

Revised Proposed Contract Language (redlined)

Original Proposed Contract Language (redlined)

Subcommittee Report Questions/Issues

		<ul style="list-style-type: none">• The Fiscal Impact section asserts conclusions but does not provide any support for those conclusions in the form of a fiscal analysis including, but not limited to, a description of value received and value surrendered, as well as a capital equipment budget for connecting the new City fiber to the City facilities.• The Fiscal Impact section asserts future cost savings, but based on the current contract status, there are no demonstrable costs that are either due and payable or currently savable.• The Background and Analysis section provides no information regarding any City plans for expansion of existing City conduit during the next five years. A disclosure of such plans is important input to any fiscal analysis since Sections 4.2 and 5.4 of the proposed contract grant Astound/Wave monopoly rights to that conduit, excluding all other commercial competitors.• With respect to the Fiscal Impact section of the Staff Report, Section 3.3 of the proposed contract references City Equipment. Does the fiscal analysis of this proposed agreement include a capital budget for the referenced City Equipment?• In staff's preparation of the Fiscal Impact section conclusion, how was the value determined of the monopoly being granted to Wave in the existing conduit and future conduit?• With respect to the Fiscal Impact section of the Staff Report, Section 6.2 of the proposed contract appears to be saying that the 12%
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		<p>clause is a baseline and that the City can choose to have Wave install additional City Fiber beyond the 12% for an additional cost. What analysis has City staff performed to determine the value of having Wave install additional fiber for the City?</p> <ul style="list-style-type: none"> • With respect to the Fiscal Impact section of the Staff Report, Section 12.2(b) <i>Ownership of Facilities and Removal at Termination of the Agreement</i> of the recently expired Comcast contract (provided herein as Attachment 5) has similar provisions as Section 7.4 Effect of Expiration of the Astound/Wave contract. Those respective contract provisions control the rights of ownership and use of both the conduit and fiber after the expiration of the contract term. The Staff Report does not appear to include any acknowledgement or analysis of the current and future impact of Section 12.2(b) or Section 7.4, especially as they relate to any future cost savings referenced in the Fiscal Impact section of the Staff Report. If Comcast will be charging the City for the future use of its fiber, should the City be charging Comcast for the future use of the City’s conduit?
<p>CONDUIT AND DARK FIBER MASTER IRU SWAP AGREEMENT</p> <p>This CONDUIT AND DARK FIBER MASTER IRU SWAP AGREEMENT (this “Agreement”) is made and entered into as of this _____, 2019 (the “Effective Date”), by and between ASTOUND BROADBAND, LLC d/b/a Wave, a Washington limited liability company, for itself and as agent for its Affiliates (“Wave”), and CITY OF DAVIS, a political subdivision of the State of California (“City”). Each of Wave and City may be referred to in this Agreement as a “Party,” and</p>	<p>CONDUIT AND DARK FIBER MASTER IRU SWAP AGREEMENT</p> <p>This CONDUIT AND DARK FIBER MASTER IRU SWAP AGREEMENT (this “Agreement”) is made and entered into as of this _____, 2019 (the “Effective Date”), by and between ASTOUND BROADBAND, LLC d/b/a Wave, a Washington limited liability company, for itself and as agent for its Affiliates (“Wave”), and CITY OF DAVIS, a political subdivision of the State of California (“City”). Each of Wave and City may be referred to in this Agreement as a “Party,” and</p>	

collectively as the “Parties.” With respect to either Party, the term “Affiliate” shall mean any person who directly or indirectly controls, is controlled by, or is under common control with that Party.

Background

A. City owns or controls communications conduit and may hereafter install additional communications conduit in various areas of the City (collectively, the “City Conduit”).

B. Wave owns and operates a fiber optic network used to provide high-speed Internet access services, VoIP services, data transport, cable television services and other lawful services now existing or hereafter developed (collectively, the “Wave Services”) to residential, governmental and commercial customers in the City.

C. City desires to grant to Wave the irrevocable right to use certain portions of the City Conduit for purposes of installing Wave’s fiber optic cable (collectively, the “Wave Fiber”) and using same in conjunction with other portions of Wave’s network to provide the Wave Services.

D. Wave desires to install Wave Fiber in the City Conduit to which City grants Wave access.

E. If and when Wave installs Wave Fiber in such city conduit Wave will grant City the irrevocable right to use certain strands of such Wave Fiber that Wave installs in such City Conduit, all as more fully described in and subject to the terms and conditions of this Agreement.

F. This Agreement will apply to the conduit that the City, in its discretion, determines to offer to Wave and Wave, in its discretion, determines it wishes to install its fiber in; this Agreement, therefore, applies only to the Conduit that is

collectively as the “Parties.” With respect to either Party, the term “Affiliate” shall mean any person who directly or indirectly controls, is controlled by, or is under common control with that Party.

Background

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C. City desires to grant to Wave the irrevocable right to use certain portions of the City Conduit for purposes of installing Wave’s fiber optic cable (collectively, the “Wave Fiber”) and using same in conjunction with other portions of Wave’s network to provide the Wave Services.

D. If and when Wave installs Wave Fiber in the City Conduit to which City grants access, Wave will grant City the irrevocable right to use certain strands of such Wave Fiber that Wave installs in such City Conduit, all as more fully described in and subject to the terms and conditions of this Agreement.

<p>referenced in the Exhibits, as they may be amended from time to time.</p> <p>G. Because the irrevocable rights of use being traded by the Parties pursuant to this Agreement are recognized and acknowledged by the Parties as being of substantially equal value, there is no monetary payment component to this Agreement.</p>	<p>E. Because the irrevocable rights of use being traded by the Parties pursuant to this Agreement are recognized and acknowledged by the Parties as being of substantially equal value, there is no monetary payment component to this Agreement.</p>	<p><---- Background section E (now section G in the revised contract language) references "substantially equal value"; a basis for that statement needs to be provided.?</p>
<p style="text-align: center;"><u>Agreement</u></p> <p>NOW, THEREFORE, in consideration of the mutual promises set forth below, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Wave and City agree as follows:</p> <p style="text-align: center;">ARTICLE 1 CITY CONDUIT</p> <p>1.1 <u>City Conduit</u>. This Agreement is intended to be a master agreement to cover now existing City Conduit and City Conduit that is installed within the five (5) year period immediately following the Effective Date. On written request by Wave, City will promptly provide Wave with information concerning the location and size of any now-existing and any additional City Conduit installed during the five (5) year period immediately following the Effective Date that the City has determined it desires to make available to Wave. If Wave desires to use any such now-existing or additional City Conduit, Wave will provide written notice to City of same (a "Wave Use Request"). On receipt of a Wave Use Request, City will promptly determine if such use is acceptable to City and notify Wave of such determination (a "Conduit Use Approval or Use Denial"). In the event City fails to provide a Conduit Use Approval or Conduit Use Denial within thirty (30) days of the date of a Wave Use Request, then such City Conduit that was the subject of the Wave Use Request shall be the subject of good faith discussions between the</p>	<p style="text-align: center;"><u>Agreement</u></p> <p>NOW, THEREFORE, in consideration of the mutual promises set forth below, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Wave and City agree as follows:</p> <p style="text-align: center;">ARTICLE 1 CITY CONDUIT</p> <p>1.1 <u>City Conduit</u>. This Agreement is intended to be a master agreement to cover now existing City Conduit and City Conduit that is installed within the five (5) year period immediately following the Effective Date. On written request by Wave, City will promptly provide Wave with information concerning the location and size of any now-existing and any additional City Conduit installed during the five (5) year period immediately following the Effective Date.</p> <p>If Wave desires to use any such now-existing or additional City Conduit, Wave will provide written notice to City of same (a "Wave Use Request"). On receipt of a Wave Use Request, City will promptly determine if such use is acceptable to City and notify Wave of such determination (a "Conduit Use Approval or Use Denial"). In the event City fails to provide a Conduit Use Approval or Conduit Use Denial within thirty (30) days of the date of a Wave Use Request, then such City Conduit that was the subject of the Wave Use Request shall be the subject of good faith discussions between the parties;</p>	<p><---- Section 1.1 needs to include a map and detailed "location and length" description of the existing conduit.</p> <p><---- Shouldn't the Staff Report provide Council with the current 5-year plan for additional City Conduit?</p>

<p>parties; provided that the City will permit Wave to keep its request pending for review without re-starting such 30-day period for not more than six months. The City Conduit that becomes available for use by Wave is referred to herein as “Designated IRU Conduit”). The Parties will use their commercially reasonable efforts to maintain a written record of all Designated IRU Conduit that accurately depicts the location and length of all Designated IRU Conduit.</p>	<p>provided that the City will permit Wave to keep its request pending for review without re-starting such 30-day period.</p> <p>The City Conduit that becomes available for use by Wave is referred to herein as “Designated IRU Conduit”). The Parties will use their commercially reasonable efforts to maintain a written record of all Designated IRU Conduit that accurately depicts the location and length of all Designated IRU Conduit.</p>	<p><---Shouldn't the initial written record of the location and length of the current conduit be part of this agreement?</p>
<p>1.2 <u>Vaults</u>. Wave shall have the irrevocable right to access the Designated IRU Conduit at any of the now or hereafter existing vaults, manholes, handholes or other access points installed or otherwise established by the City through which the Designated IRU Conduit may be accessed. All currently existing, and all such vaults, manholes, handholes and other access points through which the Designated IRU Conduit may be accessed that are installed by the City following the Effective Date are referred to as the “City Conduit Vaults.” Subject to Wave obtaining any required permits from City and coordinating efforts with the City’s telecommunications department, Wave shall also have the irrevocable right to install, at Wave’s sole cost and expense, new vaults, manholes, handholes or other access points at such locations as Wave may determine from time to time through which the Designated IRU Conduit may be accessed (collectively, the “Wave Vaults”). During the IRU Term City shall have the irrevocable right to use the Wave Vaults and, on the expiration of the IRU Term all right, title and interest of Wave in the Wave Vaults shall be automatically conveyed to the City.</p> <p>1.3 <u>Condition of Designated IRU Conduit and City Conduit Vaults</u>. Because the Designated IRU Conduit and the City Conduit Vaults are installed underground, it is not feasible to inspect all of the Designated IRU Conduit or the City Conduit Vaults</p>	<p>1.2 <u>Vaults</u>. Wave shall have the irrevocable right to access the Designated IRU Conduit at any of the now or hereafter existing vaults, manholes, handholes or other access points installed or otherwise established by the City through which the Designated IRU Conduit may be accessed. All currently existing, and all such vaults, manholes, handholes and other access points through which the Designated IRU Conduit may be accessed that are installed by the City following the Effective Date are referred to as the “City Conduit Vaults.” Subject to Wave obtaining any required permits from City and coordinating efforts with the City’s telecommunications department, Wave shall also have the irrevocable right to install, at Wave’s sole cost and expense, new vaults, manholes, handholes or other access points at such locations as Wave may determine from time to time through which the Designated IRU Conduit may be accessed (collectively, the “Wave Vaults”). During the IRU Term City shall have the irrevocable right to use the Wave Vaults and, on the expiration of the IRU Term all right, title and interest of Wave in the Wave Vaults shall be automatically conveyed to the City.</p> <p>1.3 <u>Condition of Designated IRU Conduit and City Conduit Vaults</u>. Because the Designated IRU Conduit and the City Conduit Vaults are installed underground, it is not feasible to inspect all of the Designated IRU Conduit or the City Conduit Vaults</p>	

<p>prior to accepting same. Accordingly, Wave accepts the Designated IRU Conduit and the City Conduit Vaults as of the Effective Date in their AS-IS, WHERE-IS condition.</p>	<p>prior to accepting same. Accordingly, Wave accepts the Designated IRU Conduit and the City Conduit Vaults as of the Effective Date in their AS-IS, WHERE-IS condition.</p>	
<p style="text-align: center;">ARTICLE 2 WAVE FIBER</p> <p>2.1 <u>Wave Fiber</u>. This Agreement is intended to be a master agreement to cover all Wave Fiber that is installed in the Designated IRU Conduit during the five (5) year period immediately following the Effective Date. Following the installation of Wave Fiber in the Designated IRU Conduit, Wave will promptly provide written notice to City of the location of such Wave Fiber and City will have the irrevocable right, automatically and without any further action of the Parties, to use up to twelve (12) individual strands of said fiber in the event that Wave installs fiber with at least ninety-six (96) strands within the bundle or, if Wave installs a fiber cable with less than 96 strands, a number of strands not to exceed twelve percent (12%) of the strands included in the installed cable (such fiber strands to be provided for use by City being the “Designated IRU Fiber”). The Parties will use their commercially reasonable efforts to maintain a written record of the location and length of the segments of all Designated IRU Fiber.</p> <p>2.2 <u>Testing of Designated IRU Fibers</u>. Wave will test the Designated IRU Fibers to verify that those Designated IRU Fibers are performing in a manner consistent with Wave’s standard technical criteria and in no event in a manner lower than the technical criteria generally used in the telecommunications industry.</p>	<p style="text-align: center;">ARTICLE 2 WAVE FIBER</p> <p>2.1 <u>Wave Fiber</u>. This Agreement is intended to be a master agreement to cover all Wave Fiber that is installed in the Designated IRU Conduit during the five (5) year period immediately following the Effective Date. Following the installation of Wave Fiber in the Designated IRU Conduit, Wave will promptly provide written notice to City of the location of such Wave Fiber and City will have the irrevocable right, automatically and without any further action of the Parties, to use up to twelve (12) individual strands of said fiber in the event that Wave installs fiber with at least ninety-six (96) strands within the bundle or, if Wave installs a fiber cable with less than 96 strands, a number of strands not to exceed twelve percent (12%) of the strands included in the installed cable (such fiber strands to be provided for use by City being the “Designated IRU Fiber”). The Parties will use their commercially reasonable efforts to maintain a written record of the location and length of the segments of all Designated IRU Fiber.</p> <p>2.2 <u>Testing of Designated IRU Fibers</u>. Wave will test the Designated IRU Fibers to verify that those Designated IRU Fibers are performing in a manner consistent with Wave’s standard technical criteria and in no event in a manner lower than the technical criteria generally used in the telecommunications industry.</p>	
<p style="text-align: center;">ARTICLE 3 EQUIPMENT</p> <p>3.1 <u>Equipment</u>. “Equipment” means network components including, but not limited to, any gateway or edge electronic or optronic device,</p>	<p style="text-align: center;">ARTICLE 3 EQUIPMENT</p> <p>3.1 <u>Equipment</u>. “Equipment” means network components including, but not limited to, any gateway or edge electronic or optronic device,</p>	

<p>antenna, node, concentrator, bridge, receiver, transmitter, transceiver, router, switch, hub or communications lines/cables, and associated software.</p> <p>3.2 <u>Wave Equipment.</u> Any Equipment provided by Wave in connection with its use of the Designated IRU Conduit or the Designated IRU Fiber shall be referred to as the “Wave Equipment.” Except as expressly provided to the contrary elsewhere in this Agreement, throughout the IRU Term (as that term is defined in Article 7), the Wave Equipment shall remain the property of Wave and Wave shall be responsible for all maintenance and repair of the Wave Equipment. Neither City nor any third party acting under City’s authority will relocate, modify, tamper with, attempt to repair, replace or otherwise interfere with the Wave Equipment at any time or for any purpose.</p> <p>3.3 <u>City Equipment.</u> Any Equipment provided by City in connection its use of the Designated IRU Conduit or the Designated IRU Fiber shall be referred to as the “City Equipment.” Except as expressly provided to the contrary elsewhere in this Agreement, throughout the IRU Term, the City Equipment shall remain the property of City and City shall be responsible for all maintenance and repair of the City Equipment. Neither Wave nor any third party acting under Wave’s authority will relocate, modify, tamper with, attempt to repair, replace or otherwise interfere with the City Equipment at any time or for any purpose.</p>	<p>antenna, node, concentrator, bridge, receiver, transmitter, transceiver, router, switch, hub or communications lines/cables, and associated software.</p> <p>3.2 <u>Wave Equipment.</u> Any Equipment provided by Wave in connection with its use of the Designated IRU Conduit or the Designated IRU Fiber shall be referred to as the “Wave Equipment.” Except as expressly provided to the contrary elsewhere in this Agreement, throughout the IRU Term (as that term is defined in Article 7), the Wave Equipment shall remain the property of Wave and Wave shall be responsible for all maintenance and repair of the Wave Equipment. Neither City nor any third party acting under City’s authority will relocate, modify, tamper with, attempt to repair, replace or otherwise interfere with the Wave Equipment at any time or for any purpose.</p> <p>3.3 <u>City Equipment.</u> Any Equipment provided by City in connection its use of the Designated IRU Conduit or the Designated IRU Fiber shall be referred to as the “City Equipment.” Except as expressly provided to the contrary elsewhere in this Agreement, throughout the IRU Term, the City Equipment shall remain the property of City and City shall be responsible for all maintenance and repair of the City Equipment. Neither Wave nor any third party acting under Wave’s authority will relocate, modify, tamper with, attempt to repair, replace or otherwise interfere with the City Equipment at any time or for any purpose.</p>	<p><---- In the fiscal analysis of this project, what is the budget for the City Equipment necessary to make the City fiber usable?</p>
<p>ARTICLE 4 CITY’S GRANT OF CONDUIT IRU TO WAVE</p> <p>4.1 <u>Grant of Conduit IRU.</u> City hereby grants, transfers and conveys to Wave, and Wave receives and accepts from City, a non-exclusive, unrestricted, irrevocable and infeasible right of use in the Designated IRU Conduit, together with the right to access the Designated IRU Conduit at</p>	<p>ARTICLE 4 CITY’S GRANT OF CONDUIT IRU TO WAVE</p> <p>4.1 <u>Grant of Conduit IRU.</u> City hereby grants, transfers and conveys to Wave, and Wave receives and accepts from City, a non-exclusive, unrestricted, irrevocable and infeasible right of use in the Designated IRU Conduit, together with the right to access the Designated IRU Conduit at</p>	

the City Conduit Vaults. Wave's rights in the Designated IRU Conduit and the City Conduit Vaults granted pursuant to this Section shall be referred to as the "Conduit IRU." **Where City Conduit is divided into innerducts, the term Conduit IRU shall apply only to the innerducts of the City Conduit that Wave is using and the City may rent or use in any way the remainder of the innerducts in the City Conduit as the City in its discretion deems appropriate so long as such use does not interfere with Wave's use of its fiber installed in the Designated IRU Conduit.** The Conduit IRU is granted to Wave subject to the terms and conditions set forth in this Agreement. The Conduit IRU with respect to any Designated IRU Conduit existing as of the Effective Date shall take effect on the Effective Date. The Conduit IRU with respect to any Designated IRU Conduit installed after the Effective Date shall take effect on the date such Designated IRU Conduit is installed **pursuant to any Use Request agreed to by the parties.** In either respective case, the effective commencement of the Conduit IRU is referred to herein as the "Conduit IRU Commencement Date".

If or when the City installs new or additional City Conduit after the Effective Date, the City shall provide written notice to Wave regarding the City Conduit, its route, size and the approximate date the installation of the City Conduit will be completed. The City shall also state whether the City Conduit will be available to Wave. Wave shall provide the City notice of its desire to use one or more sections of the City Conduit within 30 days. Except as provided in section 1.1, if the City does not receive notice within that time, the City shall presume that Wave does not wish to negotiate for the use of the conduit; provided that the parties may include such City Conduit in this Agreement at a later date

the City Conduit Vaults. Wave's rights in the Designated IRU Conduit and the City Conduit Vaults granted pursuant to this Section shall be referred to as the "Conduit IRU."

The Conduit IRU is granted to Wave subject to the terms and conditions set forth in this Agreement. The Conduit IRU with respect to any Designated IRU Conduit existing as of the Effective Date shall take effect on the Effective Date. The Conduit IRU with respect to any Designated IRU Conduit installed after the Effective Date shall take effect on the date such Designated IRU Conduit is installed.

In either respective case, the effective commencement of the Conduit IRU is referred to herein as the "Conduit IRU Commencement Date".

should the parties so agree. If Wave desires use of all of a portion of the City Conduit, the parties shall meet and discuss whether the City Conduit will be occupied by Wave and under what terms and conditions, which terms and conditions shall be mutually agreeable to the parties and in writing and approved by the parties in writing. Such additional City Conduit may be added to this agreement or the parties may enter into a separate written agreement.

4.2 Effect of Conduit IRU. To the fullest extent permitted by law, the Parties intend that the Conduit IRU shall grant, transfer and convey to Wave all beneficial right, title and interest in the Designated IRU Conduit and that Wave shall have exclusive possession, use and control over the space within the Designated IRU Conduit granted to Wave pursuant to Section 4.1 and shall be for all purposes the equitable owner of such space within the Designated IRU Conduit during the IRU Term; provided, however, the Conduit IRU does not convey legal title or legal ownership of the Designated IRU Conduit. For the sake of clarity, the Conduit IRU is intended by the parties to be a beneficial property interest (as distinguished from a mere contractual interest) and the grant, transfer and conveyance of the Conduit IRU effected by this Agreement is intended by the parties to be fully completed and effective, with all conditions precedent deemed to have been satisfied in all respects immediately on the Conduit IRU Commencement Date. For the further sake of clarity, this Agreement is not intended by the Parties to be a revocable license, a lease or executory contract, but rather to effect the sale and purchase of the Designated IRU Conduit by City to Wave for the IRU Term.

4.3 No Revocation of Conduit IRU.
Notwithstanding the occurrence of a breach or

4.2 Effect of Conduit IRU. To the fullest extent permitted by law, the Parties intend that the Conduit IRU shall grant, transfer and convey to Wave all beneficial right, title and interest in the Designated IRU Conduit and that Wave shall have exclusive possession, use and control over the space within the Designated IRU Conduit granted to Wave pursuant to Section 4.1 and shall be for all purposes the equitable owner of such space within the Designated IRU Conduit during the IRU Term; provided, however, the Conduit IRU does not convey legal title or legal ownership of the Designated IRU Conduit. For the sake of clarity, the Conduit IRU is intended by the parties to be a beneficial property interest (as distinguished from a mere contractual interest) and the grant, transfer and conveyance of the Conduit IRU effected by this Agreement is intended by the parties to be fully completed and effective, with all conditions precedent deemed to have been satisfied in all respects immediately on the Conduit IRU Commencement Date. For the further sake of clarity, this Agreement is not intended by the Parties to be a revocable license, a lease or executory contract, but rather to effect the sale and purchase of the Designated IRU Conduit by City to Wave for the IRU Term.

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Notwithstanding the occurrence of a breach or

<---- This section 4.2 of the agreement in combination with section 5.4 of the agreement appears to give Wave a monopoly in the existing conduit and future conduit, excluding all other commercial competitors. Is that correct?

violation by Wave of any legal duty or obligation imposed by any contract, including this Agreement, by the law of torts (including simple or gross negligence, strict liability or willful misconduct), or by any federal, state or local laws, rules, regulations, orders, standards, judicial decrees or ordinances, during the IRU Term, City shall have no right to revoke or restrict the Conduit IRU in use by Wave in any manner or to any degree whatsoever, through injunctive relief or otherwise. The Parties mutually understand and agree that any breach by Wave with respect to the Conduit IRU shall be compensable, if at all, by a remedy at law for monetary damages not to exceed \$200,000 and not at equity. Conversely, and in recognition that the Conduit IRU cannot be readily obtained in the open market and that Wave will be irreparably injured if this Agreement cannot be specifically enforced, Wave shall be entitled, in addition to bringing suit at law or equity for monetary or other damages, to obtain specific performance to order implementation of the Conduit IRU contemplated by this Agreement as to Designated IRU Conduit that has been included in this Agreement.

In any action to enforce the provisions of this Agreement regarding the Conduit IRU, City hereby irrevocably and forever waives the defense that there is an adequate remedy at law and hereby irrevocably agrees that Wave shall have the right to obtain specific performance of the Conduit IRU contemplated by this Agreement.

4.4 Limitations of Conduit IRU. Except for purposes of maintenance and repair as permitted by Section 8.1, the Conduit IRU shall not include: (i) the right to own, control, maintain, modify, relocate or repair any other communications conduit or infrastructure that may be installed where the Designated IRU Conduit is located, any City Equipment, or any other portion of City's

violation by Wave of any legal duty or obligation imposed by any contract, including this Agreement, by the law of torts (including simple or gross negligence, strict liability or willful misconduct), or by any federal, state or local laws, rules, regulations, orders, standards, judicial decrees or ordinances, during the IRU Term, **City shall have no right to revoke or restrict the Conduit IRU in use by Wave in any manner or to any degree whatsoever, through injunctive relief or otherwise.** The Parties mutually understand and agree that any breach by Wave with respect to the Conduit IRU shall be compensable, if at all, by a remedy at law for **monetary damages not to exceed \$200,000 and not at equity.** Conversely, and in recognition that the Conduit IRU cannot be readily obtained in the open market and that Wave will be irreparably injured if this Agreement cannot be specifically enforced, Wave shall be entitled, in addition to bringing suit at law or equity for monetary or other damages, to obtain specific performance to order implementation of the Conduit IRU contemplated by this Agreement as to conduit that has been included in this Agreement **and in which Wave has installed fiber.** In any action to enforce the provisions of this Agreement regarding the Conduit IRU, City hereby irrevocably and forever waives the defense that there is an adequate remedy at law and hereby irrevocably agrees that Wave shall have the right to obtain specific performance of the Conduit IRU contemplated by this Agreement.

4.4 Limitations of Conduit IRU. Except for purposes of maintenance and repair as permitted by Section 8.1, the Conduit IRU shall not include: (i) the right to own, control, maintain, modify, relocate or repair any other communications conduit or infrastructure that may be installed where the Designated IRU Conduit is located, any City Equipment, or any other portion of City's

<---- This section 4.4 appears to grant Wave a 30-year monopoly in the existing conduit and future conduit, excluding all other commercial competitors. Is that in the best interests of the City and its consumers?

<p>network facilities; (ii) except for the right to access the Designated IRU Conduit at the City Conduit Vaults, the right to physically access any other portion of City’s network facilities; (iii) the right to encumber any other portion of City’s network facilities in any manner; or (iv) the right to use any other portion of City’s network facilities except as expressly set forth herein. Wave expressly acknowledges and agrees that Wave shall receive no rights to use any of the City Equipment in connection with the Conduit IRU. In connection with the Designated IRU Conduit, City is not supplying nor is City obligated to supply to Wave any fiber optic cable, optronics or electronics or optical or electrical equipment or other facilities, all of which are solely the responsibility of Wave, nor is City responsible for performing any work in connection with the Designated IRU Conduit other than as specified in this Agreement. Wave shall keep the Designated IRU Conduit, the City Equipment and all other portions of City’s network facilities, free from any liens, rights or claims of any third party attributable to Wave.</p>	<p>network facilities; (ii) except for the right to access the Designated IRU Conduit at the City Conduit Vaults, the right to physically access any other portion of City’s network facilities; (iii) the right to encumber any other portion of City’s network facilities in any manner; or (iv) the right to use any other portion of City’s network facilities except as expressly set forth herein. Wave expressly acknowledges and agrees that Wave shall receive no rights to use any of the City Equipment in connection with the Conduit IRU. In connection with the Designated IRU Conduit, City is not supplying nor is City obligated to supply to Wave any fiber optic cable, optronics or electronics or optical or electrical equipment or other facilities, all of which are solely the responsibility of Wave, nor is City responsible for performing any work in connection with the Designated IRU Conduit other than as specified in this Agreement. Wave shall keep the Designated IRU Conduit, the City Equipment and all other portions of City’s network facilities, free from any liens, rights or claims of any third party attributable to Wave.</p>	
<p>ARTICLE 5 WAVE’S GRANT OF FIBER IRU TO CITY</p> <p>5.1 <u>Grant of Fiber IRU.</u> Wave hereby grants, transfers and conveys to City, and City receives and accepts from Wave, an exclusive, unrestricted, irrevocable and indefeasible right of use in the Designated IRU Fibers, together with the right to access the Designated IRU Fibers at the End Points (as defined in Section 5.5) of same. City’s rights in the Designated IRU Fibers granted pursuant to this Section shall be referred to as the “Fiber IRU.” The Fiber IRU is granted to City subject to the terms and conditions set forth in this Agreement.</p> <p>5.2 <u>Effect of Fiber IRU.</u> To the fullest extent permitted by law, the Parties intend that the Fiber IRU shall grant, transfer and convey to City all</p>	<p>ARTICLE 5 WAVE’S GRANT OF FIBER IRU TO CITY</p> <p>5.1 <u>Grant of Fiber IRU.</u> Wave hereby grants, transfers and conveys to City, and City receives and accepts from Wave, an exclusive, unrestricted, irrevocable and indefeasible right of use in the Designated IRU Fibers, together with the right to access the Designated IRU Fibers at the End Points (as defined in Section 5.5) of same. City’s rights in the Designated IRU Fibers granted pursuant to this Section shall be referred to as the “Fiber IRU.” The Fiber IRU is granted to City subject to the terms and conditions set forth in this Agreement.</p> <p>5.2 <u>Effect of Fiber IRU.</u> To the fullest extent permitted by law, the Parties intend that the Fiber IRU shall grant, transfer and convey to City all</p>	<p><---- Sections 5.1, 5.5 and 2.1's collective description of the fiber IRU and its control needs a plain language revision.</p>

beneficial right, title and interest in the Designated IRU Fibers and that City shall have exclusive possession, use and control over and shall be for all purposes the equitable owner of the Designated IRU Fibers during the IRU Term; provided, however, the Fiber IRU does not convey legal title or legal ownership of the Designated IRU Fibers. For the sake of clarity, the Fiber IRU is intended by the parties to be a beneficial property interest (as distinguished from a mere contractual interest) and the grant, transfer and conveyance of the Fiber IRU effected by this Agreement is intended by the parties to be fully completed and effective, with all conditions precedent deemed to have been satisfied in all respects immediately on the Fiber IRU Commencement Date. For the further sake of clarity, this Agreement is not intended by the Parties to be a revocable license, a lease or executory contract, but rather to effect the sale and purchase of the Designated IRU Fibers by Wave to City for the IRU Term.

5.3 No Revocation of Fiber IRU. Except as and to the extent provided in Section 5.6, notwithstanding the occurrence of a breach or violation by City of any legal duty or obligation imposed by any contract, including this Agreement, by the law of torts (including simple or gross negligence, strict liability or willful misconduct), or by any federal, state or local laws, rules, regulations, orders, standards, judicial decrees or ordinances, during the IRU Term, Wave shall have no right to revoke or restrict the Fiber IRU in any manner or to any degree whatsoever, through injunctive relief or otherwise. The Parties mutually understand and agree that any breach by City with respect to the Fiber IRU shall be compensable, if at all, by a remedy at law for monetary damages not to exceed \$200,000 and not at equity. Conversely, and in recognition that the Fiber IRU cannot be

beneficial right, title and interest in the Designated IRU Fibers and that City shall have exclusive possession, use and control over and shall be for all purposes the equitable owner of the Designated IRU Fibers during the IRU Term; provided, however, the Fiber IRU does not convey legal title or legal ownership of the Designated IRU Fibers. For the sake of clarity, the Fiber IRU is intended by the parties to be a beneficial property interest (as distinguished from a mere contractual interest) and the grant, transfer and conveyance of the Fiber IRU effected by this Agreement is intended by the parties to be fully completed and effective, with all conditions precedent deemed to have been satisfied in all respects immediately on the Fiber IRU Commencement Date. For the further sake of clarity, this Agreement is not intended by the Parties to be a revocable license, a lease or executory contract, but rather to effect the sale and purchase of the Designated IRU Fibers by Wave to City for the IRU Term.

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readily obtained in the open market and that City will be irreparably injured if this Agreement cannot be specifically enforced, City shall be entitled, in addition to bringing suit at law or equity for monetary or other damages, to obtain specific performance to order implementation of the Fiber IRU contemplated by this Agreement as to **Designated IRU** Fiber that has been included in this Agreement.

In any action to enforce the provisions of this Agreement regarding the Fiber IRU, Wave hereby irrevocably and forever waives the defense that there is an adequate remedy at law and hereby irrevocably agrees that City shall have the right to obtain specific performance of the Fiber IRU contemplated by this Agreement.

5.4 Limitations of the Fiber IRU; Use Restrictions. The Fiber IRU shall not include: (i) the right to own, control, maintain, modify, relocate or repair the cable, bundle or sheath in which the Designated IRU Fibers is located, any Wave Equipment, or any other portion of Wave's network facilities; (ii) except for the right to access the Designated IRU Fibers at their End Points, the right to physically access any other Wave Fiber or any other portion of Wave's network facilities; (iii) the right to encumber the Designated IRU Fibers, any other Wave Fiber or any other portion of Wave's network facilities in any manner; or (iv) the right to use the Designated IRU Fibers or any other portion of Wave's network facilities except as expressly set forth herein. City expressly acknowledges and agrees that City shall receive no rights to use any of the Wave Equipment in connection with the Fiber IRU. In connection with the Fiber IRU, Wave is not supplying nor is Wave obligated to supply to City any optronics or electronics or optical or electrical equipment or other facilities, all of which are solely the responsibility of City, nor is Wave responsible

readily obtained in the open market and that City will be irreparably injured if this Agreement cannot be specifically enforced, City shall be entitled, in addition to bringing suit at law or equity for monetary or other damages, to obtain specific performance to order implementation of the Fiber IRU contemplated by this Agreement as to

fiber that has been included in this Agreement ~~and which City beneficial use of the fiber.~~ In any action to enforce the provisions of this Agreement regarding the Fiber IRU, Wave hereby irrevocably and forever waives the defense that there is an adequate remedy at law and hereby irrevocably agrees that City shall have the right to obtain specific performance of the Fiber IRU contemplated by this Agreement.

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<---- This section 5.4 of the agreement in combination with section 4.2 of the agreement appears to give Wave a monopoly in the existing conduit and future conduit, excluding all other commercial competitors. Is that correct?

for performing any work in connection with the Designated IRU Fibers other than as specified in this Agreement. City shall keep the Designated IRU Fibers, the Wave Equipment and all other portions of Wave's network facilities, free from any liens, rights or claims of any third party attributable to City. Except as expressly provided herein, the Designated IRU Fibers may be used by the City solely and exclusively for governmental purposes. The Fiber IRU does not include the right on the part of City to use or grant to any third-party the right to use any of the Designated IRU Fibers for commercial purposes that are competitive with the Wave Services or for resale purposes, regardless of whether such grant takes the form of a license, sublicense, lease, sublease, indefeasible right of use, or any other form (collectively, the "Use Restrictions"). If City grants to one or more persons the right to use all or any portion of the Designated IRU Fibers, City covenants that it shall include in each such grant a provision prohibiting the grantee from any use that would violate the Use Restrictions and City, at its sole cost and expense, shall undertake its best efforts to enforce the Use Restrictions. Wave understands City may desire to use the Designated IRU Fibers, or grant to one or more persons the right to use all or any portion of the Designated IRU Fibers, for the purposes of providing high-speed Internet access service and data transport service (the "Permissible Services") to end user customers in areas of the City where the Permissible Services are not then available from Wave or from any other commercial provider ("Unserviced Areas"). In such case, City will provide written notice to Wave of such desire and if Wave determines that Wave will not provide the Permissible Services to the identified Unserviced Areas within the next twelve (12) months, Wave will so notify City and City may use the Designated IRU Fibers or grant to one or more entities the right

for performing any work in connection with the Designated IRU Fibers other than as specified in this Agreement. City shall keep the Designated IRU Fibers, the Wave Equipment and all other portions of Wave's network facilities, free from any liens, rights or claims of any third party attributable to City. Except as expressly provided herein, the Designated IRU Fibers may be used by the City solely and exclusively for governmental purposes. The Fiber IRU does not include the right on the part of City to use or grant to any third-party the right to use any of the Designated IRU Fibers for commercial purposes that are competitive with the Wave Services or for resale purposes, regardless of whether such grant takes the form of a license, sublicense, lease, sublease, indefeasible right of use, or any other form (collectively, the "Use Restrictions"). If City grants to one or more persons the right to use all or any portion of the Designated IRU Fibers, City covenants that it shall include in each such grant a provision prohibiting the grantee from any use that would violate the Use Restrictions and City, at its sole cost and expense, shall undertake its best efforts to enforce the Use Restrictions. Wave understands City may desire to use the Designated IRU Fibers, or grant to one or more persons the right to use all or any portion of the Designated IRU Fibers, for the purposes of providing high-speed Internet access service and data transport service (the "Permissible Services") to end user customers in areas of the City where the Permissible Services are not then available from Wave or from any other commercial provider ("Unserviced Areas"). In such case, City will provide written notice to Wave of such desire and if Wave determines that Wave will not provide the Permissible Services to the identified Unserviced Areas within the next twelve (12) months, Wave will so notify City and City may use the Designated IRU Fibers or grant to one or more entities the right

<p>to use all or any portion of the Designated IRU Fibers (i) solely for the purpose of providing the Permissible Services, (ii) solely in the identified Unserved Areas, (iii) for a period of time not to exceed five (5) years from the date of Wave’s notice stating that Wave has no immediate plans to expand its network to serve the Unserved Area(s) at issue, and such use shall not be deemed a violation of the Use Restrictions.</p> <p>5.5 <u>Wave’s Control over the Fiber Route.</u> Wave shall at all times have full and complete control and responsibility for determining any routing configurations of the Designated IRU Fibers, and may route the fiber optic cable, bundle or sheath containing the Designated IRU Fibers through any Wave facility in its reasonable discretion, so long as (i) the end points of the Designated IRU Fibers are located as described in Section 2.1 (the “End Points”), and (ii) the Designated IRU Fibers continues to meet the Fiber Specifications.</p> <p>5.6 <u>Condition Precedent to Continued Effectiveness.</u> Notwithstanding anything to the contrary contained elsewhere in this Agreement, the Parties expressly understand and agree that the effectiveness of the Fiber IRU is dependent upon the continued effectiveness of the Conduit IRU. Should, at any time during the Term of this Agreement, the Conduit IRU cease to have force or effect, for any reason, then the Fiber IRU shall cease to have force or effect co-terminously with the Conduit IRU.</p>	<p>to use all or any portion of the Designated IRU Fibers (i) solely for the purpose of providing the Permissible Services, (ii) solely in the identified Unserved Areas, (iii) for a period of time not to exceed five (5) years from the date of Wave’s notice stating that Wave has no immediate plans to expand its network to serve the Unserved Area(s) at issue, and such use shall not be deemed a violation of the Use Restrictions.</p> <p>5.5 <u>Wave’s Control over the Fiber Route.</u> Wave shall at all times have full and complete control and responsibility for determining any routing configurations of the Designated IRU Fibers, and may route the fiber optic cable, bundle or sheath containing the Designated IRU Fibers through any Wave facility in its reasonable discretion, so long as (i) the end points of the Designated IRU Fibers are located as described in Section 2.1 (the “End Points”), and (ii) the Designated IRU Fibers continues to meet the Fiber Specifications.</p> <p>5.6 <u>Condition Precedent to Continued Effectiveness.</u> Notwithstanding anything to the contrary contained elsewhere in this Agreement, the Parties expressly understand and agree that the effectiveness of the Fiber IRU is dependent upon the continued effectiveness of the Conduit IRU. Should, at any time during the Term of this Agreement, the Conduit IRU cease to have force or effect, for any reason, then the Fiber IRU shall cease to have force or effect co-terminously with the Conduit IRU.</p>	
<p>ARTICLE 6 NO MONETARY CONSIDERATION FOR IRUS</p> <p>6.1 <u>No Conduit IRU Fee Due from Wave.</u> No cash compensation is due from Wave in connection with receiving the Conduit IRU from City, as Wave’s receipt of the Conduit IRU is a material condition of City’s receipt from Wave of the Fiber IRU. However,</p>	<p>ARTICLE 6 NO MONETARY CONSIDERATION FOR IRUS</p> <p>6.1 <u>No Conduit IRU Fee Due from Wave.</u> No cash compensation is due from Wave in connection with receiving the Conduit IRU from City, as Wave’s receipt of the Conduit IRU is a material condition of City’s receipt from Wave of the Fiber IRU. However,</p>	<p><---- (1) This section 6.1's explanation of fee calculations needs both a plain language revision, as well as an illustrative example of how the "parity" formula will be calculated, and (2) how</p>

<p>Wave will be responsible for any and all charges associated with any changes or additions to the Designated IRU Conduit that are requested by Wave and agreed to by City. The parties intend for there to be relative parity between (x) the total route miles of Designated IRU Conduit into which Wave has placed Wave Fiber and (y) the total fiber miles of Designated IRU Fibers so will endeavor to evaluate such relative parity on a regular basis and work in good faith to maintain such relative parity.</p> <p>6.2 <u>No Fiber IRU Fee Due from City.</u> No cash compensation is due from City in connection with receiving the Fiber IRU from Wave, as City's receipt of the Fiber IRU is a material condition of Wave's receipt from City of the Conduit IRU. However, City will be responsible for any and all charges associated with (i) any cross connects to the Designated IRU Fibers requested by City, and (ii) any changes or additions to the Designated IRU Fibers that are requested by City and agreed to by Wave.</p> <p>6.3 <u>No Scheduled Maintenance Fees.</u> Neither Party shall pay any scheduled maintenance fees to the other Party in connection with this Agreement.</p> <p>6.4 <u>Unscheduled Maintenance Costs.</u> City shall be responsible for paying its Proportionate Share of Unscheduled Maintenance Costs with respect to the Designated IRU Fibers. Wave shall be responsible for paying its Proportionate Share of Unscheduled Maintenance Costs solely with respect to the Designated IRU Conduit used by Wave pursuant to the Conduit IRU.</p>	<p>Wave will be responsible for any and all charges associated with any changes or additions to the Designated IRU Conduit that are requested by Wave and agreed to by City. The parties intend for there to be relative parity between (x) the total route miles of Designated IRU Conduit into which Wave has placed Wave Fiber and (y) the total fiber miles of Designated IRU Fibers so will endeavor to evaluate such relative parity on a regular basis and work in good faith to maintain such relative parity</p> <p>6.2 <u>No Fiber IRU Fee Due from City.</u> No cash compensation is due from City in connection with receiving the Fiber IRU from Wave, as City's receipt of the Fiber IRU is a material condition of Wave's receipt from City of the Conduit IRU. However, City will be responsible for any and all charges associated with (i) any cross connects to the Designated IRU Fibers requested by City, and (ii) any changes or additions to the Designated IRU Fibers that are requested by City and agreed to by Wave.</p> <p>6.3 <u>No Scheduled Maintenance Fees.</u> Neither Party shall pay any scheduled maintenance fees to the other Party in connection with this Agreement.</p> <p>6.4 <u>Unscheduled Maintenance Costs.</u> City shall be responsible for paying its Proportionate Share of Unscheduled Maintenance Costs with respect to the Designated IRU Fibers. Wave shall be responsible for paying its Proportionate Share of Unscheduled Maintenance Costs solely with respect to the Designated IRU Conduit used by Wave pursuant to the Conduit IRU.</p>	<p>was the formula in this section 6.1 accounted for in the fiscal analysis performed by staff?</p> <p><---- What this Section 6.2 appears to be saying is that the 12% clause is a baseline and that the City can choose to have Wave install additional City Fiber beyond the 12% for an additional cost. What analysis has City staff performed to determine the value of having Wave install additional fiber for the City?</p>
<p>ARTICLE 7 TERM OF CONDUIT IRU AND FIBER IRU</p> <p>7.1 <u>Conduit IRU Commencement Date.</u> The Conduit IRU for all Designated IRU Conduit installed as of the Effective Date shall become effective on Effective Date and the Conduit IRU for all City</p>	<p>ARTICLE 7 TERM OF CONDUIT IRU AND FIBER IRU</p> <p>7.1 <u>Conduit IRU Commencement Date.</u> The Conduit IRU for all Designated IRU Conduit installed as of the Effective Date shall become effective on Effective Date and the Conduit IRU for all City</p>	

Conduit installed after the Effective Date shall become effective as of the date of the installation of such City Conduit (as applicable, the “**Conduit IRU Commencement Date**”).

7.2 Fiber IRU Commencement Date. The Fiber IRU for each segment of the Designated IRU Fibers shall become effective on the respective Fiber IRU Commencement Dates for each segment of the Designated IRU Fibers as described in Section 2.3.

7.3 IRU Term. Although the Conduit IRU Commencement Date and the Fiber IRU Commencement Date will occur at different times, the Parties intend that the Conduit IRU and the Fiber IRU shall be co-terminous. Accordingly, the term of the Conduit IRU and the Fiber IRU shall be for thirty (30) years (the “**IRU Term**”), commencing on the Effective Date, and expiring on the thirtieth (30th) anniversary of the Effective Date (the “**IRU Expiration Date**”).

7.4 Effect of Expiration. Upon the expiration of the IRU Term (i) all rights to use the Designated IRU Conduit shall revert to City, and Wave shall have no further right hereunder to use the Designated IRU Conduit, and (ii) all rights to use the Designated IRU Fibers shall revert to Wave, and City shall have no further right hereunder to use the Designated IRU Fibers unless Wave abandons same in accordance with the following sentence. Wave shall have the option, within ninety (90) days after the expiration of the IRU Term, to remove any Wave Fiber, Wave Equipment and/or other Wave-owned facilities installed in the Designated IRU Conduit or the City Conduit Vaults. At the end of said sixty (60) day period, any Wave Fiber, Wave Equipment, the Wave Vaults and/or other Wave-owned facilities that remain in the Designated IRU Conduit or the City Conduit Vaults shall be deemed abandoned and become the property of City.

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<---- Does the recently expired Comcast contract have similar Effect of Expiration terms as Section 7.4. If so, then Comcast has no right to continue to use the City conduit, unless there is an agreement to do so, with a fee paid to the City for such use. Comcast is charging the City for the use of its fiber, should the City be charging Comcast for the use of the City’s conduit?

ARTICLE 8 AVAILABILITY, MAINTENANCE AND REPAIR

8.1 Availability, Maintenance and Repair of Designated IRU Conduit and City Conduit Vaults. Beginning on the Conduit IRU Commencement Date and continuing through the IRU Term, City shall use commercially reasonable efforts in keeping with normal telecommunications industry standards to ensure that the Designated IRU Conduit and each of the City Conduit Vaults are available to Wave twenty-four (24) hours per day, seven (7) days per week. Except for any damage to the Designated IRU Conduit or the City Conduit Vaults caused by Wave, for which Wave shall be liable, City shall have the responsibility for maintaining and repairing the Designated IRU Conduit and the City Conduit Vaults, at City's cost and expense. Temporary interruptions in the availability of the Designated IRU Conduit for damage to the Designated IRU Conduit caused by Wave, its agents and employees, or by Force Majeure Events, will not constitute failures by City to perform its obligations under this Agreement. Wave shall have the right, at its cost and expense, to maintain and repair the Designated IRU Conduit and the City Conduit Vaults.

8.2 Availability and Maintenance of Designated IRU Fibers.

(a) Availability of Designated IRU Fibers. Beginning on the Fiber IRU Commencement Date and continuing through the IRU Term, Wave shall use commercially reasonable efforts in keeping with normal telecommunications industry standards to ensure that the Designated IRU Fibers are available to City twenty-four (24) hours per day, seven (7) days per week. It is possible, however, that there will be interruptions in the availability of the Designated IRU Fibers. City understands and

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agrees that the Designated IRU Fibers, or certain portions or components of the Designated IRU Fibers, may be unavailable from time to time either for scheduled or unscheduled maintenance, due to fiber cuts or other reasons beyond Wave's reasonable control. Temporary interruptions in the availability of the Designated IRU Fibers for such reasons, as well as interruptions or outages caused by City, its agents and employees, or by Force Majeure Events, will not constitute failures by Wave to perform its obligations under this Agreement.

(b) Maintenance of Designated IRU Fibers. Beginning on the Fiber IRU Commencement Date and continuing through the IRU Term, Wave shall be responsible for performing both regularly scheduled maintenance activities and unscheduled emergency maintenance activities with respect to the Designated IRU Fibers in a manner consistent with Wave's standard maintenance practices. Regularly scheduled maintenance shall be performed at Wave's cost and expense.

(c) Unscheduled Maintenance. The costs and expenses of performing Unscheduled Maintenance (the "**Unscheduled Maintenance Costs**") will be allocated among Wave, City and other authorized users, if any, of the affected portion of the Wave Fiber or City conduit at issue; provided that, any Unscheduled Maintenance necessitated due to the negligence or intentional misconduct of City shall be paid for by City and any unscheduled maintenance necessitated due to the negligence or intentional misconduct of Wave shall be paid for by Wave. For purposes of this Agreement, City's "**Proportionate Share**" of any costs related to Wave Fiber shall be determined by the ratio to which the number of fiber optic strands comprising the Designated IRU Fibers in that Wave Fiber bears to the total number of fiber optic

agrees that the Designated IRU Fibers, or certain portions or components of the Designated IRU Fibers, may be unavailable from time to time either for scheduled or unscheduled maintenance, due to fiber cuts or other reasons beyond Wave's reasonable control. Temporary interruptions in the availability of the Designated IRU Fibers for such reasons, as well as interruptions or outages caused by City, its agents and employees, or by Force Majeure Events, will not constitute failures by Wave to perform its obligations under this Agreement.

(b) Maintenance of Designated IRU Fibers. Beginning on the Fiber IRU Commencement Date and continuing through the IRU Term, Wave shall be responsible for performing both regularly scheduled maintenance activities and unscheduled emergency maintenance activities with respect to the Designated IRU Fibers in a manner consistent with Wave's standard maintenance practices. Regularly scheduled maintenance shall be performed at Wave's cost and expense.

(c) Unscheduled Maintenance. The costs and expenses of performing Unscheduled Maintenance (the "**Unscheduled Maintenance Costs**") will be allocated among Wave, City and other authorized users, if any, of the affected portion of the Wave Fiber or City conduit at issue; provided that, any Unscheduled Maintenance necessitated due to the negligence or intentional misconduct of City shall be paid for by City and any unscheduled maintenance necessitated due to the negligence or intentional misconduct of Wave shall be paid for by Wave. For purposes of this Agreement, City's "**Proportionate Share**" of any costs related to Wave Fiber shall be determined by the ratio to which the number of fiber optic strands comprising the Designated IRU Fibers in that Wave Fiber bears to the total number of fiber optic

<p>strands in said Wave Fiber that are currently in use (whether by Wave, City or other Authorized Users). If this fraction varies over portions of the Wave Fiber, then the Proportionate Share shall be equal to the weighted average (weighted by length as set forth in Wave' as-built drawings) of such relevant portions. For example, if the fraction for 100 feet of the affected segment is 0.1 and the fraction for the remaining 50 feet of the affected segment is 0.07, the weighted average for the entire Wave Fiber would be 0.09. Wave shall invoice City for City's Proportionate Share of any Unscheduled Maintenance Costs, and City shall pay same within thirty (30) days of the invoice date. Similarly, Wave's "Proportionate Share" of any costs related to City Conduit shall be determined by the ratio to which the sections of conduit that Wave Fiber (excluding IRU Fiber) occupies bears to the total sections of conduit requiring unscheduled maintenance. If this fraction varies over portions of the conduit, then the Proportionate Share shall be equal to the weighted average (weighted by length as set forth in Wave's as-built drawings) of such relevant portions. City shall invoice Wave for Wave's Proportionate Share of any Unscheduled Maintenance Costs, and Wave shall pay same within thirty (30) days of the invoice date. The Parties understand and agree that cost for the relevant conduit and fiber may be offset and the party owing the other party after offset shall pay the amount owed.</p> <p>8.3 <u>Equipment Maintenance</u>. Except to the extent otherwise expressly provided in the Agreement, each Party will be solely responsible for providing and paying for any and all maintenance of all of its own Equipment used in connection with this Agreement.</p>	<p>strands in said Wave Fiber that are currently in use (whether by Wave, City or other Authorized Users). If this fraction varies over portions of the Wave Fiber, then the Proportionate Share shall be equal to the weighted average (weighted by length as set forth in Wave' as-built drawings) of such relevant portions. For example, if the fraction for 100 feet of the affected segment is 0.1 and the fraction for the remaining 50 feet of the affected segment is 0.07, the weighted average for the entire Wave Fiber would be 0.09. Wave shall invoice City for City's Proportionate Share of any Unscheduled Maintenance Costs, and City shall pay same within thirty (30) days of the invoice date. Similarly, Wave's "Proportionate Share" of any costs related to City Conduit shall be determined by the ratio to which the sections of conduit that Wave Fiber (excluding IRU Fiber) occupies bears to the total sections of conduit requiring unscheduled maintenance. If this fraction varies over portions of the conduit, then the Proportionate Share shall be equal to the weighted average (weighted by length as set forth in the City's as-built drawings) of such relevant portions. City shall invoice Wave for Wave's Proportionate Share of any Unscheduled Maintenance Costs, and Wave shall pay same within thirty (30) days of the invoice date. The Parties understand and agree that cost for the relevant conduit and fiber may be offset and the party owing the other party after offset shall pay the amount owed.</p> <p>8.3 <u>Equipment Maintenance</u>. Except to the extent otherwise expressly provided in the Agreement, each Party will be solely responsible for providing and paying for any and all maintenance of all of its own Equipment used in connection with this Agreement.</p>	
<p>ARTICLE 9 TAXES, FEES AND OTHER IMPOSITIONS</p>	<p>ARTICLE 9 TAXES, FEES AND OTHER IMPOSITIONS</p>	

9.1 Definition of Impositions. As used in this Agreement, the term “**Impositions**” shall mean all taxes, fees, assessments, levies, imposts, duties, charges or withholdings of any nature (including, without limitation, ad valorem, real property, gross receipts, franchise, license and permit fees), together with any penalties, fines or interest thereon arising out of the transactions contemplated by this Agreement and/or imposed upon the IRU Conduit, or any part thereof, by any federal, state or local government or other public taxing authority, including Access Fees. The term “**Access Fees**” shall mean all fees charged or assessed by any governmental authority in respect of those portions of the IRU Conduit located on or crossing or passing through lands owned or administered by such governmental authority including, without limitation, such as are calculated or otherwise based on the number of crossings, the aggregate distance of crossings, land value or the revenue, projected revenue, receipts, income, profits or other amounts calculated in a similar manner.

9.2 Payment of Impositions Prior to IRU Effective Date. Prior to the IRU Effective Date, City shall be responsible for and shall timely pay any and all Impositions with respect to the ownership, operation or physical location of the IRU Conduit.

9.3 Payment of Impositions During the IRU Term. Beginning on the Conduit IRU Commencement Date and continuing through the IRU Expiration Date, City will either (a) waive all Impositions imposed on, based on, or otherwise measured by the gross receipts, gross income, net receipts or net income received by or accrued to Wave with respect to its use of the Designated IRU Conduit, and all Impositions assessed, allocated to, or imposed on Wave due to Wave’s use of the Designated IRU Conduit or (b) at City’s election,

9.1 Definition of Impositions. As used in this Agreement, the term “**Impositions**” shall mean all taxes, fees, assessments, levies, imposts, duties, charges or withholdings of any nature (including, without limitation, ad valorem, real property, gross receipts, franchise, license and permit fees), together with any penalties, fines or interest thereon arising out of the transactions contemplated by this Agreement and/or imposed upon the IRU Conduit, or any part thereof, by any federal, state or local government or other public taxing authority, including Access Fees. The term “**Access Fees**” shall mean all fees charged or assessed by any governmental authority in respect of those portions of the IRU Conduit located on or crossing or passing through lands owned or administered by such governmental authority including, without limitation, such as are calculated or otherwise based on the number of crossings, the aggregate distance of crossings, land value or the revenue, projected revenue, receipts, income, profits or other amounts calculated in a similar manner.

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<---- This Section 9.3 appears to give Wave a franchise to sell its services (both current and future) free of any Franchise Fee. Was the value of that zero-dollar Franchise Fee included in the fiscal analysis that supports the findings of the Fiscal Impact section of the Staff Report?

permit Wave to pass through to City any such Impositions except as provided in section 9.4 and section 9.5.

9.4 Revenue & Taxation Code Section 107.6. Possessory Interest Tax. Wave recognizes and understands that this Agreement may create a possessory interest in the IRU Conduit subject to property taxes and that, if a possessory interest is created, Wave shall be responsible for payment of property or possessory interest taxes levied against such possessory interest. Wave, at its cost, shall have the right at any time to seek a reduction in the assessed valuation of the Premises and the Property or to contest any real property taxes that are to be paid by Wave. If Wave seeks a reduction or contests the real property taxes, the failure on Wave's part to pay the real property taxes shall not constitute a default so long as Wave complies with the provisions of this Section. City shall not be required to join in any proceeding or contest brought by Wave unless the provisions of any law require that the proceeding or contest be brought by or in the name of City or any owner of the Property. In that case City shall join in the proceeding or contest or permit it to be brought in City's name so long as City is not required to bear any cost. Wave, on final determination of the proceeding or contest, shall immediately pay or discharge any decision or judgment rendered, together with all reasonable costs, charges, interest, and penalties incidental to the decision or judgment.

9.5 Payment of Impositions on the IRU Fiber. Nothing in this Agreement shall impact or affect Wave's obligations to pay any and all Impositions imposed on Wave's business by the City or by any other governmental entities for services provided

permit Wave to pass through to City any such Impositions except as provided in section 9.4 and section 9.5.

9.4 Revenue & Taxation Code Section 107.6. Possessory Interest Tax. Wave recognizes and understands that this Agreement may create a possessory interest in the IRU Conduit subject to property taxes and that, if a possessory interest is created, Wave shall be responsible for payment of property or possessory interest taxes levied against such possessory interest. Wave, at its cost, shall have the right at any time to seek a reduction in the assessed valuation of the Premises and the Property or to contest any real property taxes that are to be paid by Wave. If Wave seeks a reduction or contests the real property taxes, the failure on Wave's part to pay the real property taxes shall not constitute a default so long as Wave complies with the provisions of this Section. City shall not be required to join in any proceeding or contest brought by Wave unless the provisions of any law require that the proceeding or contest be brought by or in the name of City or any owner of the Property. In that case City shall join in the proceeding or contest or permit it to be brought in City's name so long as City is not required to bear any cost. Wave, on final determination of the proceeding or contest, shall immediately pay or discharge any decision or judgment rendered, together with all reasonable costs, charges, interest, and penalties incidental to the decision or judgment. .

9.5 Payment of Impositions on the IRU Fiber. Nothing in this Agreement shall impact or affect Wave's obligations to pay any and all Impositions imposed on Wave's business by the City or by any other governmental entities for services provided

<---- This Section 9.5 appears to provide for a limited Franchise Fee. How will sections 9.3 and 9.5 work together? How has the fiscal analysis valued these two interconnected provisions? How has the "relative parity" formula valued these two interconnected provisions?

<p>to customers which do not use the Designated IRU Fibers.</p> <p>9.6 <u>Preparation of Returns and Reports.</u> City and Wave agree to cooperate fully with one another in the preparation of any returns or reports relating to the Impositions.</p>	<p>to customers which do not use the Designated IRU Fibers.</p> <p>9.6 <u>Preparation of Returns and Reports.</u> City and Wave agree to cooperate fully with one another in the preparation of any returns or reports relating to the Impositions.</p>	
<p>ARTICLE 10 UNDERLYING RIGHTS; RELOCATION</p> <p>10.1 <u>Underlying Rights.</u> Subject to the terms and provisions of this Agreement, City shall use commercially reasonable efforts to obtain and maintain during the IRU Term, all rights-of-way use and other use or access permits or agreements which are necessary for the installation, location, maintenance and use of the Designated IRU Conduit in accordance with this Agreement (the “City Underlying Rights”). The Conduit IRU and the Fiber IRU are both subject to the terms of the City Underlying Rights, and subject to the terms under which the applicable rights-of-way are owned or held by the grantor of the City Underlying Rights. Each Party agrees to comply with the terms and conditions of the City Underlying Rights.</p> <p>10.2 <u>Relocation.</u> After the Conduit IRU Commencement Date, City may relocate, at City’s sole cost and expense, all or any portion of the Designated IRU Conduit under either of the following circumstances: (i) City is required to relocate by a third party with legal authority to so require (including, without limitation, the grantor of a City Underlying Right); (ii) City elects to relocate the Designated IRU Conduit at City’s discretion or (iii) Wave agrees to the relocation. Should any of the foregoing occur, City shall use commercially reasonable efforts to minimize any disruptions in Wave’s business operations involving the Designated IRU Conduit. In the event of a relocation required by a third party with the legal authority to so require, Wave shall be responsible</p>	<p>ARTICLE 10 UNDERLYING RIGHTS; RELOCATION</p> <p>10.1 <u>Underlying Rights.</u> Subject to the terms and provisions of this Agreement, City shall use commercially reasonable efforts to obtain and maintain during the IRU Term, all rights-of-way use and other use or access permits or agreements which are necessary for the installation, location, maintenance and use of the Designated IRU Conduit in accordance with this Agreement (the “City Underlying Rights”). The Conduit IRU and the Fiber IRU are both subject to the terms of the City Underlying Rights, and subject to the terms under which the applicable rights-of-way are owned or held by the grantor of the City Underlying Rights. Each Party agrees to comply with the terms and conditions of the City Underlying Rights.</p> <p>10.2 <u>Relocation.</u> After the Conduit IRU Commencement Date, City may relocate, at City’s sole cost and expense, all or any portion of the Designated IRU Conduit under either of the following circumstances: (i) City is required to relocate by a third party with legal authority to so require (including, without limitation, the grantor of a City Underlying Right); (ii) City elects to relocate the Designated IRU Conduit at City’s discretion or (iii) Wave agrees to the relocation. Should any of the foregoing occur, City shall use commercially reasonable efforts to minimize any disruptions in Wave’s business operations involving the Designated IRU Conduit. In the event of a relocation required by a third party with the legal authority to so require, Wave shall be responsible</p>	

<p>for its proportionate share of the total costs of the relocation, based on the percentage the Designated IRU Conduit bears to the total communications and utility facilities that are being relocated.</p>	<p>for its proportionate share of the total costs of the relocation, based on the percentage the Designated IRU Conduit bears to the total communications and utility facilities that are being relocated.</p>	
<p>ARTICLE 11 THIRD – PARTY INDEMNIFICATION</p> <p>11.1 <u>Third-Party Indemnification by Wave.</u> Subject always to an aggregate maximum liability in the amount of Two Hundred Thousand Dollars (\$200,000), Wave hereby agrees to indemnify, defend and hold harmless City, its employees, officers and directors (the “City Indemnified Persons”), from and against any and all third-party suits, actions, damages or claims of any character suffered by the City Indemnified Persons due to or arising out of: (i) any injuries or damage to persons or property to the extent the same are caused by the grossly negligent acts or omissions of Wave in the performance of its obligations under this Agreement; or (ii) Wave’s use of the Designated IRU Conduit.</p> <p>11.2 <u>Third-Party Indemnification by City.</u> Subject always to an aggregate maximum liability in the amount of Two Hundred Thousand Dollars (\$200,000), City hereby agrees to indemnify, defend and hold harmless Wave, its Affiliates, and their employees, agents, officers and directors (the “Wave Indemnified Persons”), from and against any and all third-party suits, actions, damages or claims of any character suffered by the Wave Indemnified Persons due to or arising out of: (i) any injuries or damage to persons or property to the extent the same are caused by the grossly negligent acts or omissions of City in the performance of its obligations under this Agreement; or (ii) City’s use of the Designated IRU Fibers.</p> <p>11.3 <u>Procedure.</u> Wave and the City each agree to promptly provide the other with notice of any claim which may result in an indemnification</p>	<p>ARTICLE 11 THIRD – PARTY INDEMNIFICATION</p> <p>11.1 <u>Third-Party Indemnification by Wave.</u> Subject always to an aggregate maximum liability in the amount of Two Hundred Thousand Dollars (\$200,000), Wave hereby agrees to indemnify, defend and hold harmless City, its employees, officers and directors (the “City Indemnified Persons”), from and against any and all third-party suits, actions, damages or claims of any character suffered by the City Indemnified Persons due to or arising out of: (i) any injuries or damage to persons or property to the extent the same are caused by the grossly negligent acts or omissions of Wave in the performance of its obligations under this Agreement; or (ii) Wave’s use of the Designated IRU Conduit.</p> <p>11.2 <u>Third-Party Indemnification by City.</u> Subject always to an aggregate maximum liability in the amount of Two Hundred Thousand Dollars (\$200,000), City hereby agrees to indemnify, defend and hold harmless Wave, its Affiliates, and their employees, agents, officers and directors (the “Wave Indemnified Persons”), from and against any and all third-party suits, actions, damages or claims of any character suffered by the Wave Indemnified Persons due to or arising out of: (i) any injuries or damage to persons or property to the extent the same are caused by the grossly negligent acts or omissions of City in the performance of its obligations under this Agreement; or (ii) City’s use of the Designated IRU Fibers.</p> <p>11.3 <u>Procedure.</u> Wave and the City each agree to promptly provide the other with notice of any claim which may result in an indemnification</p>	

<p>obligation hereunder. The indemnifying Party may defend such claim with counsel of its own choosing provided that no settlement or compromise of any such claim shall occur without the consent of the indemnified Party, which consent shall not be unreasonably withheld, conditioned or delayed.</p> <p>11.4 <u>Survival</u>. The indemnification obligations contained in this Article shall survive the expiration or termination of this Agreement for a period of two (2) years.</p>	<p>obligation hereunder. The indemnifying Party may defend such claim with counsel of its own choosing provided that no settlement or compromise of any such claim shall occur without the consent of the indemnified Party, which consent shall not be unreasonably withheld, conditioned or delayed.</p> <p>11.4 <u>Survival</u>. The indemnification obligations contained in this Article shall survive the expiration or termination of this Agreement for a period of two (2) years.</p>	
<p>ARTICLE 12 LIMITATION OF LIABILITY</p> <p>12.1 <u>No Special Damages</u>. EXCEPT FOR THE OBLIGATIONS OF THE PARTIES CONTAINED IN ARTICLE 11 [THIRD-PARTY INDEMNIFICATION] AND ARTICLE 15 [CONFIDENTIALITY], NEITHER PARTY SHALL BE LIABLE TO THE OTHER PARTY FOR ANY SPECIAL, INCIDENTAL, INDIRECT, PUNITIVE OR CONSEQUENTIAL COSTS, LIABILITIES OR DAMAGES, INCLUDING LOST PROFITS OR REVENUES, WHETHER FORESEEABLE OR NOT, ARISING OUT OF, OR IN CONNECTION WITH, SUCH PARTY'S PERFORMANCE OR NONPERFORMANCE OF ITS OBLIGATIONS UNDER THIS AGREEMENT, INCLUDING, CLAIMS OF LESSEES OR CUSTOMERS, CLAIMS FOR WHICH DAMAGES ARE HEREBY SPECIFICALLY WAIVED; AND PROVIDED FURTHER THAT THIS LIMITATION SHALL NOT RESTRICT EITHER PARTY'S RIGHT TO PROCEED FOR INJUNCTIVE RELIEF. NOTHING CONTAINED HEREIN SHALL OPERATE AS A LIMITATION ON THE RIGHT OF EITHER PARTY TO BRING AN ACTION FOR DAMAGES AGAINST ANY THIRD PARTY, INCLUDING CLAIMS FOR INDIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES, BASED ON ANY ACTS OR OMISSIONS OF SUCH THIRD PARTY.</p> <p>12.2 <u>Disclaimer of Warranties</u>. EXCEPT FOR AND EXCLUDING COVENANTS, REPRESENTATIONS OR WARRANTIES EXPRESSLY SET FORTH IN THIS</p>	<p>ARTICLE 12 LIMITATION OF LIABILITY</p> <p>12.1 <u>No Special Damages</u>. EXCEPT FOR THE OBLIGATIONS OF THE PARTIES CONTAINED IN ARTICLE 11 [THIRD-PARTY INDEMNIFICATION] AND ARTICLE 15 [CONFIDENTIALITY], NEITHER PARTY SHALL BE LIABLE TO THE OTHER PARTY FOR ANY SPECIAL, INCIDENTAL, INDIRECT, PUNITIVE OR CONSEQUENTIAL COSTS, LIABILITIES OR DAMAGES, INCLUDING LOST PROFITS OR REVENUES, WHETHER FORESEEABLE OR NOT, ARISING OUT OF, OR IN CONNECTION WITH, SUCH PARTY'S PERFORMANCE OR NONPERFORMANCE OF ITS OBLIGATIONS UNDER THIS AGREEMENT, INCLUDING, CLAIMS OF LESSEES OR CUSTOMERS, CLAIMS FOR WHICH DAMAGES ARE HEREBY SPECIFICALLY WAIVED; AND PROVIDED FURTHER THAT THIS LIMITATION SHALL NOT RESTRICT EITHER PARTY'S RIGHT TO PROCEED FOR INJUNCTIVE RELIEF. NOTHING CONTAINED HEREIN SHALL OPERATE AS A LIMITATION ON THE RIGHT OF EITHER PARTY TO BRING AN ACTION FOR DAMAGES AGAINST ANY THIRD PARTY, INCLUDING CLAIMS FOR INDIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES, BASED ON ANY ACTS OR OMISSIONS OF SUCH THIRD PARTY.</p> <p>12.2 <u>Disclaimer of Warranties</u>. EXCEPT FOR AND EXCLUDING COVENANTS, REPRESENTATIONS OR WARRANTIES EXPRESSLY SET FORTH IN THIS</p>	

<p>AGREEMENT, WAVE MAKES NO WARRANTIES, EXPRESS OR IMPLIED, WITH RESPECT TO THE DESIGNATED IRU FIBERS, THE WAVE FIBER OR THE WAVE EQUIPMENT OR ANY OTHER PORTION OF THE WAVE NETWORK, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR PARTICULAR PURPOSE, AND ALL SUCH WARRANTIES ARE HEREBY EXPRESSLY DISCLAIMED.</p>	<p>AGREEMENT, WAVE MAKES NO WARRANTIES, EXPRESS OR IMPLIED, WITH RESPECT TO THE DESIGNATED IRU FIBERS, THE WAVE FIBER OR THE WAVE EQUIPMENT OR ANY OTHER PORTION OF THE WAVE NETWORK, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR PARTICULAR PURPOSE, AND ALL SUCH WARRANTIES ARE HEREBY EXPRESSLY DISCLAIMED.</p>	
<p style="text-align: center;">ARTICLE 13 INSURANCE</p> <p>13.1 <u>Required Insurance</u>. Beginning on the Effective Date, and continuing through the expiration of the IRU Term, each Party shall either (i) self-insure, or (ii) procure and maintain in force, at its own expense, insurance coverage in amounts that a reasonably prudent business person would maintain considering the obligations of the Parties hereunder, but in no event less than coverage of the following types and limits:</p> <ul style="list-style-type: none"> (a) Workers' compensation as required by applicable law(s); (b) Employer's liability with minimum limits of \$1,000,000 each accident; (c) Commercial General Liability including coverage for (i) premises/operations, (ii) independent contractors, (iii) products/completed operations, (iv) personal injury, (v) contractual liability, and (vi) explosion, collapse and underground hazards, with combined single limit of not less than \$1,000,000 each occurrence or its equivalent; (d) Automobile liability with minimum limits of \$1,000,000 each accident; and 	<p style="text-align: center;">ARTICLE 13 INSURANCE</p> <p>13.1 <u>Required Insurance</u>. Beginning on the Effective Date, and continuing through the expiration of the IRU Term, each Party shall either (i) self-insure, or (ii) procure and maintain in force, at its own expense, insurance coverage in amounts that a reasonably prudent business person would maintain considering the obligations of the Parties hereunder, but in no event less than coverage of the following types and limits:</p> <ul style="list-style-type: none"> (a) Workers' compensation as required by applicable law(s); (b) Employer's liability with minimum limits of \$1,000,000 each accident; (c) Commercial General Liability including coverage for (i) premises/operations, (ii) independent contractors, (iii) products/completed operations, (iv) personal injury, (v) contractual liability, and (vi) explosion, collapse and underground hazards, with combined single limit of not less than \$1,000,000 each occurrence or its equivalent; (d) Automobile liability with minimum limits of \$1,000,000 each accident; and 	

<p>(e) Excess or Umbrella Liability, applicable to items (b), (c) and (d), with minimum limits of \$5,000,000, per occurrence.</p> <p>13.2 <u>Insurance Certificates.</u> If a Party chooses not to self-insure, such Party shall maintain the required insurance coverage with insurers licensed to conduct business in the applicable jurisdiction(s) and having an AM Best Rating of A – /VII, or equivalent from another recognized rating agency, and each Party shall, upon request, provide the other Party with an insurance certificate confirming compliance with the requirements of this Article.</p> <p>13.3 <u>Failure to Carry.</u> In the event either Party chooses not to self-insure and fails to maintain the required insurance coverage and, a claim is made or suffered, such Party shall defend, indemnify and hold harmless the other Party from any and all claims for which the required insurance would have provided coverage.</p>	<p>(e) Excess or Umbrella Liability, applicable to items (b), (c) and (d), with minimum limits of \$5,000,000, per occurrence.</p> <p>13.2 <u>Insurance Certificates.</u> If a Party chooses not to self-insure, such Party shall maintain the required insurance coverage with insurers licensed to conduct business in the applicable jurisdiction(s) and having an AM Best Rating of A – /VII, or equivalent from another recognized rating agency, and each Party shall, upon request, provide the other Party with an insurance certificate confirming compliance with the requirements of this Article.</p> <p>13.3 <u>Failure to Carry.</u> In the event either Party chooses not to self-insure and fails to maintain the required insurance coverage and, a claim is made or suffered, such Party shall defend, indemnify and hold harmless the other Party from any and all claims for which the required insurance would have provided coverage.</p>	
<p style="text-align: center;">ARTICLE 14 NOTICES</p> <p>Notices under this Agreement shall be in writing and delivered by overnight courier (e.g., Federal Express, UPS) or certified mail, return receipt requested, to the persons whose names and business addresses appear below and such notice shall be effective on the date of receipt or refusal by the receiving Party:</p> <p style="text-align: center;">[. . .]</p> <p>A Party may change its address and point of contact by notifying the other Party in writing in accordance with this Article.</p>	<p style="text-align: center;">ARTICLE 14 NOTICES</p> <p>Notices under this Agreement shall be in writing and delivered by overnight courier (e.g., Federal Express, UPS) or certified mail, return receipt requested, to the persons whose names and business addresses appear below and such notice shall be effective on the date of receipt or refusal by the receiving Party:</p> <p style="text-align: center;">[. . .]</p> <p>A Party may change its address and point of contact by notifying the other Party in writing in accordance with this Article.</p>	
<p>ARTICLE 15 CONFIDENTIALITY</p> <p>15.1 <u>Definition of Confidential Information.</u> “Confidential Information” shall mean all information, including this Agreement, regarding the telecommunications needs of City and the</p>	<p>ARTICLE 15 CONFIDENTIALITY</p> <p>15.1 <u>Definition of Confidential Information.</u> “Confidential Information” shall mean all information, including this Agreement, regarding the telecommunications needs of City and the</p>	

<p>Services that Wave offers under this Agreement which is disclosed by one Party (“Disclosing Party”) to the other Party (“Receiving Party”), to the extent that such information is marked or identified as confidential or proprietary or would be reasonably deemed confidential or proprietary given the circumstances surrounding its disclosure. All written or oral pricing and contract proposals exchanged between the Parties shall be deemed Confidential Information, whether or not so designated. The fact that City is a customer of Wave shall not be deemed Confidential Information and may be freely disclosed by either Party. Information shall not be deemed Confidential Information if (i) it is independently developed by or for the Receiving Party, (ii) it is lawfully received by the Receiving Party free of any obligation to keep it confidential, (iii) it becomes generally available to the public other than by breach of this Agreement, or (iv) it was known to the Receiving Party prior to the Disclosing Party’s disclosure of same.</p> <p>15.2 <u>Obligations Regarding Confidential Information</u>. Confidential Information is the property of the Disclosing Party and shall be returned to the Disclosing Party upon request. Except as provided in Section 7.3 below, the Receiving Party shall hold all Confidential Information in confidence. The Receiving Party: (a) shall use such Confidential Information only for the purposes of performing its obligations and/or enforcing its rights under this Agreement; (b) shall reproduce such Confidential Information only to the extent necessary for such purposes; (c) shall restrict disclosure of such Confidential Information to employees or contractors that have a need to know for such purposes (with disclosure to contractors being limited to contractors that have signed a non-disclosure agreement to protect the</p>	<p>Services that Wave offers under this Agreement which is disclosed by one Party (“Disclosing Party”) to the other Party (“Receiving Party”), to the extent that such information is marked or identified as confidential or proprietary or would be reasonably deemed confidential or proprietary given the circumstances surrounding its disclosure. All written or oral pricing and contract proposals exchanged between the Parties shall be deemed Confidential Information, whether or not so designated. The fact that City is a customer of Wave shall not be deemed Confidential Information and may be freely disclosed by either Party. Information shall not be deemed Confidential Information if (i) it is independently developed by or for the Receiving Party, (ii) it is lawfully received by the Receiving Party free of any obligation to keep it confidential, (iii) it becomes generally available to the public other than by breach of this Agreement, or (iv) it was known to the Receiving Party prior to the Disclosing Party’s disclosure of same.</p> <p>15.2 <u>Obligations Regarding Confidential Information</u>. Confidential Information is the property of the Disclosing Party and shall be returned to the Disclosing Party upon request. Except as provided in Section 7.3 below, the Receiving Party shall hold all Confidential Information in confidence. The Receiving Party: (a) Shall use such Confidential Information only for the purposes of performing its obligations and/or enforcing its rights under this Agreement; (b) Shall reproduce such Confidential Information only to the extent necessary for such purposes; (c) Shall restrict disclosure of such Confidential Information to employees or contractors that have a need to know for such purposes (with disclosure to contractors being limited to contractors that have signed a non-disclosure agreement to protect the</p>	
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<p>Confidential Information of third parties); (d) shall not disclose Confidential Information to any third party without prior written approval of the Disclosing Party except as expressly provided in this Agreement or as required by law, by court order, by administrative order of an agency having jurisdiction, or in the enforcement of its rights under this Agreement; and (e) shall use at least the same degree of care (in no event less than reasonable care) as it uses with regard to its own proprietary or confidential information to prevent the disclosure, unauthorized use or publication of Confidential Information. In the event a Receiving Party is required to disclose Confidential Information of the Disclosing Party pursuant to law, court order or administrative order of an agency having jurisdiction, the Receiving Party will, if such notice is permitted by law, notify the Disclosing Party of the required disclosure with sufficient time for the Disclosing Party to seek judicial relief from the required disclosure, and reasonably cooperate with the Disclosing Party in any efforts the Disclosing Party may take to obtain protective measures in respect to the required disclosure. The Parties agree that breach of this Article 7 may cause irreparable injury for which monetary damages are not an adequate remedy; accordingly, each Party may seek injunctive relief and any other available equitable remedies to enforce the provisions of this Article 7.</p> <p>15.3 <u>California Public Records Act.</u> Notwithstanding anything to the contrary contained elsewhere in this Article 7, the Parties understand and acknowledge that City is a governmental entity, and that California law limits the ability of City to shield from public disclosure any information given to City. Accordingly, the Parties agree to work together to avoid disclosures to City by Wave of confidential information which</p>	<p>Confidential Information of third parties); (d) Shall not disclose Confidential Information to any third party without prior written approval of the Disclosing Party except as expressly provided in this Agreement or as required by law, by court order, by administrative order of an agency having jurisdiction, or in the enforcement of its rights under this Agreement; and (e) shall use at least the same degree of care (in no event less than reasonable care) as it uses with regard to its own proprietary or confidential information to prevent the disclosure, unauthorized use or publication of Confidential Information. In the event a Receiving Party is required to disclose Confidential Information of the Disclosing Party pursuant to law, court order or administrative order of an agency having jurisdiction, the Receiving Party will, if such notice is permitted by law, notify the Disclosing Party of the required disclosure with sufficient time for the Disclosing Party to seek judicial relief from the required disclosure, and reasonably cooperate with the Disclosing Party in any efforts the Disclosing Party may take to obtain protective measures in respect to the required disclosure. The Parties agree that breach of this Article 7 may cause irreparable injury for which monetary damages are not an adequate remedy; accordingly, each Party may seek injunctive relief and any other available equitable remedies to enforce the provisions of this Article 7.</p> <p>15.3 <u>California Public Records Act.</u> Notwithstanding anything to the contrary contained elsewhere in this Article 7, the Parties understand and acknowledge that City is a governmental entity, and that California law limits the ability of City to shield from public disclosure any information given to City. Accordingly, the Parties agree to work together to avoid disclosures to City by Wave of confidential information which</p>	
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<p>would result in economic loss or damage to Wave if such information were to be disclosed to third persons by City pursuant to a request submitted under the California Public Records Act, California Government Code §§ 6250 – 6276.48, or other similar public disclosure law. In the event that City receives a request pursuant to the Public Records Act (or other similar law) to disclose information identified by Wave in writing as confidential, City’s sole obligations to Wave shall be: (i) to promptly notify Wave; and (ii) to refrain from disclosing such records for a period of up to ten (10) business days to allow Wave an opportunity to seek legal protection against disclosure from a court of competent jurisdiction. City will not be required to withhold requested records beyond the ten (10) business days unless it may do so based on good faith reliance upon an exception to disclosure under the Public Records Act, or unless City is ordered to withhold disclosure by the order of a court having competent jurisdiction. City may, but shall not be required, to join in any legal proceedings relating to the requested disclosure unless required to do so by the court. In the event that Wave initiates legal proceedings, or City initiates legal proceedings or withholds requested records at Wave’s request, Wave shall indemnify and hold City harmless from and against all costs, attorneys’ fees, expenses, liabilities, damages or other liabilities City may incur due to the legal proceedings initiated at and/or City’s withholding of records at Wave’s request. City shall not be liable to Wave for any loss, cost or expense relating to the disclosure of requested records if Wave fails to obtain legal protection against disclosure and City releases the records in good faith.</p>	<p>would result in economic loss or damage to Wave if such information were to be disclosed to third persons by City pursuant to a request submitted under the California Public Records Act, California Government Code §§ 6250 – 6276.48, or other similar public disclosure law. In the event that City receives a request pursuant to the Public Records Act (or other similar law) to disclose information identified by Wave in writing as confidential, City’s sole obligations to Wave shall be: (i) to promptly notify Wave; and (ii) to refrain from disclosing such records for a period of up to ten (10) business days to allow Wave an opportunity to seek legal protection against disclosure from a court of competent jurisdiction. City will not be required to withhold requested records beyond the ten (10) business days unless it may do so based on good faith reliance upon an exception to disclosure under the Public Records Act, or unless City is ordered to withhold disclosure by the order of a court having competent jurisdiction. City may, but shall not be required, to join in any legal proceedings relating to the requested disclosure unless required to do so by the court. In the event that Wave initiates legal proceedings, or City initiates legal proceedings or withholds requested records at Wave’s request, Wave shall indemnify and hold City harmless from and against all costs, attorneys’ fees, expenses, liabilities, damages or other liabilities City may incur due to the legal proceedings initiated at and/or City’s withholding of records at Wave’s request. City shall not be liable to Wave for any loss, cost or expense relating to the disclosure of requested records if Wave fails to obtain legal protection against disclosure and City releases the records in good faith.</p>	
<p>ARTICLE 16 DEFAULT</p>	<p>ARTICLE 16 DEFAULT</p>	

16.1 Definition. A “**Default**” shall be deemed to have occurred under this Agreement under the following circumstances:

- (a) in the case of a failure to pay any amount when due under this Agreement, a Party fails to pay such amount within fifteen (15) days after written notice from the other Party specifying such breach; or
- (b) in the case of any other material breach of this Agreement, a Party fails to cure such breach within thirty (30) days after written notice from the other Party specifying such breach, provided that if the breach is of a nature that cannot reasonably be cured within said thirty (30) day time period, a Default shall not have occurred so long as the breaching Party has commenced cure within said thirty (30) day time period and thereafter diligently pursues cure to completion.

16.2 Remedies. In the event of any Default hereunder, the non-Defaulting Party may do any one or more of the following: (i) take such actions as it deems reasonably necessary to correct the Default; (ii) pursue any other remedies available to it under this Agreement; and/or (iii) initiate the dispute resolution process contained in Article 18. The Parties intend for a Party’s good faith participation in the dispute resolution process described in Article 18 to constitute a necessary pre-requisite to the commencement by such Party of any legal action regarding this Agreement.

16.3 No Waiver. A waiver by either Party at any time of any of its rights regarding a particular breach or Default of the other Party under this Agreement shall not be deemed a permanent

16.1 Definition. A “**Default**” shall be deemed to have occurred under this Agreement under the following circumstances:

- (a) in the case of a failure to pay any amount when due under this Agreement, a Party fails to pay such amount within fifteen (15) days after written notice from the other Party vspecifying such breach; or
- (c) In the case of any other material breach of this Agreement, a Party fails to cure such breach within thirty (30) days after written notice from the other Party specifying such breach, provided that if the breach is of a nature that cannot reasonably be cured within said thirty (30) day time period, a Default shall not have occurred so long as the breaching Party has commenced cure within said thirty (30) day time period and thereafter diligently pursues cure to completion.

16.2 Remedies. In the event of any Default hereunder, the non-Defaulting Party may do any one or more of the following: (i) take such actions as it deems reasonably necessary to correct the Default; (ii) pursue any other remedies available to it under this Agreement; and/or (iii) initiate the dispute resolution process contained in Article 18. The Parties intend for a Party’s good faith participation in the dispute resolution process described in Article 18 to constitute a necessary pre-requisite to the commencement by such Party of any legal action regarding this Agreement.

16.3 No Waiver. A waiver by either Party at any time of any of its rights regarding a particular breach or Default of the other Party under this Agreement shall not be deemed a permanent

<p>waiver of such rights, nor shall any such waiver be deemed a waiver of any subsequent breach or Default.</p>	<p>waiver of such rights, nor shall any such waiver be deemed a waiver of any subsequent breach or Default.</p>	
<p style="text-align: center;">ARTICLE 17 FORCE MAJEURE</p> <p>Neither Party shall be liable for any delay in or failure of performance hereunder due to causes beyond such Party’s reasonable control including, but not limited to, acts of God, fire, flood, earthquake, ice storms, wind storms, or other severe weather events, explosion, vandalism, cable cut, terrorist acts, insurrection, riots or other civil unrest, national or regional emergency, invasions or hostilities (whether war is declared or not), a governmental authority’s failure to timely act, inability to obtain equipment, material or other supplies due to strike, lockout or work stoppage, or any law, order, regulation, direction, action or request of any civil or military governmental authority (each, a “Force Majeure Event”). The Party claiming relief under this Article shall notify the other Party of the occurrence or existence of the Force Majeure Event and of the cessation of such event. If any Force Majeure Event causes an increase in the time required for performance of any of its duties or obligations, the affected Party shall be entitled to an equitable extension of time for completion.</p>	<p style="text-align: center;">ARTICLE 17 FORCE MAJEURE</p> <p>Neither Party shall be liable for any delay in or failure of performance hereunder due to causes beyond such Party’s reasonable control including, but not limited to, acts of God, fire, flood, earthquake, ice storms, wind storms, or other severe weather events, explosion, vandalism, cable cut, terrorist acts, insurrection, riots or other civil unrest, national or regional emergency, invasions or hostilities (whether war is declared or not), a governmental authority’s failure to timely act, inability to obtain equipment, material or other supplies due to strike, lockout or work stoppage, or any law, order, regulation, direction, action or request of any civil or military governmental authority (each, a “Force Majeure Event”). The Party claiming relief under this Article shall notify the other Party of the occurrence or existence of the Force Majeure Event and of the cessation of such event. If any Force Majeure Event causes an increase in the time required for performance of any of its duties or obligations, the affected Party shall be entitled to an equitable extension of time for completion.</p>	
<p style="text-align: center;">ARTICLE 18 DISPUTE RESOLUTION</p> <p>18.1 <u>General Provisions</u>. Except for actions seeking a temporary restraining order or injunction, or suits to compel compliance with this dispute resolution process, the Parties agree to use the dispute resolution procedures set forth in this Article with respect to any controversy or claim (each, a “Dispute”) arising out of or relating to this Agreement. All discussions occurring and documents exchanged pursuant to Sections 18.2 and 18.3 are confidential and inadmissible for any</p>	<p style="text-align: center;">ARTICLE 18 DISPUTE RESOLUTION</p> <p>18.1 <u>General Provisions</u>. Except for actions seeking a temporary restraining order or injunction, or suits to compel compliance with this dispute resolution process, the Parties agree to use the dispute resolution procedures set forth in this Article with respect to any controversy or claim (each, a “Dispute”) arising out of or relating to this Agreement. All discussions occurring and documents exchanged pursuant to Sections 18.2 and 18.3 are confidential and inadmissible for any</p>	

<p>purpose in any legal proceeding involving the Parties; provided that evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its use in the negotiation or mediation process.</p> <p>18.2 <u>Negotiations</u>. Should any Dispute arise, either Party may give the other Party written notice of the Dispute (each, a “Dispute Notice”). The Parties shall use good faith efforts to resolve the Dispute through negotiation within thirty (30) days of the date on which the Dispute Notice is delivered. If the Parties do not resolve the Dispute within such thirty (30) day period, either of the Parties may submit the matter to non-binding mediation through a professional mediation service.</p> <p>18.3 <u>Governing Law</u>. This Agreement and all matters arising out of this Agreement shall be governed by the laws of the State of California. Any judicial action arising in connection with this Agreement shall be in the Superior Court of the State of California County of Yolo, or in the Federal District Court for the Northern District of California, as applicable. <i>Each Party waives, to the fullest extent permitted by law, trial by jury of any disputes, claims or issues arising under the Agreement.</i></p>	<p>purpose in any legal proceeding involving the Parties; provided that evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its use in the negotiation or mediation process.</p> <p>18.2 <u>Negotiations</u>. Should any Dispute arise, either Party may give the other Party written notice of the Dispute (each, a “Dispute Notice”). The Parties shall use good faith efforts to resolve the Dispute through negotiation within thirty (30) days of the date on which the Dispute Notice is delivered. If the Parties do not resolve the Dispute within such thirty (30) day period, either of the Parties may submit the matter to non-binding mediation through a professional mediation service.</p> <p>18.3 <u>Governing Law</u>. This Agreement and all matters arising out of this Agreement shall be governed by the laws of the State of California. Any judicial action arising in connection with this Agreement shall be in the Superior Court of the State of California County of Yolo, or in the Federal District Court for the Northern District of California, as applicable. <i>Each Party waives, to the fullest extent permitted by law, trial by jury of any disputes, claims or issues arising under the Agreement.</i></p>	
<p style="text-align: center;">ARTICLE 19 ASSIGNMENT</p> <p>Neither Party shall assign its rights under this Agreement without the prior written consent of the other Party, which will not be unreasonably withheld, delayed or conditioned; provided, however, that either Party may, without obtaining the consent of the other Party, assign its interest in and to this Agreement to: (i) any entity acquiring such Party, whether through merger or through</p>	<p style="text-align: center;">ARTICLE 19 ASSIGNMENT</p> <p>Neither Party shall assign its rights under this Agreement without the prior written consent of the other Party, which will not be unreasonably withheld, delayed or conditioned; provided, however, that either Party may, without obtaining the consent of the other Party, assign its interest in and to this Agreement to: (i) any entity acquiring such Party, whether through merger or through</p>	

<p>purchase of substantially all the assets of said Party; or (ii) an Affiliate of such Party.</p>	<p>purchase of substantially all the assets of said Party; or (ii) an Affiliate of such Party.</p>	
<p style="text-align: center;">ARTICLE 20 MISCELLANEOUS</p> <p>20.1 <u>Warranty of Authority</u>. Each of the Parties respectively warrants and represents that its signatory has been duly authorized to execute this Agreement on behalf of the Party for whom he or she purports to sign this Agreement, and that this Agreement is binding on such Party in accordance with its terms.</p> <p>20.2 <u>Entire Agreement</u>. This Agreement constitutes the entire agreement between the Parties regarding the subject matter hereof, and supersedes any and all prior oral or written agreements between the Parties regarding the subject matter contained herein. This Agreement may not be modified or amended in any manner except by a written document signed by the Party against whom such modification is sought to be enforced.</p> <p>20.3 <u>Interpretation</u>. This Agreement shall be governed and interpreted in accordance with the laws of the State of California. This Agreement and each of the terms and provisions of it are deemed to have been explicitly negotiated by the Parties, and the language in all parts of this Agreement shall, in all cases, be construed according to its fair meaning and not strictly for or against either of the Parties hereto. The captions and headings in this Agreement are used only for convenience and are not intended to affect the interpretation of the provisions of this Agreement. This Agreement shall be construed so that wherever applicable the use of the singular number shall include the plural number, and vice versa, and the use of any gender shall be applicable to all genders.</p>	<p style="text-align: center;">ARTICLE 20 MISCELLANEOUS</p> <p>20.1 <u>Warranty of Authority</u>. Each of the Parties respectively warrants and represents that its signatory has been duly authorized to execute this Agreement on behalf of the Party for whom he or she purports to sign this Agreement, and that this Agreement is binding on such Party in accordance with its terms.</p> <p>20.2 <u>Entire Agreement</u>. This Agreement constitutes the entire agreement between the Parties regarding the subject matter hereof, and supersedes any and all prior oral or written agreements between the Parties regarding the subject matter contained herein. This Agreement may not be modified or amended in any manner except by a written document signed by the Party against whom such modification is sought to be enforced.</p> <p>20.3 <u>Interpretation</u>. This Agreement shall be governed and interpreted in accordance with the laws of the State of California. This Agreement and each of the terms and provisions of it are deemed to have been explicitly negotiated by the Parties, and the language in all parts of this Agreement shall, in all cases, be construed according to its fair meaning and not strictly for or against either of the Parties hereto. The captions and headings in this Agreement are used only for convenience and are not intended to affect the interpretation of the provisions of this Agreement. This Agreement shall be construed so that wherever applicable the use of the singular number shall include the plural number, and vice versa, and the use of any gender shall be applicable to all genders.</p>	

<p>20.4 <u>Survival</u>. Those provisions of this Agreement that by their nature and import must survive the expiration or earlier termination of this Agreement in order to be given their full force and effect shall so survive.</p> <p>20.5 <u>Severability</u>. If any provision of this Agreement or the application thereof to any person or circumstance shall, for any reason and to any extent, be found invalid or unenforceable, the remainder of this Agreement and the application of that provision to other persons or circumstances shall not be affected thereby, but shall instead continue in full force and effect, to the extent permitted by law.</p> <p>20.6 <u>No Joint Venture</u>. The relationship between City and Wave shall not be that of partners, agents, or joint venturers for one another, and nothing contained in this Agreement shall be deemed to constitute a partnership or agency agreement between them for any purposes, including, but not limited to federal income tax purposes.</p> <p>20.7 <u>No Third-Party Beneficiaries</u>. This Agreement is made and entered into for the sole benefit of City and Wave. No third party shall be deemed to have any rights under this Agreement; there are no third- party beneficiaries to this Agreement.</p> <p>20.8 <u>Standard of Performance</u>. All actions, activities, consents, approvals and other undertakings of the Parties in this Agreement shall be performed in a reasonable and timely manner, it being expressly acknowledged and understood that time is of the essence in the performance of obligations required to be performed by a date expressly specified herein. Except as specifically set forth herein, for the purpose of this Agreement the standards and practices of performance within the telecommunications industry in the relevant</p>	<p>20.4 <u>Survival</u>. Those provisions of this Agreement that by their nature and import must survive the expiration or earlier termination of this Agreement in order to be given their full force and effect shall so survive.</p> <p>20.5 <u>Severability</u>. If any provision of this Agreement or the application thereof to any person or circumstance shall, for any reason and to any extent, be found invalid or unenforceable, the remainder of this Agreement and the application of that provision to other persons or circumstances shall not be affected thereby, but shall instead continue in full force and effect, to the extent permitted by law.</p> <p>20.6 <u>No Joint Venture</u>. The relationship between City and Wave shall not be that of partners, agents, or joint venturers for one another, and nothing contained in this Agreement shall be deemed to constitute a partnership or agency agreement between them for any purposes, including, but not limited to federal income tax purposes.</p> <p>20.7 <u>No Third-Party Beneficiaries</u>. This Agreement is made and entered into for the sole benefit of City and Wave. No third party shall be deemed to have any rights under this Agreement; there are no third party beneficiaries to this Agreement.</p> <p>20.8 <u>Standard of Performance</u>. All actions, activities, consents, approvals and other undertakings of the Parties in this Agreement shall be performed in a reasonable and timely manner, it being expressly acknowledged and understood that time is of the essence in the performance of obligations required to be performed by a date expressly specified herein. Except as specifically set forth herein, for the purpose of this Agreement the standards and practices of performance within the telecommunications industry in the relevant</p>	
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<p>market shall be the measure of a Party's performance.</p> <p>20.9 <u>Compliance with Law</u>. Each Party shall exercise its rights and perform its obligations under this Agreement in full compliance with all applicable laws, rules and regulations of any governmental authority having proper jurisdiction.</p> <p>20.10 <u>Execution in Counterparts</u>. This Agreement may be executed in one or more counterparts, all of which taken together shall constitute one and the same instrument. Any executed documents sent to the other Party in portable document format (pdf) images via email will be considered the same as an original document.</p> <p>20.11 <u>Cooperation on Future Projects; Joint Projects</u>. City and Wave agree that there may be additional projects in the future that would be appropriate for cooperation between the parties. Such projects may include, but are not limited to, City institutional broadband needs; City's municipal broadband project; expansion of services to residential, commercial or industrial areas that would benefit from increased access to fiber and broadband services, along with projects that may evolve in the future. To that end, the parties agree to cooperate with each other to determine if there are additional ways the parties can pursue projects that are of benefit to the City, the resident of the City and Wave, and, if so, as may be agreed to in the future, pursue such projects.</p>	<p>market shall be the measure of a Party's performance.</p> <p>20.9 <u>Compliance with Law</u>. Each Party shall exercise its rights and perform its obligations under this Agreement in full compliance with all applicable laws, rules and regulations of any governmental authority having proper jurisdiction.</p> <p>20.10 <u>Execution in Counterparts</u>. This Agreement may be executed in one or more counterparts, all of which taken together shall constitute one and the same instrument. Any executed documents sent to the other Party in portable document format (pdf) images via email will be considered the same as an original document.</p>	