused by the negligence, intentional misconduct, or criminal actions of the City, its employees, contractors, or agents.
- E. The temporary removal, adjustment or alteration of the position of Franchisee's Facilities shall not be considered relocation for any purpose whatsoever.

Section 9. Safety and Maintenance Requirements.

- A. All work authorized and required under this Franchise will be performed in a safe, thorough, and workmanlike manner, so as to minimize interference with the free passage of traffic, and the free use of adjoining property, whether public or private.
- B. Franchisee, in accordance with applicable federal, state, and local safety requirements, shall at all times employ ordinary care and shall use commonly accepted methods and devices for preventing failures and accidents which are likely to cause damage, injury, or nuisance to occur. All facilities, wherever situated or located, shall at all times be kept in a good, safe, and suitable condition. If a violation of a safety code or other applicable regulation is found to exist by the City, the City may, after discussions with Franchisee, establish a reasonable time for Franchisee to make necessary repairs. If the repairs are not made within the established time frame, the City may make the repairs itself at the cost of the Franchisee, or have them made at the cost of Franchisee.
- C. Franchisee, and any person acting on its behalf, shall provide a traffic control plan that conforms to the latest edition of the Manual of Uniform Traffic Control Devices (MUTCD). Said plan shall use suitable barricades, flags, flagmen, lights, flares, and other measures as required for the safety of all members of the general public during the performance of work, of any kind whatsoever, in public ways to prevent injury or damage to any person, vehicle, or property. Franchisee shall implement and comply with its approved traffic control plan during execution of its work.
- D. Franchisee shall maintain its Facilities in proper working order. Franchisee shall restore its Facilities to proper working order within thirty (30) days after receipt of notice from the City that Facilities are not in proper working order, or such longer period of time as approved by City and Franchisee. Notwithstanding the above, if the City determines that the Facilities are a public safety concern (e.g., the equipment box is detached), then Franchisee shall repair such Facility immediately, but no less than forty-eight (48) hours after notice, unless such time period is extended by the City.
- E. Franchisee shall endeavor to maintain all equipment lines and Facilities in an orderly manner, including, but not limited to, the removal of all bundles or extraneous wires used for the connection of aerial Facilities (e.g., connecting equipment boxes to antennas).
- F. Any opening or obstruction in the Rights-of-Way or other public places made by Franchisee in the course of its operations shall be protected by Franchisee at all times by the placement of adequate barriers, fences, or boarding, the bounds of which, during periods of dusk and darkness, shall be clearly marked and visible.

Section 10. Removal of Unauthorized Facilities.

- A. Any Small Wireless Facilities installations in the Right-of-Way that were not authorized under this Franchise (“Unauthorized Facilities”) will be subject to the payment of an Unauthorized Facilities charge by Franchisee. The City shall provide written notice to Franchisee of any Unauthorized Facilities identified by City staff and Franchisee shall either (i) establish that the site was authorized, or (ii) submit a complete application to the

City for approval of the Unauthorized Facilities. Upon notice of the Unauthorized Facility, Franchisee shall be charged an amount of Five Hundred and 00/100 Dollars (\$500.00) per day per Unauthorized Facility (“Unauthorized Facility Fee”). The Unauthorized Facility Fee shall be waived in its entirety if Franchisee can establish that the site was in fact authorized. The Unauthorized Facility Fee shall be suspended upon the submission of a complete application to the City requesting approval of the Unauthorized Facility. If the application for such Unauthorized Facilities is denied as the final decision, then the Unauthorized Facility Fee will resume until the Unauthorized Facilities are removed. In which case, Franchisee shall remove the Unauthorized Facilities from the City’s Right-of-Way within thirty (30) days after the expiration of all appeal periods for such denial. Upon the conclusion of any matter involving an Unauthorized Facility, City shall provide Franchisee an invoice detailing the total amount of the Unauthorized Facility Fee, if any, which penalty Franchisee shall pay within thirty (30) days after receipt of notice thereof. This Franchisee remedy is in addition to any other remedy available to the City at law or equity. Notwithstanding the foregoing, an Unauthorized Facility Fee pursuant to this Franchise shall not be assessed if Franchisee received City Approval pursuant to Section 13 for the Small Wireless Facilities but such Small Wireless Facilities are technically inconsistent with the City Approval; provided, however, Franchisee is still required to fix any inconsistencies with the permit requirements and that this provision does not restrict the City’s other enforcement rights.

- B. Where any Facilities or portions of Facilities are no longer needed, and their use is to be discontinued, the Franchisee shall immediately report such Facilities in writing (“Deactivated Facilities”) to the Public Works Director. This notification is in addition to the inventory revisions addressed in Section 13.F. Deactivated Facilities, or portions thereof, shall be completely removed within ninety (90) days and the site, pole or infrastructure restored to its pre-existing condition.
- C. If Franchisee leases a structure from a third party and such third party later abandons the structure, Franchisee shall remove its Facilities from the abandoned structure within the timeline provided by the third party, but not more than ninety (90) days after such notification from the third party, at no cost to the City, and shall remove the pole if so required by the third party. Notwithstanding the preceding sentence, the timelines determined by the City for relocation projects described in Section 5 above shall apply.
- D. Upon the expiration, termination, or revocation of the rights granted under this Franchise, Franchisee shall remove all of its Facilities from the Rights-of-Way within ninety (90) days of receiving written notice from the Public Works Director or his/her designee. The Facilities, in whole or in part, may not be abandoned by Franchisee without written approval by the City. Any plan for abandonment or removal of Franchisee’s Facilities must be first approved by the Public Works Director or his/her designee, and all necessary permits must be obtained prior to such work. Franchisee shall restore the Rights-of-Way to at least the same condition the Rights-of-Way were in immediately prior to any such installation, construction, relocation, maintenance or repair, provided Franchisee shall not be responsible for any changes to the Rights-of-Way not caused by Franchisee or any person doing work for Franchisee. Franchisee shall be solely responsible for all costs associated with removing its Facilities.

- E. The City may permit Franchisee's Facilities to be abandoned in place, in such a manner as the City may prescribe. Upon permanent abandonment, and Franchisee's agreement to transfer ownership of the Facilities to the City, Franchisee shall submit to the City a proposal and instruments for transferring ownership to the City.
- F. Any Facilities which are not removed within one hundred and eighty (180) days of either (i) the date of termination or revocation of this Franchise or (ii) the date the City issued a permit authorizing removal, whichever is later, shall automatically become the property of the City. Any costs incurred by the City in safeguarding such Facilities or removing the Facilities shall be reimbursed by Franchisee. Nothing contained within this Section 10 shall prevent the City from compelling Franchisee to remove any such Facilities through judicial action when the City has not permitted Franchisee to abandon said Facilities in place.
- G. The provisions of this Section 10 shall survive the expiration, revocation, or termination of this Franchise and for so long as Franchisee has Facilities in Rights-of-Way.

Section 11. Restoration of Public Ways and Other Property.

- A. When Franchisee, or any person acting on its behalf, does any work in or affecting any Public Way or other property, it shall, at its own expense, promptly remove any obstructions therefrom and restore, at Franchisee's cost, such ways and property to as good a condition as existed before the work was undertaken, unless otherwise directed by the City.
- B. If weather or other conditions do not permit the complete restoration required by this section, the Franchisee shall temporarily restore the affected ways or property. Such temporary restoration shall be at the Franchisee's cost, and Franchisee shall promptly undertake and complete the required permanent restoration when the weather or other conditions no longer prevent such permanent restoration.
- C. All restoration work is subject to inspection and final approval by the City, which shall not be unreasonably withheld. If restoration is not made to the satisfaction of the City within the established timeframe, the City may make the restoration itself at the cost of Franchisee, or have such restoration made at the cost of Franchisee.
- D. The provisions of this Section 11 shall survive the expiration, revocation, or termination of this Franchise and for so long as Franchisee has Facilities in Rights-of-Way.

Section 12. Use and/or Development Authorization and Permits. Franchisee shall obtain use, right-of-way construction, and/or development authorization and required permits from the City and all other appropriate regulatory authorities prior to constructing or installing Facilities or performing other work in a Public Way.

- A. In addition to any permitting requirements of the City specific to Facilities found in Toppenish Municipal Code Chapter 5.45, Chapter 12.08, or Chapter 17.85 the Franchisee must provide the information described in Section 12.B below.

- B. Franchisee shall provide the following information for all Facilities that it proposes to construct or install:
- (1) Engineering plans, specifications and a network map of the proposed facilities and their relation to existing facilities, in a format and media requested by the City in sufficient detail to identify:
 - a. The location and route of the proposed facilities;
 - b. When requested by the City, the location of all overhead and underground public utility, telecommunication, cable, water, sewer, drainage and other facilities in the Public Way along the proposed route;
 - c. When requested by the City, the location(s), if any, for interconnection with the telecommunication facilities of others;
 - d. The specific trees, structures, improvements, facilities and obstructions, if any, that Franchisee proposes to temporarily or permanently alter, remove or relocate.
 - (2) If Franchisee is proposing to install overhead Facilities, evidence of Franchisee's authorization to use each utility pole along the proposed route together with any conditions of use imposed by the pole owner(s) for each pole. If the overhead Facilities are subsequently relocated underground, Franchisee shall relocate its Facilities consistent with the requirements of this Franchise.
 - (3) If Franchisee is proposing to install underground Facilities in existing ducts or conduits within the Public Ways, information in sufficient detail to identify:
 - a. Evidence of ownership or authorization to use such ducts or conduits;
 - b. Conditions of use imposed by the owner(s) of the ducts or conduits;
 - c. If known to Franchisee, or reasonably ascertainable to Franchisee, the total capacity of such ducts or conduits; and
 - d. If known to Franchisee, or reasonably ascertainable to Franchisee, amount of the total capacity within such ducts or conduits which will be occupied by Franchisee's Facilities.
 - (4) If Franchisee is proposing to install underground Facilities in new ducts or conduits within the public ways:
 - a. The location proposed for new ducts or conduits;
 - b. The total capacity of such ducts or conduits; and
 - c. The initial listing of collocated facilities located within Franchisee constructed or installed ducts or conduits.
 - (5) A preliminary construction schedule and completion date together with a traffic control plan in compliance with the Manual on Uniform Traffic Control Devices (MUTCD) for any construction.
 - (6) Information to establish that the applicant has obtained all other governmental approvals and permits to construct and operate the facilities.
 - (7) Such other documentation and information regarding the Facilities requested by the City.
- C. Franchisee shall not be granted development authorization or issued permits for construction or installation of new Facilities, unless Franchisee is in full compliance with

the provisions of this Franchise, and all of Franchisee's existing Facilities have been permitted.

Section 13. Small Wireless Facilities.

- A. City Retains Approval Authority. The City shall have the authority at all times to control by appropriately exercised police powers (through ordinance or regulation consistent with 47 U.S.C. § 253, 47 U.S.C. § 332(c)(7), and the laws of the State of Washington), the location, elevation, manner of construction, and maintenance of any of Franchisee's Small Wireless Facilities, and Franchisee shall promptly conform with all such requirements, unless compliance would cause Franchisee to violate other requirements of law. This Franchise does not prohibit the City from exercising its rights under federal, state or local law to deny or give conditional approval to an application for a permit to construct any individual Small Wireless Facility.

- B. City Approvals and Permits. The granting of this Franchise is not a substitute for any other City required approvals to construct Franchisee's Facilities in the Rights-of-Way ("City Approvals"). The parties agree that such City Approvals (except Right-of-Way use permits as described in Section 12) are not considered use permits, as that term is defined in RCW 35.99.010. These City Approvals do not grant general authorization to enter and utilize the Rights-of-Way but rather grant Franchisee permission to build its specific Small Wireless Facilities. Therefore, City Approvals are not subject to the thirty (30) day issuance requirement described in RCW 35.99.030. The parties recognize that this provision is specifically negotiated as consideration for designating the entire City as the Franchise Area. Such City Approvals shall be issued consistent with the Codes, and with state and federal laws governing wireless communication facility siting and may be in addition to any permits required under Section 12. This Section does not affect the thirty (30) day issuance requirement described in RCW 35.99.030 required for use permits such as Right-of-Way use permits and traffic control permits.

- C. Preference for Existing Infrastructure; Site Specific Agreements.
 - (1) Franchisee shall utilize existing infrastructure in the City whenever possible and consistent with the design, concealment and siting regulations of the Codes. The erection of new poles or structures in the Right-of-Way may only be permitted if no other alternative space feasible for the installation of the Facility is available. In the event that existing infrastructure is not available or feasible for a Small Wireless Facility, or if the City prefers new poles or infrastructure in a particular area of the City, then Franchisee may request the placement of new or replacement structures in the Rights-of-Way consistent with the requirements of the Codes.
 - (2) Franchisee acknowledges and agrees that if Franchisee requests to place new structures or replacement structures that are higher than the replaced structure, and the overall height of the replacement structure and the Facility are over 60 feet in the Rights-of-Way, then Franchisee may be required to enter into a site-specific agreement consistent with RCW 35.21.860 in order to construct such Facilities in the Right-of-Way. Such agreements may require a site-specific charge paid to the

City. The approval of a site-specific agreement is separate from this Franchise and must be approved and executed by the City Manager or his/her designee.

- (3) Unless otherwise required by the Codes, replacement poles or structures which remain substantially similar to existing structures (or deviate in height or design as permitted within the Codes) are permissible, provided that Franchisee, or the pole owner at the Franchisee's request, removes the old pole or structure promptly, but no more than ninety (90) days after the installation of the replacement pole or structure.
- (4) This Section 13.C does not place an affirmative obligation on the City to allow the placement of new infrastructure on public property or in the Rights-of-Way, nor does it relieve Franchisee from any Code provision related to the siting or design of small wireless facilities.

- D. **Concealment.** Franchisee shall construct its Facilities consistent with the concealment or stealth requirements as described in the Codes, as the same exist or are hereafter amended, or in the applicable permit(s), lease, site specific agreement, or license agreement, in order to minimize the visual impact of such Facilities.
- E. **Eligible Facilities Requests.** The parties acknowledge that it is the intent of this Franchise to provide general authorization to use the Rights-of-Way for Small Wireless Facilities. When considering whether a proposed modification is a substantial change under Section 6409(a) of the Spectrum Act, 47 U.S.C. §1455(a), the parties acknowledge that the designs as illustrated in a Small Wireless Facility permit, including the dimensions and number of antennas and equipment boxes and the pole height are intended and stipulated to be aesthetic conditions to minimize the visual impact of the Small Wireless Facilities, and specifically to utilize concealment elements intended to maintain the look of a utility or light pole to which the Facilities are attached.
- F. **Inventory.** Franchisee shall maintain a current inventory of Small Wireless Facilities throughout the Term of this Franchise. Franchisee shall provide to the City a copy of the inventory report no later than (30) days of request by the City. The inventory report shall include GIS coordinates, date of installation, type of pole used for installation, description/type of installation for each Small Wireless Facility installation, and photographs taken before and after the installation of the Small Wireless Facility, as well as photos taken from the public street. Small Wireless Facilities that are considered Deactivated Facilities, shall be included in the inventory report and Franchisee shall provide the same information as is provided for active installations, as well as the date the Facilities were deactivated and the date the Deactivated Facilities were removed from the Right-of-Way. The City shall compare the inventory report to its records to identify any discrepancies, and the parties will work together in good faith to resolve any discrepancies. Franchisee is not required to report on future inventory reports any Deactivated Facilities that were removed from the Right-of-Way since the last reported inventory and may thereafter omit reference to the Deactivated Facilities.
- G. **Graffiti Abatement.** As soon as practical, but not later than thirty (30) days from the date Franchisee receives notice or is otherwise aware, Franchisee shall remove all graffiti on

any of its Small Wireless Facilities of which it is the owner of the pole or structure or on the Small Wireless Facilities themselves attached to a third-party pole (i.e., graffiti on the shrouding protecting the radios). The foregoing shall not relieve Franchisee from complying with any City graffiti or visual blight ordinance or regulation.

H. Emissions Reports.

- (1) Franchisee is obligated to comply with all applicable laws relating to allowable presence of or human exposure to Radiofrequency Radiation ("RFs") or Electromagnetic Fields ("EMFs") on or off any poles or structures in the Rights-of-Way, including all applicable FCC standards. Franchisee shall comply with the RF emissions certification requirements under applicable Law.
- (2) Nothing in this Franchise prohibits the City from requiring periodic testing of Franchisee's Facilities, which the City may request no more than once per year, unless as otherwise required by a permit due to a modification of the Facility. The City may inspect any of Franchisee's Facilities and equipment located in the Rights-of-Way. If the City discovers that the emissions from a Facility exceeds the FCC standards, then the City may order Franchisee to immediately turn off the Facility, or portion thereof committing the violation, until the emissions exposure is remedied. Such order shall be made orally by calling NOC 800-510-6091 and also by written notice pursuant to Section 26. Franchisee is required to promptly turn off that portion of the Facility that is in violation, no later than forty-eight (48) hours after receipt of oral notice. Franchisee shall reimburse the City for any costs incurred by the City for inspecting the Facility and providing notice as described in Section 18.

I. Interference with Public Facilities. Franchisee's Small Wireless Facilities shall not physically interfere or cause harmful interference, as defined in 47 CFR 15.3(m), with any City operations (including, but not limited to, traffic lights, public safety radio systems, or other City communications infrastructure), or with the emergency communications operation or equipment. If the Small Wireless Facilities cause such harmful interference, Franchisee shall respond to the City's request to address the source of the interference as soon as practicable, but in no event later than forty-eight (48) hours after receipt of notice. The City may require, by written notice, that Franchisee power down the specific Small Wireless Facilities, or portion thereof, causing such interference if such interference is not remedied within forty-eight (48) hours after notice. If, within thirty (30) days after receipt of such written notice from the City of such interference, Franchisee has not abated such interference in a manner that is consistent with federal guidelines, such Small Wireless Facility may be deemed an Unauthorized Facility and subject to the provisions of Section 13.I or removal by the City consistent with Section 6.H. The Small Wireless Facility, or interfering portion thereof, must remain powered down (except for testing purposes) during the abatement period; otherwise the City may take more immediate action consistent with Section 6.H to protect the public health, safety, and welfare.

J. Interference with Other Facilities. Franchisee is solely responsible for determining whether its Small Wireless Facilities interfere with telecommunications facilities of other utilities and franchisees within the Rights-of-Way. Franchisee shall comply with the rules and

regulations of the Federal Communications Commission regarding radio frequency interference when siting its Small Wireless Facilities within the Franchise Area. Franchisee, in the performance and exercise of its rights and obligations under this Franchise shall not physically or technically interfere in any manner with the existence and operation of any and all existing utilities, sanitary sewers, water mains, storm drains, gas mains, poles, aerial and underground electrical and telephone wires, electroliers, cable television, and other telecommunications, utility, or municipal property, without the express written approval of the owner or owners of the affected property or properties, except as expressly permitted by applicable law or this Franchise.

Section 14. Hold Harmless and Assumption of Risk.

- A. Franchisee releases, covenants not to bring suit against, and agrees to indemnify, defend, and hold harmless the City, its elected and appointed officials, officers, employees, agents, contractors and representatives from any and all claims, costs, judgments, awards, or liability to any person, for injury or death of any person, or damage to property caused by or arising out of any acts or omissions of Franchisee, its agents, servants, officers, or employees in the performance of this Franchise and any rights granted within this Franchise except to the extent damages are caused by the negligence, intentional misconduct, or criminal actions of the City, its employees, contractors, or agents. This indemnification obligation shall extend to claims that are not reduced to a suit and any claims that may be compromised, with Franchisee's prior written consent, prior to the culmination of any litigation or the institution of any litigation.
- B. Inspection or acceptance by the City of any work performed by Franchisee at the time of completion of construction shall not be grounds for avoidance by Franchisee of any of its obligations under this Section 14.
- C. The City shall promptly notify Franchisee of any claim or suit and request in writing that Franchisee indemnify the City. Franchisee may choose counsel to defend the City subject to this Section 14.C. City's failure to so notify and request indemnification shall not relieve Franchisee of any liability that Franchisee might have, except to the extent that such failure prejudices Franchisee's ability to defend such claim or suit. In the event that Franchisee refuses the tender of defense in any suit or any claim, as required pursuant to the indemnification provisions within this Franchise, and said refusal is subsequently determined by a court having jurisdiction (or such other tribunal that the parties shall agree to decide the matter) to have been a wrongful refusal on the part of Franchisee, Franchisee shall pay all of the City's reasonable costs for defense of the action, including all expert witness fees, costs, and attorney's fees, also including costs and fees incurred in recovering under this indemnification provision. If separate representation to fully protect the interests of both parties is necessary, such as a conflict of interest between the City and the counsel selected by Franchisee to represent the City, then upon the prior written approval and consent of Franchisee, which shall not be unreasonably withheld, the City shall have the right to employ separate counsel in any action or proceeding, and to participate in the investigation and defense thereof, and Franchisee shall pay the reasonable fees and expenses of such separate counsel, except that Franchisee shall not be required to pay the fees and expenses of separate counsel on behalf of the City for the City to bring or pursue

any counterclaims or interpleader action, equitable relief, restraining order or injunction. The City's fees and expenses shall also include all out-of-pocket expenses, such as consultants and expert witness fees. Each party agrees to cooperate, and to cause its employees and agents to cooperate, with the other party in the defense of any such claim and the relevant records of each party shall be available to the other party with respect to any such defense.

- D. Except to the extent that damage or injury arises from the sole negligence or willful misconduct of the City, its officers, officials, employees, or agents, the obligations of Franchisee under the indemnification provisions of this Section 14, and any other indemnification provision herein shall apply regardless of whether liability for damages arising out of bodily injury to persons or damages to property were caused or contributed to by the concurrent negligence of the City, its officers, officials, employees or agents and the Franchisee. Notwithstanding the proceeding sentence, to the extent the provisions of RCW 4.24.115 are applicable, the parties agree that the indemnity provisions hereunder shall be deemed amended to conform to said statute and liability shall be allocated as provided therein. It is further specifically and expressly understood that the indemnification provided constitutes Franchisee's waiver of immunity under Title 51 RCW, solely for the purposes of this indemnification, relating solely to indemnity claims made by the City directly against the Franchisee for claims made against the City by Franchisee's employees. This waiver has been mutually negotiated by the parties.
- E. Notwithstanding any other provisions of this Section 14, Franchisee assumes the risk of damage to its Facilities located in the Rights-of-Way and upon City-owned property from activities conducted by the City, its officers, agents, employees, elected and appointed officials, and contractors, except to the extent any such damage or destruction is caused by or arises from any solely negligent, willful misconduct, or criminal actions on the part of the City, its officers, agents, employees, elected or appointed officials, or contractors. In no event shall either party be liable for any indirect, incidental, special, consequential, exemplary, or punitive damages, including by way of example and not limitation lost profits, lost revenue, loss of goodwill, or loss of business opportunity in connection with its performance or failure to perform under this Franchise. Franchisee releases and waives any and all such claims against the City, its officers, agents, employees, volunteers, or elected or appointed officials, or contractors. The parties further agree to indemnify, hold harmless, and defend the other, and it's respective officers, agents and employees against any third party claims for damages, including, but not limited to, business interruption damages, lost profits and consequential damages, brought by users of Franchisee's Facilities as the result of any interruption of service due to damage or destruction of Franchisee's Facilities caused by or arising out of activities conducted by the respective party's officers, agents, employees, or contractors.
- F. The provisions of this Section 14 shall survive the expiration, revocation, or termination of this Franchise.

Section 15. Insurance.

- A. Franchisee shall procure and maintain for so long as Franchisee has Facilities in the Rights-of-Way, insurance against claims for injuries to persons or damages to property which may arise from or in connection with the acts or omissions of Franchisee. Franchisee shall require that every subcontractor maintain substantially the same insurance coverage with substantially the same policy limits as required of Franchisee. Franchisee shall procure insurance from insurers with a current A.M. Best rating of not less than A-, VII. Franchisee shall provide a copy of a certificate of insurance and additional insured endorsement (or blanket endorsement) to the City for its inspection at the time of acceptance of this Franchise, and such insurance certificate shall evidence a policy of insurance that includes:
- (1) Automobile Liability insurance with limits of \$5,000,000 combined single limit each accident for bodily injury and property damage;
 - (2) Commercial General Liability insurance, written on an occurrence basis with limits of \$5,000,000 per occurrence for bodily injury and property damage and \$5,000,000 general aggregate including personal and advertising injury, blanket contractual; premises; operations; independent contractors; products and completed operations; broad form property damage; explosion, collapse and underground (XCU);
 - (3) Pollution liability shall be in effect throughout the entire Franchise term, with a limit of one million dollars (\$1,000,000) per occurrence, and two million dollars (\$2,000,000) in the aggregate;
 - (4) Workers' Compensation coverage as required by the Industrial Insurance laws of the State of Washington and Employer's Liability with a limit of \$1,000,000 each accident/disease/policy limit. Evidence of qualified self-insurance is acceptable; and
 - (5) Excess Umbrella liability policy with limits of \$10,000,000 per occurrence and in the aggregate. Franchisee may use any combination of primary and excess to meet required total limits.
- B. Payment of deductible or self-insured retention shall be the sole responsibility of Franchisee. Franchisee may utilize primary and Umbrella liability insurance policies to satisfy the insurance policy limits required in this Section 15. Franchisee's Umbrella liability insurance policy shall be at least as broad as its primary coverage.
- C. The required insurance policies, with the exception of Workers' Compensation and Employer's Liability obtained by Franchisee shall include the City, its officers, officials, and employees ("Additional Insureds"), as additional insureds as their interests may appear under this Franchise, with coverage at least as broad as ISO form CG 20 11 or CG 20 26 04 13, or their equivalent. The coverage shall contain no special limitations on the scope of protection afforded to the Additional Insureds. In addition, the insurance policy shall contain a clause stating that coverage shall apply separately to each insured against whom a claim is made, or suit is brought, except with respect to the limits of the insurer's liability. Franchisee shall provide to the City, upon acceptance, a certificate of insurance and blanket additional insured endorsement. Receipt by the City of any certificate showing less coverage than required, is not a waiver of Franchisee's obligations to fulfill the requirements. Franchisee's required Commercial General and Automobile Liability

insurance shall be primary insurance with respect to the City. Any insurance, self-insurance, or insurance pool coverage maintained by the City shall be in excess of Franchisee's required insurance and shall not contribute with it.

- D. Upon receipt of notice from its insurer(s) Franchisee shall provide the City with thirty (30) days prior written notice of any cancellation of any insurance policy, required pursuant to this Section 15 Franchisee shall, prior to the effective date of such cancellation, obtain replacement insurance policies meeting the requirements of this Section 15. Failure to provide the insurance cancellation notice and to furnish to the City replacement insurance policies meeting the requirements of this Section 15 shall be considered a material breach of this Franchise and subject to the City's election of remedies described in Section 25 below. Notwithstanding the cure period described in Section 25.B, the City may pursue its remedies immediately upon a failure to furnish replacement insurance.
- E. Franchisee's maintenance of insurance as required by this Section 15 shall not be construed to limit the liability of Franchisee to the coverage provided by such insurance, or otherwise limit the City's recourse to any remedy available at law or equity. Further, Franchisee's maintenance of insurance policies required by this Franchise shall not be construed to excuse unfaithful performance by Franchisee.
- F. The City may review all insurance limits once every three (3) years during the term, and upon prior written notice to and review by Franchisee, may make reasonable adjustments in the limits upon thirty (30) days' prior written notice to Franchisee. Franchisee shall provide a certificate of insurance to the City showing compliance with these adjustments and the additional insured endorsement.
- G. As of the Effective Date of this Franchise, Franchisee is not self-insured. Should Franchisee wish to become self-insured at the levels outlined in this Franchise at a later date, Franchisee (or its affiliated parent) entity shall comply with the following: (i) provide the City, upon request, a copy of Franchisee's (or its parent company's), most recent audited financial statements, if such financial statements are not otherwise publicly available; (ii) Franchisee (or its parent company) is responsible for all payments within the self-insurance program; and (iii) Franchisee assumes all defense and indemnity obligations as outlined in the indemnification section of this Franchise.

Section 16. Security Fund.

- A. Franchisee shall establish and maintain a security fund in the amount of fifty thousand dollars (\$50,000), at its cost, with the City by depositing such monies, bonds, letters of credit, or other instruments in such form and amount acceptable to the City and running or renewable for the term of this Franchise. No sums may be withdrawn from the fund by Franchisee without consent of the City. The security fund shall be maintained at the sole expense of Franchisee so long as any of the Franchisee's facilities occupy a Public Way.
 - (1) The fund shall serve as security for the full and complete performance of this Franchise, including any claims, costs, damages, judgments, awards, or liability, of any kind whatsoever, the City pays or incurs, including civil penalties, because of any failure attributable to Franchisee to comply with the provisions of this

Franchise or the codes, ordinances, rules, regulations, standards, or permits of the City.

- B. Before any sums are withdrawn from the security fund, the City shall give written notice to Franchisee:
- (1) Describing the act, default or failure to be remedied, or the claims, costs, damages, judgments, awards, or liability which the City has incurred or may pay by reason of Franchisee's act or default;
 - (2) Providing a reasonable opportunity for Franchisee to first remedy the existing or ongoing default or failure, if applicable;
 - (3) Providing a reasonable opportunity for Franchisee to pay any monies due the City before the City withdraws the amount thereof from the security fund, if applicable; and
 - (4) Franchisee will be given an opportunity to review the act, default or failure described in the notice with the City or his or her designee.
- C. Franchisee shall replenish the security fund within fourteen (14) days after written notice from the City that there is a deficiency in the amount of the fund.
- D. Insufficiency of the security fund shall not release or relieve Franchisee of any obligation or financial responsibility. The amount of the bond shall not be construed to limit Franchisee's liability or to limit the City's recourse to any remedy to which the City is otherwise entitled at law or in equity.

Section 17. Construction and Maintenance Bonds.

- A. If required by permit, Franchisee shall furnish a performance bond ("Performance Bond") written by a corporate surety reasonably acceptable to the City equal to at least 120% of the estimated cost of constructing Franchisee's Facilities within the Rights-of-Way of the City prior to commencement of any such work or such other amount as deemed appropriate by the Public Works Director. The Performance Bond shall guarantee the following: (1) timely completion of construction; (2) construction in compliance with all applicable plans, permits, technical codes, and standards; (3) proper location of the Facilities as specified by the City; (4) restoration of the Rights-of-Way and other City properties affected by the construction; (5) submission of as-built drawings after completion of construction; and (6) timely payment and satisfaction of all claims, demands, or liens for labor, materials, or services provided in connection with the work which could be asserted against the City or City property. Said bond must remain in full force until the completion of construction, including final inspection, corrections, and final approval of the work, recording of all easements, provision of as-built drawings, and the posting of a Maintenance Bond as described in Section 17.B. Compliance with the Performance Bond requirement of the City's current Design and Construction Standards shall satisfy the provisions of this Section 17.A. In lieu of a separate Performance Bond for individual projects involving work in the Franchise Area, Franchisee may satisfy the City's bond requirements by posting a single on-going performance bond in an amount approved by City.

- B. Maintenance Bond. Franchisee shall furnish a two (2) year maintenance bond (“Maintenance Bond”), or other surety acceptable to the City, at the time of final acceptance of construction work on Facilities within the Rights-of-Way. The Maintenance Bond amount will be equal to ten percent (10%) of the documented final cost of the construction work. The Maintenance Bond in this Section 17.B must be in place prior to City’s release of the bond required in Section 17.A. Compliance with the Maintenance Bond requirement of the City’s current Design and Construction Standards shall satisfy the provisions of this Section 17.B. In lieu of a separate Maintenance Bond for individual projects involving work in the Franchise Area, Franchisee may satisfy the Maintenance Bond requirement by posting a single on-going Maintenance Bond in an amount approved by City.

Section 18. Taxes, Charges, and Fees.

- A. Franchisee shall pay and be responsible for (i) all charges and fees imposed to recover actual administrative expenses incurred by the City that are directly related to receiving and approving this Franchise, (ii) any use and/or development authorizations which may be required, or (iii) any permit which may be required, to inspecting plans and construction, or to the preparation of a detailed statement pursuant to RCW Ch. 43.21C. Regular application and processing charges and fees imposed by the City shall be deemed to be attributable to actual administrative expenses incurred by the City but shall not excuse Franchisee from paying and being responsible for other actual administrative expenses incurred by the City.
- (1) Franchisee shall pay a fee for the actual administrative expenses incurred by the City that are directly related to the receiving and approving this Franchise pursuant to RCW 35.21.860, including the costs associated with the City’s legal costs incurred in drafting and processing this Franchise.
 - (2) Franchisee shall pay fees according to applicable sections of the Toppenish Municipal Code, including but not limited to Title 3, Title 5, and Title 12.
- B. Franchisee shall pay and be responsible for taxes permitted by law. Franchisee acknowledges that certain of its business activities may be subject to taxation as a telephone business and that Franchisee shall pay to the City the rate applicable to such taxable services under Toppenish Municipal Code Title 3, and consistent with state and federal law. The parties agree that if there is a dispute regarding tax payments, the process in Toppenish Municipal Code Title 3 shall control. In that event, the City may not enforce remedies under Section 25.A or Section 25.B or commence a forfeiture or revocation process pursuant to Section 25.C until the dispute is finally resolved either consistent with Toppenish Municipal Code Title 3 or by judicial action and then only if the Franchisee does not comply with such resolution. The parties agree however, that nothing in this Franchise shall limit the City's power of taxation as may exist now or as later imposed by the City. This provision does not limit the City's power to amend Toppenish Municipal Code Chapter Title 3 as may be permitted by law.
- C. Where the City incurs costs and expenses for review, inspection, or supervision of activities, including but not limited to reasonable fees associated with attorneys,

consultants, City staff and City Attorney time, undertaken through the authority granted in this Franchise, or any ordinances relating to the subject for which a permit fee is not established, Franchisee shall pay such costs and expenses directly to the City in accordance with the provisions of Section 18(E), except for costs incurred by the City due to its own delay.

- D. Franchisee shall promptly reimburse the City in accordance with the provisions of Section 18.E and Section 18.F for any and all costs the City reasonably incurs in response to any emergency situation involving Franchisee's Facilities, to the extent said emergency is not the fault of the City. The City agrees to simultaneously seek reimbursement from any franchisee or permit holder who caused or contributed to the emergency situation.
- E. Franchisee shall reimburse the City within sixty (60) days of submittal by the City of any billing for incurred costs, itemized by project, for Franchisee's proportionate share of all actual, identified expenses incurred by the City in planning, constructing, installing, repairing, altering, or maintaining any City facility as the result of the presence of Franchisee's Facilities in the Rights of Way. Such costs and expenses shall include but not be limited to Franchisee's proportionate cost of City personnel assigned to oversee or engage in any work in the Rights of Way as the result of the presence of Franchisee's Facilities in the Rights of Way. Such costs and expenses shall also include Franchisee's proportionate share of any time spent reviewing construction plans in order to either accomplish the relocation of Franchisee's Facilities, or the routing or rerouting of any utilities so as not to interfere with Franchisee's Facilities.
- F. The time of City employees shall be charged at their respective rate of salary, including overtime if applicable, plus benefits and reasonable overhead. Any other costs will be billed proportionately on an actual cost basis. All billings will be itemized so as to specifically identify the costs and expenses for each project for which the City claims reimbursement. A charge for the actual costs incurred in preparing the billing may also be included in said billing. At the City's option, the billing may be on an annual basis, but the City shall provide the Franchisee with the City's itemization of costs, in writing, at the conclusion of each project for information purposes.
- G. Franchisee hereby warrants that its operations, as authorized under this Franchise, are those of a telephone business as defined in RCW 82.16.010, or a service provider as defined in RCW 35.21.860. As a result, the City will not impose a franchise fee under the terms of this Franchise, other than as described herein. The City hereby reserves its right to impose a franchise fee on Franchisee if Franchisee's operations as authorized by this Franchise change such that the statutory prohibitions of RCW 35.21.860 no longer apply, or if statutory prohibitions on the imposition of such fees are removed. In either instance, the City also reserves its right to require that Franchisee obtain a separate Franchise for its change in use

Section 19. Shared Excavations; Additional Ducts and Conduits.

- A. If Franchisee shall, at any time, plan to make excavations in any area covered by this Franchise, the Franchisee shall afford the City, upon receipt of a written request to do so, an opportunity to share such excavation, PROVIDED THAT:
- (1) Such joint use shall not unreasonably delay the work of the Franchisee causing the excavation to be made;
 - (2) Such joint use shall be arranged and accomplished on terms and conditions satisfactory to both parties;
 - (3) To the extent reasonably possible, Franchisee, at the direction of the City, shall cooperate with the City and provide other private utility companies with the opportunity to utilize joint or shared excavations in order to minimize disruption and damage to the Right-of-Way, as well as to minimize traffic-related impacts: and
 - (4) Franchisee may only charge the incremental costs to the City of installing facilities supplied by the City in such joint or shared excavations.
- B. Franchisee shall inform the City with at least thirty (30) days' advance written notice that it is constructing, relocating, or placing ducts or conduits in the Rights-of-Way and provide the City with an opportunity to request that Franchisee provide the City with additional duct or conduit and related structures necessary to access the conduit pursuant to RCW 35.99.070.
- C. Except as expressly provided in this section, Franchisee shall not charge the City for any costs, of any kind whatsoever, for facilities provided by Franchisee in accordance with this Section 18.G.

Section 20. Access to Facilities. Franchisee shall provide access to its facilities by hire, sale, or resale on a nondiscriminatory basis. If Franchisee purports to serve the general public, it shall make its telecommunications services available to any customer within the City who shall request such service whenever feasible, without discrimination, as to the terms, conditions, rates or charges for the Franchisee's services; provided, however, that nothing in this section shall prohibit Franchisee from making any reasonable classifications among differently situated customers.

Section 21. Acquisition of Facilities. Upon Franchisee's acquisition of any facilities in the Public Way, or upon any addition or annexation to the City of any area in which Franchisee has facilities, such facilities shall immediately be subject to the terms of this Franchise without further action of the City or Franchisee.

Section 22. Vacation of Public Ways. If at any time the City, by ordinance, vacates all or any portion of the area affected by this Franchise, the City shall not be liable for any damages or loss to the Franchisee by reason of such vacation. The City shall notify the Franchisee in writing not less than sixty (60) days before vacating all or any portion of any such area. The City may, after sixty (60) days written notice to the Franchisee, terminate this Franchise with respect to such vacated area.

Section 23. Records; Duty to Provide Information.

- A. Within thirty (30) days of a written request from the City, Franchisee shall furnish the City with all requested information sufficient to reasonably demonstrate that the Franchisee has complied with all applicable requirements of this Franchise:
- (1) That Franchisee has complied with all requirements of this Franchise;
 - (2) That taxes, fees, charges, or other costs owed or payable by Franchisee have been properly collected and paid; and
 - (3) Franchisee's obligations under this section are in addition to those provided in Section 6.J, Section 6.L and subsection (B) below.
- B. Franchisee will manage all of its operations in accordance with a policy of keeping its documents and records open and accessible to the City. The City will have access to, and the right to inspect, any documents and records of Franchisee and its affiliates that are reasonably necessary for the enforcement of this Franchise or to verify Franchisee's compliance with terms or conditions of this Franchise. Franchisee will not deny the City access to any of Franchisee's records on the basis that Franchisee's documents or records are under the control of any affiliate or a third party.
- (1) All books, records, maps and documents maintained by Franchisee with respect to its Facilities within the Rights-of-Way shall be made available for inspection by the City at reasonable times and intervals; provided, however, that nothing in this Section 23.C shall be construed to require Franchisee to violate state or federal law regarding customer privacy, nor shall this Section be construed to require Franchisee to disclose proprietary or confidential information without adequate safeguards for its confidential or proprietary nature. Unless otherwise permitted or required by state or federal law, nothing in this Section shall be construed as permission to withhold relevant customer data from the City that the City requests in conjunction with a tax audit or review; provided, however, Franchisee may redact identifying information including but not limited to names, street addresses (excluding City and zip code), Social Security Numbers, or Employer Identification Numbers related to any confidentiality agreements Franchisee has with third parties.
- C. One copy of documents and records requested by the City will be furnished to the City at the cost of Franchisee. If the requested documents and records are too voluminous or for security reasons cannot be copied or removed, then Franchisee may submit records in electronic form or request, in writing and within ten (10) calendar days of the City's request, that the City inspect them at Franchisee's local office. If any documents or records of Franchisee are not kept in a local office and/or are not made available in copies to the City, and if the City determines that an examination of such documents or records is necessary or appropriate for the enforcement of this Franchise, or to verify Franchisee's compliance with terms or conditions of this Franchise, then all reasonable travel and related costs incurred in making such examination shall be paid by Franchisee.

- D. Franchisee shall not be required to disclose information that it reasonably deems to be proprietary or confidential in nature; provided, however, Franchisee shall disclose such information to comply with a utility tax audit. Franchisee shall be responsible for clearly and conspicuously identifying the work as confidential or proprietary and shall provide a brief written explanation as to why such information is confidential and how it may be treated as such under State or federal law. In the event that the City receives a public records request under Chapter 42.56 RCW or similar law for the disclosure of information Franchisee has designated as confidential, trade secret, or proprietary, the City shall promptly provide written notice of such disclosure so that Franchisee can take appropriate steps to protect its interests.
- E. Nothing in this Franchise prohibits the City from complying with Chapter 42.56 RCW or any other applicable law or court order requiring the release of public records, and the City shall not be liable to Franchisee for compliance with any law or court order requiring the release of public records. Franchisee shall indemnify, defend, and hold the City harmless against any claims, liabilities, penalties, costs and attorneys' fees that the City incurs based on public records that are in the possession or under the dominion and control of Franchisee, including, but not limited to, Franchisee's failure or declination to retain or conduct a reasonable search in compliance with law, withhold in whole or in part, or timely provide the public records to the City, or based upon any and all actions of Franchisee in seeking to prevent disclosure of a record in whole or in part that is in the possession of the City. The City shall comply with any injunction or court order obtained by Franchisee that prohibits the disclosure of any confidential records; however, in the event a higher court overturns such injunction or court order and such higher court action is or has become final and non-appealable, Franchisee shall reimburse the City for any fines or penalties imposed for failure to disclose such records as required hereunder within sixty (60) days of a request from the City.

Section 24. Assignment or Transfer. Franchisee's rights, privileges, and authority under this Franchise, and ownership or working control of facilities constructed or installed pursuant to this Franchise, may not, directly or indirectly, be transferred, assigned or disposed of by sale, lease, merger, consolidation or other act of Franchisee, by operation of law or otherwise, except as provided herein, or without the prior written consent of the City, which consent shall not be unreasonably withheld or delayed. Any transfer, assignment or disposal of Franchisee's rights, privileges, and authority under this Franchise, or ownership or working control of facilities constructed or installed pursuant to this Franchise, may be subject to reasonable conditions as may be prescribed by the City.

- A. Franchisee and the proposed assignee or transferee shall provide and certify the following information to the City not less than one hundred and twenty (120) days prior to the proposed date of assignment, transfer, or disposal:
- (1) Complete information setting forth the nature, terms and condition of the proposed assignment, transfer, or disposal;
 - (2) Any other information reasonably required by the City; and
 - (3) A transfer application fee in an amount to be determined by the City to recover actual administrative costs directly related to receiving and approving the proposed

assignment, transfer, or disposal, on the condition that the City provide Franchisee with a breakdown of actual costs incurred.

- B. No assignment, transfer, or disposal may be made or shall be approved unless the assignee or transferee has the legal, technical, financial, and other requisite qualifications to operate, maintain, repair, and remove facilities constructed or installed pursuant to this Franchise and to comply with the terms and conditions of this Franchise.
- C. Any transfer, assignment, or disposal of rights, privileges, and authority under this Franchise or ownership or working control of facilities constructed or installed pursuant to this Franchise, without prior written approval of the City pursuant to this section, shall be void and is cause for termination of this Franchise.
- D. Franchisee may freely assign this Franchise in whole or in part to a parent, subsidiary, or affiliated entity, unless there is a change of control as described in Section 24.E below, or to an entity that acquires all or substantially all of Franchisee's assets located in the area defined by the Federal Communications Commission in which the Facilities are located, or for collateral security purposes.
- E. Any transactions which singularly or collectively result in a change of 50% or more of the (i) ownership or working control (for example, management of Franchisee or its Facilities) of the Franchisee; or (ii) ownership or working control of the Franchisee's Facilities within the City; or (iii) control of the capacity or bandwidth of the Franchisee's Facilities within the City, shall be considered an assignment or transfer requiring notice to and consent by the City pursuant to this Franchise. Such transactions between affiliated entities are not exempt from notice requirements. A Franchisee shall notify the City of any proposed change in, or transfer of, or acquisition by any other party of control of a Franchisee within sixty (60) days following the closing of the transaction.
- F. Franchisee may, without prior consent from the City: (i) lease the Facilities, or any portion, to another person; (ii) grant an indefeasible right of user interest in the Facilities, or any portion, to another person; or (iii) offer to provide capacity or bandwidth in its Facilities to another person, provided further, that Franchisee shall at all times retain exclusive control over its Facilities and remain fully responsible for compliance with the terms of this Franchise, and Franchisee shall furnish, upon request from the City, evidence of: (a) the entity leasing such Facilities, (b) evidence that Franchisee maintains full control and responsibility over such Facilities, and (c) declaration that the lease or agreement requires that the lessee complies, to the extent applicable, with the requirements of this Franchise and applicable Codes. In lieu of such documentation, Franchisee may provide a copy of any such lease or agreement which contains elements (a)-(c) above.
- G. All terms and conditions of this Franchise shall be binding upon all successors and assigns of Franchisee and all persons who obtain ownership or working control of any facility constructed or installed pursuant to this Franchise.

Section 25. Violations, Noncompliance, and Other Grounds for Termination or Cancellation.

- A. The City may elect, without any prejudice to any of its other legal rights and remedies, to obtain an order from the superior court having jurisdiction compelling Franchisee to comply with the provisions of the Franchise and to recover damages and costs incurred by the City by reason of Franchisee's failure to comply. In addition to any other remedy provided herein, the City reserves the right to pursue any remedy to compel or force Franchisee and/or its successors and assigns to comply with the terms hereof, and the pursuit of any right or remedy by the City shall not prevent the City from thereafter declaring a forfeiture or revocation for breach of the conditions herein. Provided, further, that by entering into this Franchise, it is not the intention of the City or Franchisee to waive any other rights, remedies, or obligations as otherwise provided by law, equity, or otherwise, and nothing contained herein shall be deemed or construed to affect any such waiver
- B. If Franchisee shall violate, or fail to comply with any of the provisions of this Franchise, or should it fail to heed or comply with any notice given to Franchisee under the provisions of this Franchise, the City shall provide Franchisee with written notice specifying, with reasonable particularity, the nature of any such breach and Franchisee shall undertake all commercially reasonable efforts to cure such breach within thirty (30) days of receipt of notification. If the parties reasonably determine the breach cannot be cured within (30) thirty days, the City may specify a longer cure period, and condition the extension of time on Franchisee's submittal of a plan to cure the breach within the specified period, commencement of work within the original thirty (30) day cure period, and diligent prosecution of the work to completion. If the breach is not cured within the specified time, or Franchisee does not comply with the specified conditions, the City may, at its discretion, (1) commence revocation proceedings, pursuant to Section 25.C, or (2) claim damages of Two Hundred Fifty Dollars (\$250.00) per day against the security fund set forth in Section 16, or (3) suspend the issuance of additional permits, or (4) pursue other remedies as described in Section 25.A above.
- C. If the City shall violate, or fail to comply with any of the provisions of this Franchise, Franchisee shall provide City with written notice specifying with reasonable particularity the nature of any such breach and City shall undertake all commercially reasonable efforts to cure such breach within thirty (30) days of receipt of notification, if the City determines that the breach cannot be cured within (30) thirty days, then the City may specify a longer cure period, and provide a plan to cure the breach within the specified period, commencement of work within the original thirty (30) day cure period, and diligent prosecution of the work to completion. In the event said breach is not cured to Franchisee's reasonable satisfaction within said cure period, Franchisee may terminate this Franchise, and remove its Facilities from the Franchise Area. Further, Franchisee reserves the right to use any remedy available to Franchisee at law or in equity.
- D. This Franchise, and any right, privilege or authority of Franchisee to enter, occupy or use Public Ways may be terminated or cancelled by the City for any of the following reasons:
- (1) Violation of or noncompliance with any term or condition of this Franchise by Franchisee;

- (2) Violation of or noncompliance with the material terms of any use and/or development authorization or required permit by Franchisee;
 - (3) Construction, installation, operation, maintenance, or repair of facilities on, in, under, over, across, or within any Public Way without Franchisee first obtaining use and/or development authorization and required permits from the City and all other appropriate regulatory authorities;
 - (4) Unauthorized construction, installation, operation, maintenance, or repair of facilities on City property;
 - (5) Misrepresentation or lack of candor, by or on behalf of, Franchisee in any application or written or oral statement upon which the City relies in making the decision to grant, review or amend any right, privilege or authority to Franchisee;
 - (6) Abandonment of facilities;
 - (7) Failure of Franchisee to pay taxes, fees, charges or costs when and as due; or
 - (8) Insolvency or bankruptcy of Franchisee.
- E. In the event that the City believes that grounds exist for termination or cancellation of this Franchise or any right, privilege or authority of Franchisee to enter, occupy or use Public Ways, Franchisee shall be given written notice, and providing Franchisee a reasonable period of time not exceeding thirty (30) calendar days to furnish evidence:
- (1) That corrective action has been, or is being actively and expeditiously pursued, to remedy the violation, noncompliance, or other grounds for termination or cancellation;
 - (2) That rebuts the alleged violation, noncompliance, or other grounds for termination or cancellation; or
 - (3) That it would be in the public interest to impose some penalty or sanction less than termination or cancellation.
- F. In the event that Franchisee fails to provide evidence reasonably satisfactory to the City as provided in subsection (D) of this section, the City shall refer the apparent violation, noncompliance, or other grounds for termination or cancellation to the City Council. The City Council shall provide the Franchisee with notice and a reasonable opportunity to be heard concerning the matter.
- G. If the City Council determines that the violation, noncompliance, or other grounds for termination or cancellation arose from willful misconduct or gross negligence by Franchisee, then, Franchisee shall, at the election of the City Council, forfeit all rights, privileges and authority conferred under this Franchise or any use and/or development authorization or permit granted by the City, and this Franchise and any such use and/or development authorization or permit may be terminated or cancelled by the City Council. The City Council may elect, in lieu of the above and without any prejudice to any of its other legal rights and remedies, to pursue other remedies, including obtaining an order compelling Franchisee into compliance or to take corrective action, or to recover damages and costs incurred by the City by reason of Franchisee's actions or omissions. The City

Council shall utilize the following factors in analyzing the nature, circumstances, extent, and gravity of the actions or omissions of Franchisee:

- (1) Whether the misconduct was egregious;
- (2) Whether substantial harm resulted;
- (3) Whether the violation was intentional;
- (4) Whether there is a history of prior violations of the same or other requirements;
- (5) Whether there is a history of overall compliance; and
- (6) Whether the violation was voluntarily disclosed, admitted or cured.

H. The City Council's choice of remedy shall not excuse Franchisee from compliance with any term or condition of this Franchise or the material terms of any use and/or development authorization or required permit by Franchisee. Franchisee shall have a continuing duty to remedy any violation, noncompliance, or other grounds for termination or cancellation. Further, nothing herein shall be construed as limiting any remedies that the City may have, at law or in equity, for enforcement of this Franchise and any use and/or development authorization or permit granted to Franchisee.

Section 26. Notices.

A. Any regular notice or information required or permitted to be given to the parties under this Franchise may be sent to the following addresses unless otherwise specified:

The City: City of Toppenish
Attn: City Manager
21 West First Avenue
Toppenish, WA 98948

Phone: (509) 865-6319

Franchisee: LightSpeed Networks, Inc.
Attn: Contracts Manager
921 SW Washington St. Suite 210
Portland, OR 97205

Phone: (503) 294-5300

- B. Franchisee shall additionally provide a phone number and designated responsible officials to respond to emergencies. After being notified of an emergency, Franchisee shall cooperate with the City and make best efforts to immediately respond to minimize damage, protect the health and safety of the public and repair facilities to restore them to proper working order. Annually, on request of the City, Franchisee will meet with City emergency response personnel to coordinate emergency management operations and, at least once a year, at the request of the City, actively participate in emergency preparations.
- C. Additionally, Franchisee shall designate a Franchise manager or government affairs liaison, and shall use reasonable efforts to periodically update the City with contact information for a Franchise manager or government affairs liaison to act as a resource for the City for Franchise related questions, including but not limited to questions related to Franchise compliance, scheduling and construction. Failure to periodically update the City with the contact information will not be considered a breach of this Franchisee.

Section 27. Non-Waiver. The failure of the City to exercise any rights or remedies under this Franchise or to insist upon compliance with any terms or conditions of this Franchise shall not be a waiver of any such rights, remedies, terms or conditions of this Franchise by the City and shall not prevent the City from demanding compliance with such terms or conditions at any future time or pursuing its rights or remedies.

Section 28. Eminent Domain. This Franchise is subject to the power of eminent domain and the right of the City Council to repeal, amend or modify the Franchise in the interest of the public. In any proceeding under eminent domain, the Franchise itself shall have no value.

Section 29. Limitation of Liability. Administration of this Franchise may not be construed to create the basis for any liability on the part of the City, its elected officials, officers, employees, servants, agents, and representatives for any injury or damage from the failure of the Franchisee to comply with the provisions of this Franchise; by reason of any plan, schedule or specification review, inspection, notice and order, permission, or other approval or consent by the City; for any

action or inaction thereof authorized or done in connection with the implementation or enforcement of this Franchise by the City; or for the accuracy of plans submitted to the City.

Section 30. Governing Law and Venue. This Franchise and use of the applicable Public Ways will be governed by the laws of the State of Washington, unless preempted by federal law. Franchisee agrees to be bound by the laws of the State of Washington, unless preempted by federal law, and subject to the jurisdiction of the courts of the State of Washington. Any action relating to this Franchise must be brought in the Superior Court of Washington for Yakima County, or in the case of a federal action, the United States District Court for the Eastern District of Washington at Yakima, Washington, unless an administrative agency has primary jurisdiction.

Section 31. Severability. If any section, sentence, clause or phrase of this Franchise or its application to any person or entity should be held to be invalid or unenforceable, such invalidity or unenforceability will not affect the validity or enforceability of any other section, sentence, clause or phrase of this Franchise nor its application to any other person or entity.

Section 32. Miscellaneous.

- A. Equal Employment and Nondiscrimination. Throughout the term of this Franchise, Franchisee will fully comply with all equal employment and nondiscrimination provisions and requirements of federal, state, and local laws, and in particular, FCC rules and regulations relating thereto.
- B. Local Employment Efforts. Franchisee will use reasonable efforts to utilize qualified local contractors, including minority business enterprises and woman business enterprises, whenever the Franchisee employs contractors to perform work under this Franchise.
- C. Descriptive Headings. The headings and titles of the sections and subsections of this Franchise are for reference purposes only and do not affect the meaning or interpretation of the text herein.
- D. Costs and Attorneys' Fees. If any action or suit arises in connection with this Franchise, the substantially prevailing party will be entitled to recover all of its reasonable costs, including attorneys' fees, as well as costs and reasonable attorneys' fees on appeal, in addition to such other relief as the court may deem proper.
- E. No Joint Venture. Nothing herein will be deemed to create a joint venture or principal-agent relationship between the parties, and neither party is authorized to, nor shall either party act toward third persons or the public in any manner that would indicate any such relationship with the other.
- F. Mutual Negotiation. This Franchise was mutually negotiated by the Franchisee and the City and has been reviewed by the legal counsel for both parties. Neither party will be deemed to be the drafter of this Franchise.
- G. Third-Party Beneficiaries. There are no third-party beneficiaries to this Franchise.

- H. Actions of the City or Franchisee. In performing their respective obligations under this Franchise, the City and Franchisee will act in a reasonable, expeditious, and timely manner. Whenever this Franchise sets forth a time for any act to be performed by Franchisee, such time shall be deemed to be of the essence, and any failure of Franchisee to perform within the allotted time may be considered a material breach of this Franchise, and sufficient grounds for the City to invoke any relevant remedy.
- I. Entire Agreement. This Franchise represents the entire understanding and agreement between the parties with respect to the subject matter and supersedes all prior oral and written negotiations between the parties.
- J. Modification. The parties may alter, amend or modify the terms and conditions of this Franchise upon written agreement of both parties to such alteration, amendment or modification. Nothing in this subsection shall impair the City's exercise of authority reserved to it under this Franchise.
- K. Rights Granted. This Franchise does not convey any right, title or interest in public ways, but shall be deemed only as authorization to enter, occupy, or use public ways for the limited purposes and term stated in this Franchise. Further, this Franchise shall not be construed as any warranty of title. This Franchise may be enforced by both law and equity.
- L. Contractors and Subcontractors. Franchisee's contractors and subcontractors must be licensed and bonded in accordance with the City's ordinances, rules, and regulations. Work by contractors and subcontractors is subject to the same restrictions, limitations and conditions as if the work were performed by Franchisee. Franchisee shall be responsible for all work performed by its contractors and subcontractors and others performing work on its behalf as if the work were performed by Franchisee and shall ensure that all such work is performed in compliance with this Franchise and applicable law.
- M. Hazardous Substances. Franchisee shall not introduce or use any hazardous substances (chemical or waste) in violation of any applicable law or regulation, and Franchisee shall not allow any of its agents, contractors, or any person under its control to do the same. Franchisee will be solely responsible for and will defend, indemnify, and hold the City and its officers, officials, employees, agents, and representatives harmless from and against any and all claims, costs, and liabilities, including reasonable attorney fees and costs, arising out of or in connection with the cleanup or restoration of the property associated with Franchisee's use, storage, or disposal of hazardous substances, whether or not intentional, and/or with the use, storage or disposal of such substances by Franchisee's agents, contractors, or other persons acting under Franchisee's control, whether or not intentional. Notwithstanding the foregoing, any and other provision in this Franchise, Franchisee shall not be liable or responsible for any environmental condition except to the extent Franchisee causes the condition or exacerbates the condition of which it has reason to be aware.
- N. Licenses, Fees and Taxes. Prior to constructing any improvements, Franchisee shall obtain a business or utility license from the City. Franchisee shall pay promptly and before they become delinquent, all taxes on personal property and improvements owned or placed by Franchisee and shall pay all license fees and public utility charges relating to the conduct

of its business, shall pay for all permits, licenses and zoning approvals, shall pay any other applicable tax unless documentation of exemption is provided to the City and shall pay utility taxes and license fees imposed by the City.

- O. FAA and FCC. Franchisee acknowledges that it, and not the City, shall be responsible for the premises and equipment's compliance with all marking and lighting requirements of the FAA and the FCC. Franchisee shall indemnify and hold the City harmless from any fines or other liabilities caused by Franchisee's failure to comply with such requirements. Should Franchisee or the City be cited by either the FCC or the FAA because the Facilities or the Franchisee's equipment is not in compliance, and should Franchisee fail to cure the conditions of noncompliance within the timeframe allowed by the citing agency, the City may either terminate this Franchise immediately (on notice to the Franchisee), or proceed to cure the conditions of noncompliance at the Franchisee's expense.
- P. Acceptance. Franchisee shall execute and return to the City its execution and acceptance of this Franchise in the form attached hereto as Exhibit A. In addition, Franchisee shall submit proof of insurance obtained and additional insured endorsement pursuant to Section 15, any Performance Bond, if applicable, pursuant to Section 17.A, and the security fund required pursuant to Section 16.
- Q. Survival. All of the provisions, conditions, and requirements of Section 5, Section 10, Section 11, Section 14, Section 15, Section 30 and Section 32.Q of this Franchise shall be in addition to any and all other obligations and liabilities Franchisee may have to the City at common law, by statute, or by contract, and shall survive the City's Franchise to Franchisee for the use of the Franchise Area, and any renewals or extensions thereof. All of the provisions, conditions, regulations and requirements contained in this Franchise shall further be binding upon the heirs, successors, executors, administrators, legal representatives and assigns of Franchisee and all privileges, as well as all obligations and liabilities of Franchisee shall inure to its heirs, successors and assigns equally as if they were specifically mentioned where Franchisee is named herein.
- R. Expiration. If this Franchise expires without renewal, the City may, subject to applicable law:
 - (1) Allow Franchisee to maintain and operate its Facilities on a month-to-month basis, provided that Franchisee maintains insurance for such Facilities during such period and continues to comply with this Franchise; or
 - (2) The City may order the removal of any and all Facilities at Franchisee's sole cost and expense consistent with Section 10.

Section 33. Publication. The City Clerk is authorized and directed to publish a summary hereof in accordance with RCW 35.22.288.

Section 34. Effective Date. This ordinance shall become effective on the thirty-first (31st) day after its first publication as required by law, but if, and only if, the Franchisee has endorsed this ordinance and accepted the terms and conditions thereof.

PASSED by the City Council of the City of Toppenish, at a regular meeting on the ____ day
of _____, 2023.

ELPIDIA SAAVEDRA, Mayor

ATTEST:

HEIDI RIOJAS, CMC, City Clerk

APPROVED AS TO FORM:

GARY M. CUILLIER, City Attorney

Date Published: _____, 2023.

EXHIBIT A

ACCEPTANCE:

The provisions of this Franchise are agreed to and hereby accepted. By accepting this Franchise, Franchisee covenants and agrees to perform, and be bound by, each and all of the terms and conditions imposed by the franchise and the municipal code and ordinances of the City.

By: _____

Its: _____

Signature: _____

Printed Name: _____

Title: _____

CERTIFICATION OF COMPLIANCE WITH CONDITIONS AND EFFECTIVE DATE:

I certify that I have received confirmation that: (1) the Franchisee returned a signed copy of this Franchise to the City Council in accordance with this Franchise; (2) the Franchisee has presented to the City acceptable evidence of insurance and security as required in this Franchise; and (3) the Franchisee has paid all applicable processing costs set forth in the franchise.

The effective date of this Franchise ordinance is: _____, 2023.

By: Heidi Riojas, CMC, City Clerk



**CITY OF TOPPENISH
REQUEST FOR COUNCIL ACTION
Agenda Bill No.: 23-019**

Meeting Date: March 27, 2023

Subject: Water Service Meter Replacement HLA Project No. 21032C

Attachments: Resolution 2023-13, Task Order No. 2021-01, Addendum No. 2

Prepared by: Dan Ford, Assistant City Manager/ Public Works Director

Presented by: Dan Ford, Assistant City Manager/ Public Works Director

Approved For Agenda By: Debbie Zabell, City Manager

Discussion:

Task Order No. 2021-01, Addendum No. 2 reflects the need for additional project support from the City’s consultant HLA Engineering (HLA) for the City’s Water Service Meter Replacement Project. This cost will be an addition to the initial construction engineering services performed by HLA for the project as initially outlined in Task Order 2021-01, Addendum No. 1. The scope of services to be revised as follows:

- Assist City with review and coordination of end user licensing agreement with Mueller Systems Inc.
- Participate in bi-weekly project update meetings prior to field installation work and weekly project update meetings following start of field installation work.
- Participate in on-site pre-installation and demonstration meeting.
- Respond to contractor delay notices and requests for extension of contract time.

Addendum No. 2 increases the original contract for services by \$18,000. All work shall be completed on an hourly basis at normal hourly billing rates, for the estimated maximum fee of \$49,000.

Change to Contract Price

• Original Contract Amount	\$19,800.00
• Addendum #1: Additional Design Engineering	11,200.00
• Addendum #2: Construction Engineering	<u>18,000.00</u>
• New Contract Amount	\$49,000.00

Change to Contract Time

There are no revisions to the time of performance for the contractor Mueller System, Inc.

Fiscal Impact: \$18,000 increase to current contract amount.

Recommendation: Approve Resolution 2023-13, authorizing the City Manager to sign Task Order 2021-01, Addendum No. 2 for the Water Service Meter Replacement Project.

Alternatives: 1) Do not adopt. 2) Forward to Study Session for further review.

RESOLUTION 2023-13

**A RESOLUTION APPROVING ADDENDUM NO. 2 TO GENERAL AGREEMENT
WITH HLA ENGINEERING AND LAND SURVEYING, INC.
FOR THE WATER SERVICE METER REPLACEMENT PROJECT**

WHEREAS the City of Toppenish needs to revise the scope of work for the general professional engineering, surveying, and construction management services for a Water Service Meter Replacement Project, and

WHEREAS the City does not have sufficient staff to perform any necessary engineering services, and

WHEREAS HLA Engineering and Land Surveying, Inc., is a professional engineering firm with the staff and expertise to provide professional engineering, surveying, and construction project management services for projects such as the Water Service Meter Replacement Project,

NOW THEREFORE BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TOPPENISH, WASHINGTON AS FOLLOWS:

Addendum No. 2 to Task Order No. 2021-01 regarding the General Agreement between the City of Toppenish and HLA Engineering and Land Surveying, Inc. for professional engineering and surveying services for the Water Service Meter Replacement Project, for additional construction engineering services for an estimated amount of \$18,000.00, and when added with the original estimated maximum amount of \$31,000.00 for Task Order No. 2021-01 and Addendum No. 1 to Task Order No. 2021-01, equals \$49,000.00 is approved and the City Manager is authorized and directed to execute said addendum on behalf of the City of Toppenish.

This resolution shall be effective immediately upon passage and signatures hereto.

PASSED by the Toppenish City Council at its regular meeting held on March 27, 2023.

ELPIDIA SAAVEDRA, Mayor

ATTEST:

HEIDI RIOJAS, CMC, City Clerk

ADDENDUM NO. 2

TASK ORDER NO. 2021-01

REGARDING GENERAL AGREEMENT BETWEEN CITY OF TOPPENISH

AND

HLA ENGINEERING AND LAND SURVEYING, INC. (HLA)

PROJECT DESCRIPTION:

Water Service Meter Replacement **HLA Project No. 21032C**

The City of Toppenish (CITY) desires to replace their existing failing water service meters and install a new advanced metering infrastructure (AMI) system.

REASON FOR ADDENDUM NO. 2:

Construction engineering services for this project identified in Task Order 2021-01 were limited to review of contracts and material submittals, participation in a preconstruction meeting, recommendation of progress payments, monitoring Contractor compliance with payment of prevailing wages, and final punch list preparation. Construction engineering services were provided on an estimated hourly basis. HLA involvement during construction was much greater than originally estimated and included the following additional tasks:

- Assisted the CITY with review and coordination of the end user licensing agreement required by Mueller Systems, Inc.
- Participated in bi-weekly project update meetings with the Contractor and CITY prior to field installation work.
- Participated in weekly project update meetings following start of field installation work.
- Participated in on-site pre-installation and demonstration meeting with Contractor and CITY.
- Assisted the CITY with response to Contractor delays and requests for extension of time.
- Completed additional construction engineering tasks resulting from granted contract time extensions, including processing additional progress payment requests and general construction administration tasks.

SCOPE OF SERVICES:

The scope of services in Task Order No. 2021-01 is to be revised as follows:

2.0 Construction Engineering

- 2.9 Assist CITY with review and coordination of end user licensing agreement with Mueller Systems.
- 2.10 Participate in bi-weekly project update meetings prior to field installation work and weekly project update meetings following start of field installation work.
- 2.11 Participate in on-site pre-installation and demonstration meeting.
- 2.12 Respond to Contractor delay notices and requests for extension of contract time.

TIME OF PERFORMANCE:


There are no revisions to the time of performance.

FEE FOR SERVICE:

The fee for service in Task Order No. 2021-01 is to be revised as follows:

2.0 Construction Engineering

All work for Construction Engineering services shall be completed on an hourly basis, at normal hourly billing rates, for the estimated maximum fee of \$29,000.00. The amount of Addendum No. 2 for added construction engineering services is \$18,000.00, and when added to the original amount for Task Order No. 2021-01 of \$11,000.00 equals \$29,000.00.

Proposed:  _____ 3/6/2023
HLA Engineering and Land Surveying, Inc. Date
Michael T. Battle, PE, President

Approved: _____ _____
City of Toppenish Date
Debbie Zabell, City Manager



CITY OF TOPPENISH
REQUEST FOR COUNCIL ACTION
Agenda Bill No.: 23-020

Agenda Item
5c

Meeting Date: March 27, 2023

Subject: Flock Safety Cameras

Attachments: Resolution 2023-14, Letter from Yakima County, and Sole Source Letter

Prepared by: Linda Finley, Assistant to the Chief of Police

Presented by: John Clary, Chief of Police

Approved For Agenda By: Debbie Zabell, City Manager

Discussion:

On June 23, 2022, the Assistant to the Chief of Police, Linda Finley, applied to Yakima County for the County's American Rescue Plan Act Recovery (ARPA) grant in the amount of \$340,700. The request included the initial installation, placement, and 5-year lease payments of 26 Flock Safety Falcon cameras.

On March 3, 2023, Yakima County notified the City that \$80,028.00 would be awarded for the 26 Flock Safety Cameras. In addition, Commissioner LaDon Linde updated Council of the award during the March 13, Regular Council meeting.

City Manager Zabell confirmed the County's intent to have all the (awarded) Flock Camera Interlocal Agreement's (ILA) completed first, due the anticipated price increase on April 1. To date, the city has not received the ILA from the County; and the city received notification from the vendor of the increase costs effective April 1, 2023.

The increase will result in an additional annual cost of \$500 per camera (\$14,040 inc. tax) and an additional charge of \$350.00 for permitting fees (\$9,828 inc. tax) for installation. The total increase for 2023 is \$23,868, which would be the city's responsibility to pay; and then an annual increase for the city, of \$14,040 including tax for the cameras.

Based on the economic factors of waiting for the County's ILA, and the written documentation and verbal notification received by the County confirming the award of the grant funds, staff is requesting Council to authorize the City Manager to sign the agreement with Flock Safety prior to April 1 increase, and prior to receiving and approving the ILA from Yakima County.

Fiscal Impact: 2023: \$80,028.00 to be reimbursed from Yakima County ARPA grant; and the ongoing annual expense of \$70,200 for the camera system.

Recommendation: Approve Resolution 2023-14 authorizing the City Manager to sign the agreement with Flock Group Inc. for 26 Falcon Flock Safety cameras.

Alternatives: 1) Do not adopt. 2) Forward to Study Session for further review.

RESOLUTION 2023-14

**A RESOLUTION AUTHORIZING THE CITY MANAGER TO EXECUTE
THE FLOCK GROUP, INC. SERVICES AGREEMENT ORDER FORM
WITH THE GOVERNMENT AGENCY AGREEMENT ATTACHED FOR
FLOCK SAFETY CAMERA TECHNOLOGY AND SERVICE**

WHEREAS the City has determined there is a need for the use of Flock Safety technology for awareness, prevention, and prosecution of crime to assist law enforcement, and

WHEREAS Flock offers a software and hardware situational awareness solution for automatic license plates, video, and audio detection through Flock’s technology platform (the “Flock Service”), and upon detection, the Flock Service is capable of capturing audio, video, image, and recording data and can provide notifications to the Toppenish Police Department upon the instructions of Non-Agency End User, and

WHEREAS City of Toppenish Police Department desires access to the Flock Service in order to create view, search and archive footage and receive notifications, including those from Non-Agency End Users of the Flock Service (where there is an investigative or bona fide lawful purpose) such as schools, neighborhood homeowners associations, businesses, and individual users,

NOW THEREFORE BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TOPPENISH, WASHINGTON AS FOLLOWS:

The attached Flock Group, Inc. Services Agreement Order Form with the Government Agency Agreement for the use of the Flock Safety Technology and the Flock Service is approved and the City Manager is authorized and directed to execute said Order Form on behalf of the City.

This Resolution shall be effective immediately upon passage and signatures hereto.

PASSED by the Toppenish City Council at its regular meeting held on March 27, 2023.

ELPIDIA SAAVEDRA, Mayor

ATTEST:

HEIDI RIOJAS, CMC, City Clerk

FLOCK GROUP INC.
SERVICES AGREEMENT
ORDER FORM

This Order Form together with the Terms (as defined herein) describe the relationship between Flock Group Inc. (“**Flock**”) and the customer identified below (“**Agency**”) (each of Flock and Customer, a “**Party**”). This order form (“**Order Form**”) hereby incorporates and includes the “GOVERNMENT AGENCY AGREEMENT” attached (the “**Terms**”) which describe and set forth the general legal terms governing the relationship (collectively, the “**Agreement**”). The Terms contain, among other things, warranty disclaimers, liability limitations and use limitations.

The Agreement will become effective when this Order Form is executed by both Parties (the “**Effective Date**”).

Agency: WA - Toppenish PD Legal Entity Name:	Contact Name: Joseph Mehline
Address: 1 W 1st Ave Toppenish, Washington 98948	Phone: (509) 865-1629 E-Mail: joseph.mehline@cityoftoppenish.us
Expected Payment Method:	Billing Contact: (if different than above)

Initial Term: 12 months Renewal Term: 24 months	Billing Term: Annual payment due Net 30 per terms and conditions Billing Frequency: Annual Plan - First Year Invoiced at Signing
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Professional Services and One-Time Purchases

Name	Price/Usage Fee	QTY	Subtotal
Professional Services - Standard Implementation Fee	\$350.00	26.00	\$9,100.00

Hardware and Software Products

Annual recurring amounts over subscription term

Name	Price/Usage Fee	QTY	Subtotal
Falcon	\$2,500.00	26.00	\$65,000.00

Subtotal Year 1:	\$74,100.00
Subscription Term:	12 Months
Annual Recurring Total:	\$65,000.00
Estimated Sales Tax:	\$5,928.00
Total Contract Amount:	\$80,028.00

Special terms:

- Prior to commencement of installation, Customer may terminate this agreement without cost or liability.

I have reviewed and agree to the Customer Implementation Guide on Schedule B at the end of this agreement.

By executing this Order Form, Agency represents and warrants that it has read and agrees all of the terms and conditions contained in the Terms attached. The Parties have executed this Agreement as of the dates set forth below.

FLOCK GROUP, INC.

Agency: WA - Toppenish PD
City of Toppenish

By: _____

By: _____

Name: _____

Name: _____

Title: _____

Title: _____

Date: _____

Date: _____

flock safety

GOVERNMENT AGENCY AGREEMENT

This Government Agency Agreement (this “**Agreement**”) is entered into by and between Flock Group, Inc. with a place of business at 1170 Howell Mill Rd NW Suite 210, Atlanta, GA 30318 (“**Flock**”) and the police department or government agency identified in the signature block of the Order Form (“**Agency**”) (each a “**Party**,” and together, the “**Parties**”).

RECITALS

WHEREAS, Flock offers a software and hardware situational awareness solution for automatic license plates, video and audio detection through Flock’s technology platform (the “**Flock Service**”), and upon detection, the Flock Services are capable of capturing audio, video, image, and recording data and can provide notifications to Agency upon the instructions of Non-Agency End User (as defined below) (“**Notifications**”);

WHEREAS, Agency desires access to the Flock Service on existing cameras, provided by Agency, or Flock provided Flock Hardware (as defined below) in order to create, view, search and archive Footage and receive Notifications, including those from Non-Agency End Users of the Flock Service (where there is an investigative or bona fide lawful purpose) such as schools, neighborhood homeowners associations, businesses, and individual users;

WHEREAS, Flock deletes all Footage on a rolling thirty (30) day basis, excluding Wing Replay which is deleted after seven (7) days. Agency is responsible for extracting, downloading and archiving Footage from the Flock System on its own storage devices for auditing for prosecutorial/administrative purposes; and

WHEREAS, Flock desires to provide Agency the Flock Service and any access thereto, subject to the terms and conditions of this Agreement, solely for the awareness, prevention, and prosecution of crime, bona fide investigations by police departments, and archiving for evidence gathering (“**Permitted Purpose**”).

AGREEMENT

NOW, THEREFORE, Flock and Agency agree that this Agreement, and any addenda attached hereto or referenced herein, constitute the complete and exclusive statement of the Agreement of the Parties with respect to the subject matter of this Agreement, and replace and supersede all prior agreements, term sheets, purchase orders, correspondence, oral or written communications and negotiations by and between the Parties.

1. DEFINITIONS

Certain capitalized terms, not otherwise defined herein, have the meanings set forth or cross-referenced in this Section 1.

1.1 “**Advanced Search**” means the provision of Services, via the web interface using Flock’s software applications, which utilize advanced evidence delivery capabilities including convoy analysis, multi-geo search, visual search, cradlepoint integration for automatic vehicle location, and common plate analysis.

1.2 “**Agency Data**” means the data, media and content provided by Agency through the Services. For the avoidance of doubt, the Agency Data will include the Footage.

1.3 “**Agency Generated Data**” means the messages, text, illustrations, files, images, graphics, photos, comments, sounds, music, videos, information, content, ratings, reviews, data, questions, suggestions, other information or materials posted, uploaded, displayed, published, distributed, transmitted, broadcasted, or otherwise made available on or submitted through the Wing Suite.

1.4. “**Agency Hardware**” means the third-party camera owned or provided by Agency and any other physical elements that interact with the Embedded Software and the Web Interface to provide the Services.

1.5. “**Aggregated Data**” means information that relates to a group or category of individuals, from which any potential individuals’ personal identifying information has been permanently “anonymized” by commercially available standards to irreversibly alter data in such a way that a data subject (i.e., individual person or impersonal entity) can no longer be identified directly or indirectly.

1.6 “**Authorized End User(s)**” means any individual employees, agents, or contractors of Agency accessing or using the Services through the Web Interface, under the rights granted to Agency pursuant to this Agreement.

1.7 “**Deployment Plan**” means the strategic geographic mapping of the location(s) and implementation of Flock Hardware, and/or other relevant Services required under this Agreement.

1.8 “**Documentation**” means text and/or graphical documentation, whether in electronic or printed format, that describe the features, functions and operation of the Services which are provided by Flock to Agency in accordance with the terms of this Agreement.

1.9 “**Embedded Software**” means the software and/or firmware embedded or preinstalled on the Flock Hardware or Agency Hardware.

1.10 “**Falcon Flex**” means an infrastructure-free, location-flexible license plate reader camera that enables the Agency to self-install.

1.11 “**Flock Hardware**” means the Flock cameras or device, pole, clamps, solar panel, installation components, and any other physical elements that interact with the Embedded Software and the Web Interface to provide the Flock Services.

1.12 “**Flock IP**” means the Services, the Documentation, the Embedded Software, the Installation Services, and any and all intellectual property therein or otherwise provided to Agency and/or its Authorized End Users in connection with the foregoing.

1.13 “**Flock Safety Falcon™**” means an infrastructure-free license plate reader camera that utilizes Vehicle Fingerprint™ technology to capture vehicular attributes.

1.14 “**Flock Safety Raven™**” means an audio detection device that provides real-time alerting to law enforcement based on programmed audio events such as gunshots, breaking glass, and street racing.

1.15 “**Flock Safety Sparrow™**” means an infrastructure-free license plate reader camera for residential roadways that utilizes Vehicle Fingerprint™ technology to capture vehicular attributes.

1.17 “**Footage**” means still images, video, audio and other data captured by the Flock Hardware or Agency Hardware in the course of and provided via the Services.

1.18 “**Hotlist(s)**” means a digital file containing alphanumeric license plate related information pertaining to vehicles of interest, which may include stolen vehicles, stolen vehicle license plates, vehicles owned or associated with wanted or missing person(s), vehicles suspected of being involved with criminal or terrorist activities, and other legitimate law enforcement purposes. Hotlist also includes, but is not limited to, national data (i.e. NCIC) for similar categories, license plates associated with AMBER Alerts or Missing Persons/Vulnerable Adult Alerts, and includes manually entered license plate information associated with crimes that have occurred in any local jurisdiction.

1.19 “**Implementation Fee(s)**” means the monetary fees associated with the Installation Services, as defined below.

1.20 “**Installation Services**” means the services provided by Flock for installation of Agency Hardware and/or Flock Hardware, including any applicable installation of Embedded Software on Agency Hardware.

1.21 “**Non-Agency End User(s)**” means any individual, entity, or derivative therefrom, authorized to use the Services through the Web Interface, under the rights granted to pursuant to the terms (or to those materially similar) of this Agreement.

1.22 “**Services**” or “**Flock Services**” means the provision, via the Web Interface, of Flock’s software applications for automatic license plate detection, alerts, audio detection, searching image records, video and sharing Footage.

1.23 “**Support Services**” means Monitoring Services, as defined in Section 2.10 below.

1.24 “**Usage Fee**” means the subscription fees to be paid by the Agency for ongoing access to Services.

1.25 “**Web Interface**” means the website(s) or application(s) through which Agency and its Authorized End Users can access the Services, in accordance with the terms of this Agreement.

1.26 “**Wing Suite**” means the Flock interface which provides real-time access to the Flock Services, location of Flock Hardware, Agency Hardware, third-party cameras, live-stream video, Wing Livestream, Wing LPR, Wing Replay, alerts and other integrations.

1.27 “**Wing Livestream**” means real-time video integration with third-party cameras via the Flock interface.

1.28 “**Wing LPR**” means software integration with third-party cameras utilizing Flock’s Vehicle Fingerprint Technology™ for license plate capture.

1.29 “**Wing Replay**” means enhanced situational awareness encompassing Footage retention, replay ability, and downloadable content from Hot Lists integrated from third-party cameras.

1.30 “*Vehicle Fingerprint™*” means the unique vehicular attributes captured through Services such as: type, make, color, state registration, missing/covered plates, bumper stickers, decals, roof racks, and bike racks.

2. SERVICES AND SUPPORT

2.1 **Provision of Access.** Subject to the terms of this Agreement, Flock hereby grants to Agency a non-exclusive, non-transferable right to access the features and functions of the Services via the Web Interface during the Term, solely for the Authorized End Users. The Footage will be available for Agency’s designated administrator, listed on the Order Form, and any Authorized End Users to access and download via the Web Interface for thirty (30) days. Authorized End Users will be required to sign up for an account and select a password and username (“*User ID*”). Flock will also provide Agency with the Documentation to be used in accessing and using the Services. Agency shall be responsible for all acts and omissions of Authorized End Users, and any act or omission by an Authorized End User which, if undertaken by Agency, would constitute a breach of this Agreement, shall be deemed a breach of this Agreement by Agency. Agency shall undertake reasonable efforts to make all Authorized End Users aware of the provisions of this Agreement as applicable to such Authorized End User’s use of the Services and shall cause Authorized End Users to comply with such provisions. Flock may use the services of one or more third parties to deliver any part of the Services, (such as using a third party to host the Web Interface for cloud storage or a cell phone provider for wireless cellular coverage) which makes the Services available to Agency and Authorized End Users. Warranties provided by said third party service providers are the agency’s sole and exclusive remedy and Flock’s sole and exclusive liability with regard to such third-party services, including without limitation hosting the Web Interface. Agency agrees to comply with any acceptable use policies and other terms of any third-party service provider that are provided or otherwise made available to Agency from time to time.

2.2 **Embedded Software License.** Subject to all terms of this Agreement, Flock grants Agency a limited, non-exclusive, non-transferable, non-sublicensable (except to the Authorized End Users), revocable right to use the Embedded Software as installed on the Flock Hardware or Agency Hardware; in each case, solely as necessary for Agency to use the Services.

2.3 **Documentation License.** Subject to the terms of this Agreement, Flock hereby grants to Agency a non-exclusive, non-transferable right and license to use the Documentation during the Term in connection with its use of the Services as contemplated herein, and under Section 2.5 below.

2.4 **Wing Suite License.** Subject to all terms of this Agreement, Flock grants Agency a limited, non-exclusive, non-transferable, non-sublicensable (except to the Authorized End Users), revocable right to use the Wing Suite software and interface.

2.5 **Usage Restrictions.**

2.5.1 **Flock IP.** The permitted purpose for usage of the Flock Hardware, Agency Hardware, Documentation, Services, support, and Flock IP are solely to facilitate gathering evidence that could be used in a lawful criminal investigation by the appropriate government agency (“*Permitted Purpose*”). Agency will not, and will not permit any Authorized End Users to, (i) copy or duplicate any of the Flock IP; (ii) decompile, disassemble, reverse engineer, or otherwise attempt to obtain or perceive the source code from which any software component of any of the Flock IP is compiled or interpreted, or apply any other process or procedure to derive the source code of any software included in the Flock IP; (iii) attempt to modify, alter, tamper with or repair any of the Flock IP, or attempt to create any derivative product from any of the foregoing; (iv) interfere or attempt to interfere in any manner with the functionality or proper working of any of the Flock IP; (v) remove, obscure, or alter any notice of any intellectual property or proprietary right appearing on or contained within any of the Services or Flock IP; (vi) use the Services, support, Flock Hardware, Documentation, or the Flock IP for anything other than the Permitted Purpose; or (vii) assign, sublicense, sell, resell, lease, rent, or otherwise transfer, convey, pledge as security, or otherwise encumber, Agency’s rights under Sections 2.1, 2.2, 2.3, or 2.4.

2.5.2. **Flock Hardware.** Agency understands that all Flock Hardware is owned exclusively by Flock, and that title to any Flock Hardware does not pass to Agency upon execution of this Agreement. Except for Falcon Flex products, which are designed for self-installation, Agency is not permitted to remove, reposition, re-install, tamper with, alter, adjust or otherwise take possession or control of Flock Hardware. Notwithstanding the notice and cure period set for in Section 6.3, Agency agrees and understands that in the event Agency is found to engage in any of the restricted actions of this Section 2.5.2, all warranties herein shall be null and void, and this Agreement shall be subject to immediate termination (without opportunity to cure) for material breach by Agency.

2.6 **Retained Rights; Ownership.** As between the Parties, subject to the rights granted in this Agreement, Flock and its licensors retain all right, title and interest in and to the Flock IP and its components, and Agency acknowledges that it neither owns nor acquires any additional rights in and to the foregoing not expressly granted by this Agreement. Agency further acknowledges that Flock retains the right to use the foregoing for any purpose in Flock’s sole discretion. There are no implied rights.

2.7 **Suspension.**

2.7.1 **Service Suspension.** Notwithstanding anything to the contrary in this Agreement, Flock may temporarily suspend Agency’s and any Authorized End User’s access to any portion or all of the Flock IP or Flock Service if Flock reasonably determines that (a) there is a threat or attack on any of the Flock IP by Agency; (b) Agency’s or any Authorized End User’s use of the Flock IP disrupts or poses a security risk to the Flock IP or any other customer or vendor of Flock; (c) Agency or any Authorized End User is/are using the Flock IP for fraudulent or illegal activities; (d) Agency has violated any term of this provision, including, but not limited to, utilizing the Services for

anything other than the Permitted Purpose; or (e) any unauthorized access to Flock Services through Agency's account ("**Service Suspension**"). Agency shall not be entitled to any remedy for the Service Suspension period, including any reimbursement, tolling, or credit.

2.7.2 Service Interruption. Services may be interrupted in the event that: (a) Flock's provision of the Services to Agency or any Authorized End User is prohibited by applicable law; (b) any third-party services required for Services are interrupted; (c) if Flock reasonably believe Services are being used for malicious, unlawful, or otherwise unauthorized use; (d) there is a threat or attack on any of the Flock IP by a third party; or (e) scheduled or emergency maintenance ("**Service Interruption**"). Flock will make commercially reasonable efforts to provide written notice of any Service Interruption to Agency and to provide updates regarding resumption of access to Flock Services. Flock will use commercially reasonable efforts to resume providing access to the Services as soon as reasonably possible after the event giving rise to the Service Interruption is cured. Flock will have no liability for any damage, liabilities, losses (including any loss of data or profits), or any other consequences that Agency or any Authorized End User may incur as a result of a Service Interruption. To the extent that the Service Interruption is not caused by Agency's direct actions or by the actions of parties associated with the Agency, the expiration of the Term will be tolled by the duration of the Service Interruption (for any continuous suspension lasting at least one full day) prorated for the proportion of cameras on the Agency's account that have been impacted. For example, in the event of a Service Interruption lasting five (5) continuous days, Agency will receive a credit for five (5) free days at the end of the Term.

2.8 Installation Services.

2.8.1 Designated Locations. For installation of Flock Hardware, excluding Falcon Flex products, prior to performing the physical installation of the Flock Hardware, Flock shall advise Agency on the location and positioning of the Flock Hardware for optimal license plate image capture, as conditions and location allow. Flock may consider input from Agency regarding location, position and angle of the Flock Hardware ("**Designated Location**") and collaborate with Agency to design the Deployment Plan confirming the Designated Locations. Flock shall have final discretion on location of Flock Hardware. Flock shall have no liability to Agency resulting from any poor performance, functionality or Footage resulting from or otherwise relating to the Designated Locations or delay in installation due to Agency's delay in confirming Designated Locations, in ordering and/or having the Designated Location ready for installation including having all electrical work preinstalled and permits ready, if necessary. After installation, any subsequent changes to the Deployment Plan ("**Reinstalls**") will incur a charge for Flock's then-current list price for Reinstalls, as listed in the then-current Reinstall policy (available at <https://www.flocksafety.com/reinstall-fee-schedule>) and any equipment fees. For clarity, Agency will receive prior notice and provide approval for any such fees. These changes include but are not limited to re-positioning, adjusting of the mounting, re-angling, removing foliage, replacement, changes to heights of poles, regardless of whether the need for Reinstalls related to vandalism, weather, theft, lack of criminal activity in view, and the like. Flock shall have full discretion on decision to reinstall Flock Hardware.

2.8.2 Agency Installation Obligations. Agency agrees to allow Flock and its agents reasonable access in and near the Designated Locations at all reasonable times upon reasonable notice for the purpose of performing the installation work. Although Flock Hardware is designed to utilize solar power, certain Designated Locations may require a reliable source of 120V or 240V AC power. In the event adequate solar power is not available, Agency is solely responsible for costs associated with providing a reliable source of 120V or 240V AC power to Flock Hardware. Flock will provide solar options to supply power at each Designated Location. If Agency refuses recommended solar options, Agency waives any reimbursement, tolling, or credit for any suspension period of Flock Services due to low solar power. Additionally, Agency is solely responsible for (i) any permits or associated costs, and managing the permitting process of installation of cameras or AC power; (ii) any federal, state, or local taxes including property, license, privilege, sales, use, excise, gross receipts, or other similar taxes which may now or hereafter become applicable to, measured by or imposed upon or with respect to the installation of the Flock Hardware, its use (excluding tax exempt entities), or (iii) any other supplementary cost for services performed in connection with installation of the Flock Hardware, including but not limited to contractor licensing, engineered drawings, rental of specialized equipment, or vehicles, third-party personnel (i.e. Traffic Control Officers, Electricians, State DOT-approved poles, etc., if necessary), such costs to be approved by the Agency (“**Agency Installation Obligations**”). In the event that a Designated Location for Flock Hardware requires permits, Flock may provide the Agency with a temporary alternate location for installation pending the permitting process. Once the required permits are obtained, Flock will relocate the Flock Hardware from the temporary alternate location to the permitted location at no additional cost. Without being obligated or taking any responsibility for the foregoing, Flock may pay and invoice related costs to Agency if Agency did not address them prior to the execution of this Agreement or a third party requires Flock to pay. Agency represents and warrants that it has, or shall lawfully obtain, all necessary right title and authority and hereby authorizes Flock to install the Flock Hardware at the Designated Locations and to make any necessary inspections or tests in connection with such installation.

2.8.3 Flock’s Obligations. Installation of Flock Hardware shall be installed in a workmanlike manner in accordance with Flock’s standard installation procedures, and the installation will be completed within a reasonable time from the time that the Designated Locations are confirmed. Upon removal of Flock Hardware, Flock shall restore the location to its original condition, ordinary wear and tear excepted. Following the initial installation of the Flock Hardware and any subsequent Reinstalls or maintenance operations, Flock’s obligation to perform installation work shall cease; however, for the sole purpose of validating installation, Flock will continue to monitor the performance of Flock Hardware for the length of the Term and will receive access to the Footage for a period of seven (7) business days after the initial installation for quality control and provide any necessary maintenance. Labor may be provided by Flock or a third-party. Flock is not obligated to install, reinstall, or provide physical maintenance to Agency Hardware. Notwithstanding anything to the contrary, Agency understands that Flock will not provide installation services for Falcon Flex products.

2.8.4 Ownership of Hardware. Flock Hardware shall remain the personal property of Flock and will be removed upon the natural expiration of this Agreement at no additional cost to Agency. Agency shall not perform any acts which would interfere with the retention of title of the Flock Hardware by Flock. Should Agency default on any

payment of the Flock Services, Flock may remove Flock Hardware at Flock's discretion. Such removal, if made by Flock, shall not be deemed a waiver of Flock's rights to any damages Flock may sustain as a result of Agency's default and Flock shall have the right to enforce any other legal remedy or right.

2.9 Hazardous Conditions. Unless otherwise stated in the Agreement, Flock's price for its services under this Agreement does not contemplate work in any areas that contain hazardous materials, or other hazardous conditions, including, without limit, asbestos, lead, toxic or flammable substances. In the event any such hazardous materials are discovered in the designated locations in which Flock is to perform services under this Agreement, Flock shall have the right to cease work immediately in the area affected until such materials are removed or rendered harmless.

2.10 Support Services. Subject to the payment of fees, Flock shall monitor the performance and functionality of Flock Services and may, from time to time, advise Agency on changes to the Flock Services, Installation Services, or the Designated Locations which may improve the performance or functionality of the Services or may improve the quality of the Footage. The work, its timing, and the fees payable relating to such work shall be agreed by the Parties prior to any alterations to or changes of the Services or the Designated Locations ("**Monitoring Services**"). Flock will use commercially reasonable efforts to respond to requests for support. Flock will provide Agency with reasonable technical and on-site support and maintenance services ("**On-Site Services**") in-person or by email at support@flocksafety.com, at no additional cost. Notwithstanding anything to the contrary, Agency is solely responsible for installation of Falcon Flex products. Agency further understands and agrees that Flock will not provide monitoring services or on-site services for Falcon Flex.

2.11 Special Terms. From time to time, Flock may offer certain special terms related to guarantees, service and support which are indicated in the proposal and on the Order Form and will become part of this Agreement, upon Agency's prior written consent ("**Special Terms**"). To the extent that any terms of this Agreement are inconsistent or conflict with the Special Terms, the Special Terms shall control.

2.12 Upgrades to Platform. Flock may, in its sole discretion, make any upgrades to system or platform that it deems necessary or useful to (i) maintain or enhance (a) the quality or delivery of Flock's products or services to its agencies, (b) the competitive strength of, or market for, Flock's products or services, (c) such platform or system's cost efficiency or performance, or (ii) to comply with applicable law. Parties understand that such upgrades are necessary from time to time and will not materially change any terms or conditions within this Agreement.

3. RESTRICTIONS AND RESPONSIBILITIES

3.1 Agency Obligations. Flock will assist Agency Authorized End Users in the creation of a User ID. Agency agrees to provide Flock with accurate, complete, and updated registration information. Agency may not select as its User ID a name that Agency does not have the right to use, or another person's name with the intent to impersonate that person. Agency may not transfer its account to anyone else without prior written permission of Flock. Agency

will not share its account or password with anyone and must protect the security of its account and password. Unless otherwise stated and defined in this Agreement, Agency may not designate Authorized End Users for persons who are not officers, employees, or agents of Agency. Authorized End Users shall only use Agency-issued email addresses for the creation of their User ID. Agency is responsible for any activity associated with its account. Agency shall be responsible for obtaining and maintaining any equipment and ancillary services needed to connect to, access or otherwise use the Services. Agency will, at its own expense, provide assistance to Flock, including, but not limited to, by means of access to, and use of, Agency facilities, as well as by means of assistance from Agency personnel to the limited extent any of the foregoing may be reasonably necessary to enable Flock to perform its obligations hereunder, including, without limitation, any obligations with respect to Support Services or any Installation Services.

3.2 Agency Representations and Warranties. Agency represents, covenants, and warrants that Agency will use the Services only in compliance with this Agreement and all applicable laws and regulations, including but not limited to any laws relating to the recording or sharing of video, photo, or audio content. Although Flock has no obligation to monitor Agency's use of the Services, Flock may do so and may prohibit any use of the Services it believes may be (or alleged to be) in violation of the foregoing.

4. CONFIDENTIALITY; AGENCY DATA

4.1 Confidentiality. To the extent allowable by applicable FOIA and state-specific Public Records Acts, each Party (the "**Receiving Party**") understands that the other Party (the "**Disclosing Party**") has disclosed or may disclose business, technical or financial information relating to the Disclosing Party's business (hereinafter referred to as "**Proprietary Information**" of the Disclosing Party). Proprietary Information of Flock includes non-public information regarding features, functionality and performance of the Services. Proprietary Information of Agency includes non-public data provided by Agency to Flock or collected by Flock via the Flock Hardware or Agency Hardware, to enable the provision of the Services, which includes but is not limited to geolocation information and environmental data collected by sensors. The Receiving Party agrees: (i) to take the same security precautions to protect against disclosure or unauthorized use of such Proprietary Information that the Party takes with its own proprietary information, but in no event will a Party apply less than reasonable precautions to protect such Proprietary Information, and (ii) not to use (except in performance of the Services or as otherwise permitted herein) or divulge to any third person any such Proprietary Information. Flock's use of the Proprietary Information may include processing the Proprietary Information to send Agency alerts, or to analyze the data collected to identify motion or other events. The Disclosing Party agrees that the foregoing shall not apply with respect to any information that the Receiving Party can document (a) is or becomes generally available to the public, or (b) was in its possession or known by it prior to receipt from the Disclosing Party, or (c) was rightfully disclosed to it without restriction by a third party, or (d) was independently developed without use of any Proprietary Information of the Disclosing Party. Nothing in this Agreement will prevent the Receiving Party from disclosing the Proprietary Information pursuant to any judicial or governmental order, provided that the Receiving Party gives the Disclosing

Party reasonable prior notice of such disclosure to contest such order. For clarity, Flock may access, use, preserve and/or disclose the Footage to law enforcement authorities, government officials, and/or third parties, if legally required to do so or if Flock has a good faith belief that such access, use, preservation or disclosure is reasonably necessary to: (a) comply with a legal process or request; (b) enforce this Agreement, including investigation of any potential violation thereof; (c) detect, prevent or otherwise address security, fraud or technical issues; or (d) protect the rights, property or safety of Flock, its users, a third party, or the public as required or permitted by law, including respond to an emergency situation. Flock may store deleted Footage in order to comply with certain legal obligations, but such retained Footage will not be retrievable without a valid court order.

4.2 Agency Data. As between Flock and Agency, all right, title and interest in the Agency Data, belong to and are retained solely by Agency. Agency hereby grants to Flock a limited, non-exclusive, royalty-free, worldwide license to (i) use the Agency Data and perform all acts with respect to the Agency Data as may be necessary for Flock to provide the Flock Services to Agency, including without limitation the Support Services set forth in Section 2.10 above, and a non-exclusive, perpetual, irrevocable, worldwide, royalty-free, fully paid license to use, reproduce, modify, display, and distribute the Agency Data as a part of the Aggregated Data, (ii) disclose the Agency Data (both inclusive of any Footage) to enable law enforcement monitoring for elected law enforcement Hotlists as well as provide Footage search access to law enforcement for investigative purposes only, and (iii) and obtain Aggregated Data as set forth below in Section 4.5. As between Agency and Non-Agency End Users that have prescribed access of Footage to Agency, each of Agency and Non-Agency End Users will share all right, title and interest in the Non-Agency End User Data. This Agreement does not by itself make any Non-Agency End User Data the sole property or the Proprietary Information of Agency. Flock will automatically delete Footage older than thirty (30) days. Agency has a thirty (30) day window to view, save and/or transmit Footage to the relevant government agency prior to its deletion. Notwithstanding the foregoing, Flock automatically deletes Wing Replay after seven (7) days, during which time Agency may view, save and/or transmit such data to the relevant government agency prior to deletion. Flock does not own and shall not sell Agency Data.

4.3 Agency Generated Data in Wing Suite. Parties understand that Flock does not own any right, title, or interest to third-party video integrated into the Wing Suite. Flock may provide Agency with the opportunity to post, upload, display, publish, distribute, transmit, broadcast, or otherwise make available on or submit through the Wing Suite, messages, text, illustrations, files, images, graphics, photos, comments, sounds, music, videos, information, content, ratings, reviews, data, questions, suggestions, or other information or materials produced by Agency. Agency shall retain whatever legally cognizable right, title, and interest that Agency has in Agency Generated Data. Agency understands and acknowledges that Flock has no obligation to monitor or enforce Agency's intellectual property rights to Agency Generated Data. To the extent legally permissible, Agency grants Flock a non-exclusive, perpetual, irrevocable, worldwide, royalty-free, fully paid license to use, reproduce, modify, display, and distribute the Agency Generated Data for the sole purpose of providing Flock Services. Flock does not own and shall not sell Agency Generated Data.

4.4 **Feedback.** If Agency provides any suggestions, ideas, enhancement requests, feedback, recommendations or other information relating to the subject matter hereunder, Agency hereby assigns (and will cause its agents and representatives to assign) to Flock all right, title and interest (including intellectual property rights) with respect to or resulting from any of the foregoing.

4.5 **Aggregated Data.** Flock shall have the right to collect, analyze, and anonymize Agency Data and Agency Generated Data to create Aggregated Data to use and perform the Services and related systems and technologies, including the training of machine learning algorithms. Agency hereby grants Flock a non-exclusive, worldwide, perpetual, royalty-free right (during and after the Term hereof) to use and distribute such Aggregated Data to improve and enhance the Services and for other development, diagnostic and corrective purposes, other Flock offerings, and crime prevention efforts. Parties understand that the aforementioned license is required for continuity of Services. No rights or licenses are granted except as expressly set forth herein. Flock does not sell Aggregated Data.

5. PAYMENT OF FEES

5.1. **Fees.** Agency shall pay the fees as set forth in the Order Form.

5.2 **Notice of Changes to Fees.** Flock reserves the right to change the fees for subsequent Renewal Terms by providing sixty (60) days' notice (which may be sent by email) prior to the end of the Initial Term or Renewal Term (as applicable).

5.3 **Invoicing, Late Fees; Taxes.** Flock may choose to bill through an invoice, in which case, full payment for invoices must be received by Flock thirty (30) days after the date of invoice. If Agency is a non-tax-exempt entity, Agency shall be responsible for all applicable taxes associated with Services (for non-tax-exempt reasons). If Agency believes that Flock has billed Agency incorrectly, Agency must contact Flock no later than sixty (60) days after the closing date on the first billing statement in which the error or problem appeared, to receive an adjustment or credit. Agency acknowledges and agrees that a failure to contact Flock within this sixty (60) day period will serve as a waiver of any claim Agency may have had due to such billing error.

6. TERM AND TERMINATION

6.1 **Term.** The initial term of this Agreement shall be for the period of time set forth on the Order Form and shall commence at the time outlined in this section below (the "**Term**"). Following the Term, unless otherwise indicated on the Order Form, this Agreement will automatically renew for successive renewal terms of the greater of one year or the length set forth on the Order Form (each, a "**Renewal Term**") unless either Party gives the other Party notice of non-renewal at least thirty (30) days prior to the end of the then-current term.

- a. For Wing Suite products: the Term shall commence upon execution of this Agreement and continue for one (1) year, after which, the Term may be extended by mutual consent of the Parties, unless terminated by either Party.
- b. For Falcon and Sparrow products: the Term shall commence upon first installation and validation of Flock Hardware.
- c. For Raven products: the Term shall commence upon first installation and validation of Flock Hardware.
- d. For Falcon Flex products: the Term shall commence upon execution of this Agreement.
- e. For Advanced Search products: the Term shall commence upon execution of this Agreement.

6.2 Termination for Convenience. At any time during the agreed upon Term, either Party may terminate this Agreement for convenience. Termination for convenience of the Agreement by the Agency will be effective immediately. Termination for convenience by Agency will result in a one-time removal fee of \$500 per Flock Hardware. Termination for convenience by Flock will not result in any removal fees. Upon termination for convenience, a refund will be provided for Flock Hardware, prorated for any fees for the remaining Term length set forth previously. Wing Suite products and Advanced Search are not subject to refund for early termination. Flock will provide advanced written notice and remove all Flock Hardware at Flock's own convenience, within a commercially reasonable period of time upon termination. Agency's termination of this Agreement for Flock's material breach of this Agreement shall not be considered a termination for convenience for the purposes of this Section 6.2.

6.3 Termination. Notwithstanding the termination provisions in Section 2.5.2, in the event of any material breach of this Agreement, the non-breaching Party may terminate this Agreement prior to the end of the Term by giving thirty (30) days prior written notice to the breaching Party; provided, however, that this Agreement will not terminate if the breaching Party has cured the breach prior to the expiration of such thirty (30) day period. Either Party may terminate this Agreement, without notice, (i) upon the institution by or against the other Party of insolvency, receivership or bankruptcy proceedings, (ii) upon the other Party's making an assignment for the benefit of creditors, or (iii) upon the other Party's dissolution or ceasing to do business. Upon termination for Flock's material breach, Flock will refund to Agency a pro-rata portion of the pre-paid fees for Services not received due to such termination.

6.4 No-Fee Term. Flock will provide Agency with complimentary access to Hotlist alerts, as further described in Section 4.2 ("**No-Fee Term**"). In the event a Non-Agency End User grants Agency access to Footage and/or notifications from a Non-Agency End User, Agency will have access to Non-Agency End User Footage and/or notifications until deletion, subject to a thirty (30) day retention policy for all products except Wing Replay, which is subject to a seven (7) day retention policy. Flock may, in their sole discretion, provide access or immediately terminate the No-Fee Term. The No-Fee Term will survive the Term of this Agreement. Flock, in its sole discretion, can determine to impose a price per No-Fee Term upon thirty (30) days' notice to Agency. Agency may terminate any No-Fee Term or access to future No-Fee Terms upon thirty (30) days' notice.

6.5 **Survival.** The following Sections will survive termination: 2.5, 2.6, 3, 4, 5, 6.4, 7.3, 7.4, 8.1, 8.2, 8.3, 8.4, 9.1 and 9.6.

7. REMEDY; WARRANTY AND DISCLAIMER

7.1 **Remedy.** Upon a malfunction or failure of Flock Hardware or Embedded Software (a “*Defect*”), Agency must notify Flock’s technical support as described in Section 2.10 above. If Flock is unable to correct the Defect, Flock shall, or shall instruct one of its contractors to repair or replace the Flock Hardware or Embedded Software suffering from the Defect. Flock reserves the right in their sole discretion to refuse or delay replacement or its choice of remedy for a Defect until after it has inspected and tested the affected Flock Hardware provided that such inspection and test shall occur within a commercially reasonable time, but no longer than seven (7) business days after Agency notifies the Flock of a known Defect. In the event of a Defect, Flock will repair or replace the defective Flock Hardware at no additional cost to Agency. Absent a Defect, in the event that Flock Hardware is lost, stolen, or damaged, Agency may request that Flock replace the Flock Hardware at a fee according to the then-current Reinstall policy (<https://www.flocksafety.com/reinstall-fee-schedule>). Agency shall not be required to replace subsequently lost, damaged or stolen Flock Hardware, however, Agency understands and agrees that functionality, including Footage, will be materially affected due to such subsequently lost, damaged or stolen Flock Hardware and that Flock will have no liability to Agency regarding such affected functionality nor shall the Usage Fee or Implementation Fees owed be impacted. Flock is under no obligation to replace or repair Flock Hardware or Agency Hardware.

7.2 **Exclusions.** Flock will not provide the remedy described in Section 7.1 if Agency has misused the Flock Hardware, Agency Hardware, or Service in any manner.

7.3 **Warranty.** Flock shall use reasonable efforts consistent with prevailing industry standards to maintain the Services in a manner which minimizes errors and interruptions in the Services and shall perform the Installation Services in a professional and workmanlike manner. Services may be temporarily unavailable for scheduled maintenance or for unscheduled emergency maintenance, either by Flock or by third-party providers, or because of other causes beyond Flock’s reasonable control, but Flock shall use reasonable efforts to provide advance notice in writing or by e-mail of any scheduled service disruption.

7.4 **Disclaimer.** THE REMEDY DESCRIBED IN SECTION 7.1 ABOVE IS AGENCY’S SOLE REMEDY, AND FLOCK’S SOLE LIABILITY, WITH RESPECT TO DEFECTIVE EMBEDDED SOFTWARE. FLOCK DOES NOT WARRANT THAT THE SERVICES WILL BE UNINTERRUPTED OR ERROR FREE; NOR DOES IT MAKE ANY WARRANTY AS TO THE RESULTS THAT MAY BE OBTAINED FROM USE OF THE SERVICES. EXCEPT AS EXPRESSLY SET FORTH IN THIS SECTION, THE SERVICES ARE PROVIDED “AS IS” AND FLOCK DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR

PURPOSE AND NON-INFRINGEMENT. THIS DISCLAIMER OF SECTION 7.4 ONLY APPLIES TO THE EXTENT ALLOWED BY THE GOVERNING LAW OF THE STATE MENTIONED IN SECTION 9.6.

7.5 Insurance. Flock will maintain commercial general liability policies with policy limits reasonably commensurate with the magnitude of Flock's business risk. Certificates of Insurance can be provided upon request.

7.6 Force Majeure. Parties are not responsible or liable for any delays or failures in performance from any cause beyond their control, including, but not limited to acts of God, changes to law or regulations, embargoes, war, terrorist acts, acts or omissions of third-Party technology providers, riots, fires, earthquakes, floods, power blackouts, strikes, supply chain shortages of equipment or supplies, weather conditions or acts of hackers, internet service providers or any other third Party acts or omissions. Force Majeure includes the novel coronavirus Covid-19 pandemic, and the potential spread of variants, which is ongoing as of the date of the execution of this Agreement.

8. LIMITATION OF LIABILITY; NO FEE TERM; INDEMNITY

8.1 Limitation of Liability. NOTWITHSTANDING ANYTHING TO THE CONTRARY, FLOCK AND ITS SUPPLIERS (INCLUDING BUT NOT LIMITED TO ALL HARDWARE AND TECHNOLOGY SUPPLIERS), OFFICERS, AFFILIATES, REPRESENTATIVES, CONTRACTORS AND EMPLOYEES SHALL NOT BE RESPONSIBLE OR LIABLE WITH RESPECT TO ANY SUBJECT MATTER OF THIS AGREEMENT OR TERMS AND CONDITIONS RELATED THERETO UNDER ANY CONTRACT, NEGLIGENCE, STRICT LIABILITY, PRODUCT LIABILITY, OR OTHER THEORY: (A) FOR ERROR OR INTERRUPTION OF USE OR FOR LOSS OR INACCURACY, INCOMPLETENESS OR CORRUPTION OF DATA OR FOOTAGE OR COST OF PROCUREMENT OF SUBSTITUTE GOODS, SERVICES OR TECHNOLOGY OR LOSS OF BUSINESS; (B) FOR ANY INDIRECT, EXEMPLARY, INCIDENTAL, SPECIAL OR CONSEQUENTIAL DAMAGES; (C) FOR ANY MATTER BEYOND FLOCK'S ACTUAL KNOWLEDGE OR REASONABLE CONTROL INCLUDING REPEAT CRIMINAL ACTIVITY OR INABILITY TO CAPTURE FOOTAGE OR IDENTIFY AND/OR CORRELATE A LICENSE PLATE WITH THE FBI DATABASE; (D) FOR ANY PUBLIC DISCLOSURE OF PROPRIETARY INFORMATION MADE IN GOOD FAITH; (E) FOR CRIME PREVENTION; OR (F) FOR ANY AMOUNTS THAT, TOGETHER WITH AMOUNTS ASSOCIATED WITH ALL OTHER CLAIMS, EXCEED THE FEES PAID AND/OR PAYABLE BY AGENCY TO FLOCK FOR THE SERVICES UNDER THIS AGREEMENT IN THE TWELVE (12) MONTHS PRIOR TO THE ACT OR OMISSION THAT GAVE RISE TO THE LIABILITY, IN EACH CASE, WHETHER OR NOT FLOCK HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THIS LIMITATION OF LIABILITY OF SECTION 8 ONLY APPLIES TO THE EXTENT ALLOWED BY THE GOVERNING LAW OF THE STATE MENTIONED IN SECTION 9.6.

8.2 Additional No-Fee Term Requirements. IN NO EVENT SHALL FLOCK'S AGGREGATE LIABILITY, IF ANY, ARISING OUT OF OR IN ANY WAY RELATED TO THE COMPLIMENTARY NO-FEE TERM AS DESCRIBED IN SECTION 6.4 EXCEED \$100, WITHOUT REGARD TO WHETHER SUCH CLAIM IS BASED

IN CONTRACT, TORT (INCLUDING NEGLIGENCE), PRODUCT LIABILITY OR OTHERWISE. Parties acknowledge and agree that the essential purpose of this Section 8.2 is to allocate the risks under the No-Fee Term described in Section 6.4 and limit potential liability given the aforementioned complimentary service, which would have been substantially higher if Flock were to assume any further liability other than as set forth herein. Flock has relied on these limitations in determining whether to provide the complementary No-Fee Term. The limitations set forth in this Section 8.2 shall not apply to claims or damages resulting from Flock's other obligations under this Agreement.

8.3 Responsibility. Each Party to this Agreement shall assume the responsibility and liability for the acts and omissions of its own employees, deputies, officers, or agents, in connection with the performance of their official duties under this Agreement. Each Party to this Agreement shall be liable (if at all) only for the torts of its own officers, agents, or employees.

9. INDEMNIFICATION

Agency hereby agrees to indemnify and hold harmless Flock against any damages, losses, liabilities, settlements and expenses in connection with any claim or action that arises from an alleged violation of Section 3.1, a breach of this Agreement, Agency's Installation Obligations, Agency's sharing of any data in connection with the Flock system, Flock employees or agent or Non-Agency End Users, or otherwise from Agency's use of the Services, Flock Hardware, Agency Hardware and any Embedded Software, including any claim that such actions violate any applicable law or third Party right. Although Flock has no obligation to monitor Agency's use of the Services, Flock may do so and may prohibit any use of the Services it believes may be (or alleged to be) in violation of Section 3.1 or this Agreement.

10. MISCELLANEOUS

10.1 Compliance With Laws. The Agency agrees to comply with all applicable local, state and federal laws, regulations, policies and ordinances and their associated record retention schedules, including responding to any subpoena request(s). In the event Flock is legally compelled to comply with a judicial order, subpoena, or government mandate, to disclose Agency Data or Agency Generated Data, Flock will provide Agency with notice.

10.2 Severability. If any provision of this Agreement is found to be unenforceable or invalid, that provision will be limited or eliminated to the minimum extent necessary so that this Agreement will otherwise remain in full force and effect.

10.3 Assignment. This Agreement is not assignable, transferable or sublicensable by either Party, without prior consent. Notwithstanding the foregoing, either Party may assign this Agreement, without the other Party's consent,

(i) to any parent, subsidiary, or affiliate entity, or (ii) to any purchaser of all or substantially all of such Party's assets or to any successor by way of merger, consolidation or similar transaction.

10.4 Entire Agreement. This Agreement, together with the Order Form(s), the then-current Reinstall policy (<https://www.flocksafety.com/reinstall-fee-schedule>), Deployment Plan(s), and any attached addenda are the complete and exclusive statement of the mutual understanding of the Parties and supersedes and cancels all previous written and oral agreements, communications and other understandings relating to the subject matter of this Agreement, and that all waivers and modifications must be in a writing signed by both Parties, except as otherwise provided herein. None of Agency's purchase orders, authorizations or similar documents will alter the terms of this Agreement, and any such conflicting terms are expressly rejected. In the event of any conflict of terms found in this Agreement or any other terms and conditions, the terms of this Agreement shall prevail.

10.5 Relationship. No agency, partnership, joint venture, or employment is created as a result of this Agreement and Agency does not have any authority of any kind to bind Flock in any respect whatsoever. Flock shall at all times be and act as an independent contractor.

10.6 Governing Law; Venue. This Agreement shall be governed by the laws of the State in which the Agency is located. The Parties hereto agree that venue would be proper in the chosen courts of the State of which the Agency is located. The Parties agree that the United Nations Convention for the International Sale of Goods is excluded in its entirety from this Agreement.

10.7 Publicity. Upon prior consent from Agency, Flock has the right to reference and use Agency's name and trademarks and disclose the nature of the Services provided hereunder in each case in business and development and marketing efforts, including without limitation on Flock's website.

10.8 Export. Agency may not remove or export from the United States or allow the export or re-export of the Flock IP or anything related thereto, or any direct product thereof in violation of any restrictions, laws or regulations of the United States Department of Commerce, the United States Department of Treasury Office of Foreign Assets Control, or any other United States or foreign agency or authority. As defined in Federal Acquisition Regulation ("FAR"), section 2.101, the Services, the Flock Hardware and Documentation are "commercial items" and according to the Department of Defense Federal Acquisition Regulation ("DFAR") section 252.2277014(a)(1) and are deemed to be "commercial computer software" and "commercial computer software documentation." Flock is compliant with FAR Section 889 and does not contract or do business with, use any equipment, system, or service that uses the enumerated banned Chinese telecommunication companies, equipment or services as a substantial or essential component of any system, or as critical technology as part of any Flock system. Consistent with DFAR section 227.7202 and FAR section 12.212, any use, modification, reproduction, release, performance, display, or disclosure of such commercial software or commercial software documentation by the U.S. Government will be

governed solely by the terms of this Agreement and will be prohibited except to the extent expressly permitted by the terms of this Agreement.

10.9 **Headings.** The headings are merely for organization and should not be construed as adding meaning to the Agreement or interpreting the associated sections.

10.10 **Authority.** Each of the below signers of this Agreement represent that they understand this Agreement and have the authority to sign on behalf of and bind the Parties they are representing.

10.11 **Notices.** All notices under this Agreement will be in writing and will be deemed to have been duly given when received, if personally delivered; when receipt is electronically confirmed, if transmitted by email; the day after it is sent, if sent for next day delivery by recognized overnight delivery service; and upon receipt, if sent by certified or registered mail, return receipt requested.

FLOCK NOTICES ADDRESS:

1170 HOWELL MILL ROAD, NW SUITE 210
ATLANTA, GA 30318
ATTN: LEGAL DEPARTMENT
EMAIL: legal@flocksafety.com

AGENCY NOTICES ADDRESS:

ADDRESS:

ATTN:
EMAIL:



BOARD OF YAKIMA COUNTY COMMISSIONERS

Amanda McKinney
District 1

Kyle Curtis
District 2

LaDon Linde
District 3

March 3, 2023

John Clary
Toppenish Police Department
1 W 1st Ave
Toppenish, WA 98948

Re: ARPA Application # 38230 – Flock Cameras

Dear ARPA Applicant-

Congratulations! The Board of Yakima County Commissioners has agreed to fund **\$80,028.00** from Yakima County's American Rescue Plan Act Recovery (ARPA) funds for the project stated above. We had many more applications than we had anticipated and those that we received were all very impressive so it took longer than anticipated to finalize the allocation of these funds.


Here is what you can expect moving forward on your ARPA award. Yakima County is working with CliftonLarsonAllen, LLC, to implement an ARPA tracking system to support the application, contracting, reimbursement and federal reporting requirements for the ARPA funds. Once this is in place, you will be contacted and shown how to enter your information into the system so we can move the agreement between Yakima County and your entity forward. Your contact with Yakima County will be Craig Warner, Financial Services Director, at (509) 574-1313 or at craig.warner@co.yakima.wa.us. If you have questions, please contact Craig.

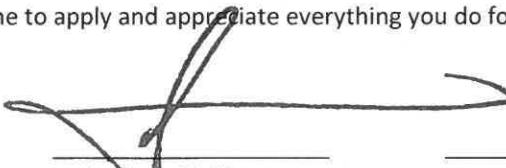
We know that we may not have been able to fund your entire project, and even if we did with inflation, you may be looking for other resources. Here are various funding opportunities that may be applicable to your project/program. We encourage your organization to look at the following resources to see if your project/program meets the funding guidelines:

- Supporting Investment in Economic Development (SIED)
<https://chooseyakimavalley.com/doing-business/public-infrastructure-funding-program-sied/>
- Yakima Valley Community Foundation
<https://yakimavalleycf.org/>
- WA Department of Commerce
<https://www.commerce.wa.gov/category/contracting-with-commerce/grants-and-loans/>
- Legends Casino – Yakama Cares
<https://legendscasino.com/yakama-cares/>
- Federal Government Grants and Loans
<https://www.usa.gov/grants>

We thank you for taking the time to apply and appreciate everything you do for our community.

With appreciation,


LaDon Linde
Chair of the Board
Commissioner, District 3


Amanda McKinney
Commissioner, District 1


Kyle Curtis
Commissioner, District 2

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Sole Source Letter for Flock Safety ALPR Cameras and Solution

Flock Safety is the sole manufacturer and developer of the Flock Safety ALPR Camera. Flock Safety is also the sole provider of the comprehensive monitoring, processing, and machine vision services which integrate with the Flock Safety ALPR Camera.

The Flock Safety ALPR camera and devices are the only Law Enforcement Grade ALPR System to offer the following combination of proprietary features:

1. Patented Vehicle Fingerprint Technology:
 - Patented proprietary machine vision to analyze vehicle license plate, state recognition, vehicle color, vehicle type, vehicle make and objects (roof rack, bumper stickers, etc.) based on image analytics (not car registration data)
 - Machine vision to capture and identify characteristics of vehicles with a paper license plate and vehicles with the absence of a license plate
 - Ability to 'Save Search' based on description of vehicles using our patented Vehicle Fingerprint Technology without the need for a license plate, and set up alerts based on vehicle description
 - Only LPR provider with "Visual Search" which can transform digital images from any source into an investigative lead by finding matching vehicles based on the vehicle attributes in the uploaded photo

2. Integrated Cloud-Software & Hardware Platform:
 - Ability to capture two (2+) lanes of traffic simultaneously with a single camera from a vertical mass
 - Best in class ability to capture and process up to 30,000 vehicles per day with a single camera powered exclusively by solar power
 - Wireless deployment of solar powered license plate reading cameras with integrated cellular communication weighing less than 5lbs and able to be powered solely by a solar panel of 60W or less
 - Web based footage retrieval tool with filtering capabilities such as vehicle color, vehicle type, vehicle manufacturer, partial or full license plate, state of license plate, and object detection
 - Utilizes motion capture to start and stop recording without the need for a reflective plate
 - Motion detection allows for unique cases such as bicycle capture, ATV, motorcycle, etc.
 - On device machine processing to limit LTE bandwidth consumption
 - Cloud storage of footage

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- Covert industrial design for minimizing visual pollution
- 3. Transparency & Ethical Product Design:
 - One-of-a-kind “Transparency Portal” public-facing dashboard that details the policies in place by the purchaser, as well as automatically updated metrics from the Flock system
 - Built-in integration with NCMEC to receive AMBER Alerts to find missing children
 - Privacy controls to enable certain vehicles to “opt-out” of being captured
- 4. Integrated Audio & Gunshot Detection:
 - Natively integrated audio detection capabilities utilizing machine learning to recognize audio signatures typical of crimes in progress (e.g., gunshots)
- 5. Partnerships:
 - Flock Safety is the only LPR provider to officially partner with AXON to be natively and directly integrated into Evidence.com
 - Flock Safety is the only LPR provider to be fully integrated into a dynamic network of Axon’s Fleet 3 mobile ALPR cameras for patrol cars and Flock Safety’s Falcon cameras
 - Access to additional cameras purchased by our HOA and private business partners, means an ever-increasing amount of cameras and data at no additional cost
- 6. Warranty & Service:
 - Lifetime maintenance and support included in subscription price
 - Flock Safety is the only fully integrated ALPR one-stop solution from production of the camera to delivery and installation
 - Performance monitoring software to predict potential failures, obstructions, tilts, and other critical or minor issues

Thank you,



Garrett Langley CEO, Flock Safety



**CITY OF TOPPENISH
REQUEST FOR COUNCIL ACTION
Agenda Bill No.: 23-021**

**Agenda Item
5d**

Meeting Date: March 27, 2023

Subject: Planning Commission Appointment

Prepared by: Heidi Riojas, City Clerk

Presented by: Elpidia Saavedra, Mayor

Approved For Agenda By: Debbie Zabell, City Manager

Discussion:

Toppenish Municipal Code 2.30 sets out the method for filling positions on advisory boards. Three members of the City Council are selected bi-annually to serve as the City's Selection Committee. For 2022-23 the members are Mayor Saavedra and Councilmembers Duval and Garcia.

There are currently two vacancies on the planning commission, which require the City Council's motion to appoint. The Planning Commission serves an essential role in the development of the City's Zoning and Development codes.

Staff has met with and discussed the requirements of the Planning Commission with HollyAnna DeCoteau Littlebull. Ms. Littlebull would like to serve on the planning commission and requests the Council consideration of her appointment.

Fiscal Impact: None.

Recommendation: Motion to appoint HollyAnna DeCoteau Littlebull to serve on the Planning Commission.

Alternatives: 1) Do not adopt. 2) Forward to Study Session for further review.