



Board of Aldermen Request for Action

MEETING DATE: 10/4/2022

DEPARTMENT: Public Works

AGENDA ITEM: Bill No. 2961-22, Right of Way Use Agreement with Missouri Network Alliance also known as Bluebird Network. 2nd Reading

REQUESTED BOARD ACTION:

Motion to approve Bill No. 2961-22, authorizing the Mayor to sign a Right-Of-Way Use Agreement For Communications Facilities. 2nd reading by title only.

SUMMARY:

Missouri Network Alliance, also known as Bluebird Network, is a company offering communication services via fiber to their customers. Bluebird is requesting a Use of Right of Way Agreement to install their infrastructure. The City and Legal staff have negotiated the attached agreement for the Boards approval.

This agreement is similar to the many other agreement of other users in the Right of Way. it provides Bluebird the right to install their facilities within City Right of Way and easements subject to permitting, inspection, and restoration.

Bluebird will be servicing CPC of Missouri located in First Park.

PREVIOUS ACTION:

None

POLICY ISSUE:

Continued service and infrastructure maintenance

FINANCIAL CONSIDERATIONS:

There is no financial impact.

ATTACHMENTS:

- | | |
|---|--|
| <input checked="" type="checkbox"/> Ordinance | <input checked="" type="checkbox"/> Contract - Agreement |
| <input type="checkbox"/> Resolution | <input type="checkbox"/> Plans |
| <input type="checkbox"/> Staff Report | <input type="checkbox"/> Minutes |
| <input type="checkbox"/> Other: | |

BILL NO. 2961-22

ORDINANCE NO. _____

**ORDINANCE APPROVING A RIGHT-OF-WAY AGREEMENT WITH
MISSOURI NETWORK ALLIANCE, LLC dba BLUEBIRD NETWORK**

WHEREAS, Chapter 510 of the Smithville Code of Ordinances prescribes the method by which the City manages its Rights-of-Way and allows other entities to access and use the Rights-of-Way; and

WHEREAS, prior to any entity being allowed to utilize and/or access the Rights-of-Way a written agreement must be executed by such entity agreeing to the terms of the agreement and the City Code as now enacted and as amended hereafter; and

WHEREAS, Section 510.025 requires Board of Aldermen approval to enter such agreements which shall be entered into on a non-discriminatory basis, provided that the applicant is in compliance with all applicable requirements; and

WHEREAS, Applicant has submitted its application to be granted a Right-of Way permit and has agreed to the terms of the City's current Right-of-Way Agreement, a copy of which is attached hereto Exhibit 1; and

WHEREAS, staff has recommended approval of the proposed Right-of Way Agreement with Applicant.

**NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF ALDERMEN OF
THE CITY OF SMITHVILLE, MISSOURI AS FOLLOWS:**

That the Mayor or City Administrator is authorized and empowered to sign on behalf of the City Right-of-Way Agreement with Missouri Network Alliance, LLC dba Bluebird Network attached hereto in the form of Exhibit 1.

Passed by the Board of Aldermen of Smithville, Missouri and approved by the Mayor of Smithville, Missouri this 4th day of October 2022.

Damien Boley, Mayor

ATTEST:

Linda Drummond, City Clerk

1st reading 09/20/2022

2nd reading 10/04/2022

EXHIBIT 1

RIGHTS-OF-WAY USE AGREEMENT FOR COMMUNICATIONS FACILITIES

THIS AGREEMENT, made and entered into as of the "Effective Date" (as defined in Section 11.1) by and between Missouri Network Alliance, LLC dba Bluebird Network on behalf of its operating subsidiaries and affiliates, a Missouri limited liability company (the "Licensee"), and the City of Smithville, Missouri, State of Missouri (the "City") may sometimes be referred to in this Agreement individually as a "party" or collectively as the "parties."

RECITALS:

WHEREAS, Licensee has requested consent from the City authorizing the use of the City Rights-of-Way to construct, install, maintain, and. operate facilities for telecommunications and optic fiber communications or related capabilities; and

WHEREAS, Missouri law authorizes the City to consent to and regulate the use and occupancy of Rights-of-Way for placement of a System as hereinafter defined; and

WHEREAS, the City is authorized to and has established standards for occupancy of the Rights-of-Way by communications facilities and other uses that are consistent with and recognize the Public Service Commission's duties and jurisdiction; and

WHEREAS, the City and Licensee desire to execute this Agreement, establishing the terms of such use of the Rights-of-Way by Licensee, and incorporating the provisions of the "ROW Code" (as defined in Section 1.2).

NOW THEREFORE, in consideration of the mutual promises and covenants herein contained, the Parties mutually agree as follows:

SECTION 1. GENERAL

1.1 Preservation of Police Power Authority. Any rights granted to Licensee pursuant to this Agreement are subject to the authority of the City to adopt and enforce ordinances necessary to the health, safety, and welfare of the public.

1.2 Defined Terms. For purposes of this Agreement, the capitalized terms, phrases, words, and their derivatives shall have the meanings as set forth in the Municipal Code of the City, Chapter 510, as may be amended from time to time (the "Code" or "ROW Code"). For purposes of this Agreement, the following additional terms, phrases, words, and their derivatives shall have the meanings set forth in this Section, unless the context clearly indicates that another meaning is intended. Words used in the present tense include the future tense, words in the single number include the plural number, and words in the plural number include the singular. The words "shall" and "will" are mandatory, and "may" is permissive, Words not defined shall be given their common and ordinary meaning.

A. "Agreement" means the Agreement herein agreed to and executed by Licensee.

B. "Antenna" means any device that transmits and/or receives radio waves for voice, data or video communications purposes including, but not limited to, television, AM/FM radio, microwave, cellular telephone and similar forms of

communications. A combination of panels, boxes, or other antenna physically connected and designed in conjunction to receive signals at one location in the System shall be considered one (1) Antenna.

- C.** **"City"** means the City of Smithville, Missouri.
- D.** **"Collocation"** means the shared use of Facilities, including, but not limited to, the placement of conduit owned by more than one Rights-of-Way user in the same trench or boring and the placement of equipment owned by more than one user in the same or connected conduit. Collocation does not include interconnection of Facilities or the sale or purchase of capacity (whether bundled or unbundled).
- E.** **"Communications"** means the transmission via the Facilities, in whole or in part, between or among points specified by the user, of information of the user's choosing (e.g., data, video, voice), without change in the form or content of the information as sent and received, regardless of the statutory or regulatory scheme to which such transmissions may be subject.
- F.** **"Communications Service"** means the transmission via Facilities, in whole or in part, of any writings, signs, signals, pictures, sounds, or other forms of intelligence through wire, wireless, or other means, including, but not limited to, any "telecommunications service," "enhanced service," "information service," or "Internet service," as such terms are now, or may in the future be, defined under federal law, and including all instrumentalities, Facilities, apparatus (Communications Facilities), and services (among other things, the receipt, forwarding, and delivery of telecommunications) incidental to or designed to directly or indirectly facilitate or accept such transmission and shall also include "video services" as defined in § 67.2677 RSMo., unless the Licensee has obtained a franchise from the City to separate franchising requirements and application, or rental of conduit or physical facilities.
- G.** **"Facilities"** means any portion of a System located in, along, over, upon, under, or through the Rights-of-Way.
- H.** **"Rights-of-Way"** means the surface and space on, above and below every municipal street, alley, road, highway, lane or City right-of-way dedicated or commonly used now or hereafter for utility purposes, including, but not limited to, overhead lighting facilities. This term shall not include any county, state, or federal rights-of-way or any property owned or controlled by any Person or Agency other than the City, except as provided by applicable Laws or pursuant to an agreement between the City and any such Person or Agency. "Rights-of-Way" shall not include public property owned or leased by the City and not intended for right-of-way use, including, but not limited to, parks and City Hall or public works facility property.
- I.** **"System"** means the cables, wires, lines, towers, wave guides, optic fiber, Antennae,

and any associated converters, equipment, or other facilities designed and constructed for the purpose of producing, receiving, amplifying or distributing Communications to or from locations within the City.

1.3 Agreement Subject to Provisions of ROW Code. This Agreement fully incorporates the provisions of the ROW Code as if fully set forth herein, and Licensee agrees as a part of this Agreement to abide by the provisions of such Code as now adopted or as amended and other applicable ordinances of the City as a ROW User, and to be subject to the enforcement by the City as provided therein and in this Agreement as a material term herein. This Agreement may establish Licensee obligations that are supplementary to the ROW Code, and nothing in this Agreement shall be deemed to waive any obligation or requirement applicable to Licensee authorized or established by the ROW Code. The consent to use the Rights-of-Way authorized by this Agreement is subject to the continuing accuracy during the term of this Agreement of the application information provided by and maintained by Licensee for this authorization as provided to and on file with the City.

SECTION 2. GRANT OF AUTHORITY TO USE THE RIGHTS-OF-WAY

2.1 Agreement Non-Exclusive. This Agreement shall grant nonexclusive privileges to use the Rights-of-Way. The City specifically reserves the right to grant, at any time, such additional agreements or other rights to use the Rights-of-Way for any purpose and to any other person, including itself, as it deems appropriate, subject to applicable federal and state law. Nothing in this Agreement shall relieve Licensee from its obligations to apply for and obtain all necessary permits for installation of its Facilities including excavation, building, electrical, zoning, etc. before installation of its Facilities within the ROW.

2.2 Nature of Rights Granted by this Agreement. This Agreement shall not convey title to Licensee, equitable or legal, in the Rights-of-Way, and gives only the right to occupy Rights-of-Way for the purposes and for the period stated in this Agreement and subject to the requirements herein. This Agreement also shall not grant the right to use Facilities owned or controlled by the City or a third-party without the separate consent of the City or such third-party owning or controlling the Facilities, nor shall it excuse Licensee from obtaining appropriate access or pole attachment agreements before locating on Facilities controlled or owned by the City or a third party.

2.3 Grant. Subject to the terms and conditions of this Agreement, the ROW Code and the conditions set forth on Exhibit A attached to and incorporated by reference into this Agreement, Licensee is hereby granted the nonexclusive right and privilege to construct, operate, and maintain Facilities in, through, over, above and along the City's Rights-of-Way and utility easements (to the extent, but only to the extent authorized by such Rights-of-Way or other easement), for the purposes of supplying Communications Services within the City and to sell or lease transmission capacity on its System to other non-residential entities, subject, however, to the terms and conditions herein set forth within this Agreement and the Code and all such special conditions as may be set forth in Exhibit A. Notwithstanding the above, Licensee shall not grant or convey to its customers as set forth in the previous sentence any right to physically access the Licensee's System via the City's Right- of-Way (as granted to Licensee in this Agreement), but Licensee customers may utilize the System installed by Licensee to transmit data without permission from the City. As a condition of this grant, Licensee is required to obtain and maintain any permit, license certification, grant,

registration or any other authorization required by any appropriate governmental entity, including, but not limited to, the City, the Federal Communications Commission or the Missouri Public Service Commission, subject to Licensee's right to timely challenge in good faith the requirements of any such permit, license certification, grant, registration or any other authorization. In the event that the use of the Rights-of-Way is proposed to change or to provide services other than as described, Licensee shall be required to seek amendment hereto prior to commencing such service or changed use.

Except as set forth above, this Agreement does not provide Licensee the right to install any Antenna or Antenna support structures in the rights-of-way, rent conduit or physical facilities to third-parties nor provide services not authorized herein, except to the extent set forth in the Uniform Small Wireless Facility Deployment Act, and then only to the extent as authorized by City Code.

2.4 Use of Rights-of-Way; Police Powers; Licensee's Use Subordinate. The Licensee shall construct and maintain its Facilities in accordance with all applicable federal, state and local laws, codes and ordinances, including all permit requirements and fee payments, in effect as of the Effective Date or adopted after the Effective Date, to the extent the same are not in contravention of applicable law. The City makes no express or implied representation or warranty regarding its rights to authorize the installation or construction of Licensee's Facilities on any particular segment of Rights-of-Way. The burden and responsibility for making all such determinations in advance of construction or installation shall be entirely upon Licensee. The use of the Rights-of-Way authorized by this Agreement shall in all matters be subordinate to the City's use of and rights to the same, and Licensee shall be limited to such uses as have been expressly granted to Licensee by the City. Licensee shall excavate in or install Facilities in the Rights-of-Way in locations and in a manner only as authorized by a specific permit granted by the City. Licensee shall further be subject to the City's exercise of its powers, including but not limited to its administration and regulation related to the management of the Rights-of-Way exercised in a competitively neutral and non-discriminatory reasonable manner.

2.5 No Interference. Licensee shall construct and maintain its Facilities to be so located, constructed and maintained as to cause minimum interference with the proper use of all Rights-of-Ways and so as not to materially interfere with other users of the Rights-of-Way. Except as may otherwise be provided, Licensee shall provide reasonable notice to all City residents affected by the proposed work prior to commencement of such work. All construction and maintenance by Licensee or its subcontractors shall be performed in accordance with generally accepted industry standards and any standard specifications, drawings, and procedures adopted by the City.

2.6 Notification, Joint Installation and Collocation Requirements. Licensee shall, prior to any excavation or installation within the Rights-of-Way for which joint installation opportunities are commercially reasonable for Licensee, make commercially reasonable efforts to provide sufficient notification and joint installation opportunity on a shared-cost basis to potential users of the Rights-of-Way under such written policy or direction as may be established by the City. Licensee shall further make its installed facilities available to other licensees on a nondiscriminatory competitively neutral basis consistent with the requirements of federal law codified at § 47 U.S.C. 224.

2.7 Licensee Responsible for Costs. Licensee shall be responsible for all reasonable

costs borne by the City that are directly associated with Licensee's installation, maintenance, repair, operation, use, and replacement of its Facilities within the Rights-of-Way that are not otherwise accounted for as part of the permit fee established pursuant to the ROW Code and not contrary to any applicable requirements of Sections 67.1830 to 67.1846 RSMo. All such costs shall be itemized and the City's books and records related to these costs shall be made available upon request to the Licensee. Licensee shall be responsible for its own costs incurred in removing or relocating its Facilities when required to do so by the City due to City requirements relating to maintenance and use of the Rights-of-Way for City purposes.

SECTION 3. TERM

This Agreement shall be effective for a term of ten (10) years from the Effective Date ("Term subject to earlier termination or forfeiture as provided herein. So long as Licensee has not breached the terms of this Agreement (after any applicable cure periods) and/or forfeited the License and Privilege as set forth Section 6.1, this Agreement may be renewed by Licensee upon 90 days written notice to the City, for a 5-year term. Such notice shall be given during the last year of the original Term. Subject to the terms set forth above, Licensee shall also have the right to extend this Agreement for a second and final renewal term of 5 years so long as notice is given in the same fashion as above during the final year of the first renewal term. Notwithstanding the above, for purposes of any of the terms or renewals hereof, Licensee shall only have the right to exercise nay right to cure, on no more than 2 occasions during nay term or renewal.

SECTION 4. TAXES

The Licensee agrees to pay all applicable taxes including but not limited to license taxes, business taxes, video services provider fees, and other applicable taxes of the City and failure to pay such taxes shall be considered a material breach of this Agreement. Licensee shall be subject to audit by City and at City's sole expense no more than twice per year and during normal business hours and with reasonable notice, and shall itemize by category of service the amount received and taxes paid for services provided by Facilities in the Right-of-Way. Such taxes shall be in addition to compensation, if any, required by the City by ordinance subject to any limitations of applicable state or federal law. Nothing herein shall limit the ability of the City to alter, amend, modify or expand any taxes that may be lawfully assessed on Licensee's business activities or otherwise.

SECTION 5. TRANSFER OF AGREEMENT OR FACILITIES

5.1 Transfer of Agreement. The Licensee shall not sell, transfer, lease, assign, sublet or dispose of, in whole or in part, either by forced or voluntary sale, or by ordinary sale, consolidation, or otherwise, this Agreement or any of the rights or privileges granted by this Agreement, without the prior consent of the City, which consent will not be unreasonably withheld. Notwithstanding the foregoing sentence, Licensee may sell, transfer, lease or assign this Agreement or its rights under this Agreement, in whole or in part, with prior written notice to the City if to; (a) any entity controlling, controlled by or under common control with Licensee; (b) any surviving successor entity or newly created successor entity in the event of a merger, reorganization or consolidation involving Licensee. The City reserves the right to be reimbursed for its reasonable costs relating to a transfer of ownership. Licensee shall not change its name under which it does business with the public without providing at least 30 days prior notice to the City.

5.2 Sale or Lease of Facilities. Except as otherwise may be provided by law, Licensee shall not lease, sell, sublet or otherwise transfer possession or control or use of the Facilities, or any portion thereof, for any purpose to any person that has not obtained a duly issued Agreement, or other grant by the City to use the Rights-of-Way and which includes the authority to use or maintain such leased or transferred Facilities. Notwithstanding the above, the customers of Licensee as set forth in the previous sentence shall not have any right conferred in any agreement between Licensee and its customer to physically access the Licensee's System and/or City's Right-of-Way unless such customers have received and executed any and all agreements, permits, and approvals with the City required for such access. Notwithstanding the foregoing, Customers of Licensee may utilize the System installed by Licensee to transmit data.

SECTION 6. FORFEITURE OF LICENSE AND PRIVILEGE.

6.1 In case of failure on the part of the Licensee, its successors and assigns, to comply with any of the provisions of this Agreement, including the provisions of the Code, or if the Licensee, its successors and assigns, should do or cause to be done any act or thing prohibited by or in violation of the terms of this Agreement, including the provisions of the City's Code of Ordinances, the Licensee, its successors and assigns, shall forfeit all rights and privileges permitted herein, and all rights hereunder shall cease, terminate and become null and void, provided that said forfeiture shall not take effect until the City shall carry out the following proceedings: Before the City proceeds to forfeit this Agreement, it shall first serve a written notice upon the Licensee, setting forth in detail the neglect or failure complained of, and the Licensee shall have thirty (30) days thereafter in which to cure the default by complying with the conditions of this Agreement. If at the end of such thirty (30) day period the City determines that the conditions have not been complied with, the City shall after reasonable notice and hearing, take action by an affirmative vote of the City Council present at the meeting and voting, to terminate the Agreement; setting out the grounds upon which said Agreement is to be canceled or terminated. Nothing herein shall prevent the City from taking any other action or remedy as may be set forth in the City's Code of Ordinances or as may otherwise exist at law. All remedies described in this section are cumulative and in addition to any other rights and remedies to which a party may be entitled at law, in equity or under this Agreement.

SECTION 7. GENERAL CONDITIONS

7.1 Compliance With Laws. In performing activities and exercising its rights and obligations under this Agreement, the Licensee shall comply with all applicable federal, state and local laws, ordinances, regulations and policies, including, but not limited to, all laws, ordinances, regulations and policies relating to construction, bonding, insurance, and use of public property.

7.2.1 Insurance. In addition to the requirements of the ROW Code, except as may be prohibited by law, Licensee shall provide, at its sole expense, and maintain during the term of this Agreement commercial general liability insurance with a reputable, qualified, and financially sound company licensed, authorized or permitted to do business in the State of Missouri, and unless otherwise approved by the City, with a rating by Best of not less than "A," that shall be endorsed to cover Licensee, the City, and the City's officials, officers, and employees in the event of claims which may arise from operations under this Agreement, whether such operations are by the Licensee, its officers, directors, employees and agents, or any subcontractors of Licensee. This liability insurance shall include, but shall not be limited to, protection against claims arising from

bodily and personal injury and damage to property, resulting from all Licensee operations, products, services or use of automobiles, or construction equipment. The amount of insurance for Single Limit Coverage applying to Bodily and Personal Injury and Property Damage shall be at least \$2,000,000.00, but in no event less than the individual and combined sovereign immunity limits established by § 537.610 RSMo. for political subdivisions; provided that nothing herein shall be deemed to waive the City's sovereign immunity. An endorsement shall be provided which states that the City is named as an additional insured and stating the policy shall not be cancelled or materially modified so as to be out of compliance with the requirements of this Section, or not renewed without thirty (30) days' advance written notice of such event being given to the City Administrator. Licensee shall make best efforts to provide thirty (30) days' advance written notice to the City Administrator if the policy is intended to be cancelled or materially modified so as to be out of compliance with the requirements of this Section.

7.2.2 Exception. The insurance requirements set forth in Section 7.2.1 shall not apply to Licensee to the extent and for such period during this Agreement as Licensee is exempt from such requirements pursuant to 67.1830(6)(a), and has on file with the City Clerk an affidavit certifying that Licensee has twenty-five million dollars (\$25,000,000.00) in net assets and is therefore otherwise exempt.

7.3 Enforcement; Attorneys' Fees. The City shall be entitled to enforce this Agreement through all remedies lawfully available, and Licensee shall pay the City its costs of enforcement including reasonable attorneys' fees in the event that Licensee is determined judicially to have violated the terms of this Agreement.

7.4 Relationship of the Parties. Under no circumstances shall this Agreement be construed as one of agency, partnership, joint venture, or employment between the parties.

7.5 Relocation or Removal of Facilities.

7.5.1 In addition to the requirements of the ROW Code, the City may, in its exercise of the public interest, require that Licensee, at Licensee's sole cost and expense, relocate or reinstall any of Licensee's Facilities when other licensees within the same Facility are also so required to relocate or reinstall their similar facilities. The City shall give reasonable notice of such requirement to Licensee, including the location of facilities to be relocated, and a reasonable time to relocate such facilities. Licensee shall forthwith remove or relocate such Facilities within the reasonable time provided by the City in its written notice, which shall not be less than 90 days, other than on an emergent basis. The cost of such relocation, removal, or reinstallation of the Licensee's portion of the Facilities shall be the exclusive obligation of said Licensee without expense to the City. The parties shall work in good faith to establish the new location for the Facilities and to attempt reasonably limit any disruption of Licensees services to its customers.

7.5.2 Licensee shall, upon request and notice of not less than 90 days of any person other than the City requesting relocation of Facilities and holding a validly issued building or moving permit, and within forty-eight (48) hours prior to the date upon which said person intends to exercise its rights under said permit, Licensee shall thereupon temporarily raise, lower, or relocate its wires or other Facilities as may be required for the person to exercise the rights under the permit. Notwithstanding the above, in the event of an emergency as determined by the City, the notice required above shall not be required and Licensee shall act immediately. Except where good cause is approved by the City, a permit-holder must make its request at least 14 days prior to the date it intends to exercise its rights under the permit. If applicable, Licensee will, within 7

days of its receipt of such a request, deliver to the permit-holder an invoice for the services. However, Licensee will not be required to honor any such request unless and until the permit-holder makes payment in advance for any expenses incurred, or to be incurred by said Licensee pursuant to said person's request. If any Facilities are not relocated in accordance with this section and within the reasonable time frames required by the City, the City or its contractors may relocate the Facilities and the Licensee and its surety shall be liable to the City for any and all costs incurred by the City, including but not limited to any liquidated delay damages.

7.6 No Cause of Action Against the City. The Licensee shall have no remedy or recourse whatsoever against the City for any loss, cost, expense, or damage arising from any of the provisions or requirements of this Agreement, or because of the enforcement thereof by the City, or for the failure of the City to have the authority to grant, all, or any part, of the rights herein granted; provided that said Licensee expressly acknowledges that it accepted the rights herein granted under this Agreement in reliance upon its independent and personal investigation and understanding of the power of authority of the City to enter into this Agreement herein with Licensee; provided further that the Licensee acknowledges by its acceptance of this Agreement that it has not been induced to enter into this Agreement upon any understanding, or promise, whether given verbally or in writing by or on behalf of any party, or by any other person concerning any term or condition of this Agreement not expressed herein; provided further that the Licensee acknowledges by the acceptance of this Agreement that it has carefully read the provisions, terms, and conditions hereof and all incorporated provisions and is willing to, and does accept, all of the risk attendant to said provisions, terms, and conditions of this Agreement. Nothing herein shall be deemed to waive the City's sovereign immunity.

SECTION 8. INDEMNIFICATION

8.1 Licensee at its sole cost and expense, hereby agrees to indemnify, protect, release, defend (with counsel reasonably acceptable to the City) and hold harmless the City, its municipal officials, elected officials, boards, commissions, officers, employees, attorneys, and agents from and against any and all causes of action, claims, demands, all damages and losses, liabilities, fines, charges, penalties, administrative and judicial proceedings and orders, judgments, remedial actions of any kind, and all costs and expenses of any kind, including, without limitation, reasonable attorney's fees and costs of defense arising, directly or indirectly, in whole or in part, from the action or omission of Licensee, its agents, representatives, employees, contractors, subcontractors or any other person for whose acts Licensee is liable, in constructing, operating, maintaining, repairing, restoring or removing facilities, or in carrying on Licensee's business or operations in the City, or out of the fact that the City entered into this Agreement with Licensee, the rights granted to Licensee, or the activities performed, or failed to be performed, by Licensee under this Agreement, or otherwise, except to the extent arising from or caused by the negligent or willful misconduct of the City, its elected officials, officers, employees, agents or contractors,. This indemnity shall apply, without limitation, to any claim or cause of action for invasion of privacy, defamation, antitrust, negligence, theft, fire, violation or infringement of any copyright, trademark, trade name, service mark or patent or intellectual property right of any person, whether or not any act or omission complained of is authorized, allowed or prohibited by this Agreement. The indemnification, duty to defend and hold harmless obligations set forth in this Section shall survive for a period of five (5) years from the date of expiration or termination of this Agreement.

SECTION 9. NOTICE

9.1 Any notice, demand, consent, approval, request or other communication required or permitted to be given to either party under with respect to this Agreement (collectively, "Notice") must be in writing and must be delivered in person, by a reputable overnight delivery service or by certified mail, postage prepaid, return receipt requested, to the appropriate address(es) set forth below:

If Notice to Licensee:

Missouri Network Alliance, LLC dba Bluebird Network
Attn: Contract Management
4215 Philips Farm Road, Suite 103
Columbia, MO 65201

With a copy to: Contract.Management@bluebirdnetwork.com

If Notice to City:

City of Smithville
Attn: City Administrator
107 West Main Street
Smithville, MO 64089

With a copy to: [Chuck Soules -- csoules@smithvillemo.org](mailto:csoules@smithvillemo.org)

9.2 If notice is given by personal delivery, a receipt indicating that personal delivery was made must be obtained. Notice will be deemed effective on the date of receipt by the addressee as shown on the receipt if given by personal delivery, on the return receipt if notice is given by certified mail or the confirmation of delivery form if notice is given by overnight delivery service. Rejection or refusal to accept or the inability to deliver because of a changed address of which no notice was given will be deemed to be receipt of the notice as of the date of rejection, refusal or inability to deliver. Either party may change its address for notice by giving notice of address change to the other party in the manner for giving notice prescribed in Section 9.1.

SECTION 10. MISCELLANEOUS

10.1 This Agreement, together with all Exhibits, shall constitute the entire Agreement between the parties as to the subject matter of this Agreement, and no negotiations or discussions prior to the Effective Date shall be of any effect.

10.2 The invalidity in whole or in part of any provision of this Agreement shall not affect the validity of any other provision.

10.3 No term or condition of this Agreement will be deemed to have been waived by a party unless the waiver is made in writing and is signed by the party against whom the waiver is claimed. No waiver of default or breach of this Agreement or consent to the default or breach will be deemed to have been waived or consented to unless the waiver or consent is made in writing and signed by the party against whom the waiver or consent is claimed. The waiver of or consent

to a breach or default of this Agreement will not be deemed to be a waiver of or consent to any other breach or default of this Agreement, or to or any subsequent breach or default of the same term, or condition of this Agreement. No course of dealing or conduct or failure of a party to strictly enforce any term, right or condition of this Agreement constitutes a general waiver or relinquishment of the term, right or condition.

10.4 The rights and remedies of the Parties shall be cumulative and in addition to any other rights and remedies provided by law or equity. The laws of the State of Missouri shall govern this Agreement and any actions arising pursuant to the terms of this Agreement shall be brought in the Circuit Courts of Clay County Missouri.

10.5 This Agreement is for the benefit of the parties and not for any other person or entity. This Agreement creates no third-party beneficiary rights.

10.6 Each and every provision hereof shall be reasonably subject to acts of God, fires, strikes, riots, floods, war, and other disasters beyond the Licensee's or the City's control.

SECTION 11. SUBCONTRACTORS DUTIES.

11.1 All subcontractors utilized by Licensee in performance of any of the work authorized hereby shall execute an acknowledgement and acceptance of the duties, responsibilities liabilities and indemnities of the Licensee with regard to the work to be performed by such subcontractor, and shall provide to the City a copy of the certificate insurance required hereby, including naming the City as an additional insured without waiving any of the City's sovereign immunity.

SECTION 12. EFFECTIVE DATE AND ACCEPTANCE.

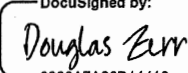
12.1 This Agreement shall be effective on the date that this Agreement is last signed by both parties ("Effective Date"). The parties acknowledge that this Agreement is a lawful contract between the City and Licensee and that Licensee agrees to the terms hereof and entered into this Agreement voluntarily and with full authority to execute this Agreement.

IN WITNESS WHEREOF, this Agreement is entered into as of the Effective Date.

CITY OF SMITHVILLE

By: _____
Name: Damien Boley
Title: Mayor

LICENSEE

DocuSigned by:

By: _____
Name: Douglas Zerr
Title: SVP of Engineering

ACKNOWLEDGEMENT AND ACCEPTANCE:

Subcontractor named below hereby acknowledges and accepts the duty to perform the work assigned to such subcontractor by Licensee pursuant to the terms hereof as well as an acknowledgement and acceptance of the duties, responsibilities liabilities and indemnities of the Licensee and shall provide to the City a copy of the certificate of insurance required hereby, including naming the City as an additional insured without waiving any of the City's sovereign immunity. . Subcontractor also acknowledges subcontractor must obtain all needed city business license for such work to be performed by the subcontractor prior to beginning such work.

Authorized Representative NAME: _____

ADDRESS: _____

Contact number for Supervisor of work: _____

Email Address for Supervisor of work: _____

**CERTIFICATE OF INSURANCE REQUIRED BY THE AGREEMENT MUST BE
ATTACHED PRIOR TO BEGINNING ANY WORK**

SUBCONTRACTOR NAME:

Authorized representative

Date _____

EXHIBIT A

SPECIAL CONDITIONS

The following special conditions shall be a condition of this Agreement and shall supersede any provision in this Agreement to the contrary:

1. All new Facilities shall be installed underground, except where good cause is shown otherwise, or, with such good cause, above ground on existing poles through private agreement(s) with existing franchise holders. Licensee will not be allowed to erect any additional poles in the Right-of-Way, except as set forth in the City Code regarding Small Wireless Facilities. Ground-mounted pedestals customarily installed for underground facilities shall be authorized subject to applicable permit requirements, provided that such pedestals or equipment that are larger or otherwise not customarily found within the City shall not be deemed authorized by this Agreement.
 - a. All underground cables must be installed using directional bore technology except where open excavations are necessary for beginning or terminating a directional bore.
 - b. Cables shall be placed so as not to interfere with any existing utilities or facilities owned by the City or any other company legally authorized to own or place utilities or facilities located within City Rights-of-Way.
 - c. All backfilling and surface restoration following any necessary open excavations shall be accomplished by Licensee in accordance with City requirements in effect at the time of the excavation and such work shall be completed within 30 days of the substantial completion of the work. Licensee, at its expense, will replace and restore all Rights-of-Way to a condition substantially similar to the condition of the Right-of-Way existing immediately prior to the commencement of work. In the case of any disturbance of pavement, sidewalks, driveways, lawns, or any other surface within the Right-of-Way, Licensee shall, at its expense, promptly replace, restore, and maintain same to the same condition, as required by the City's ROW repair specifications and such work shall be completed within 30 days of the substantial completion of the work. Licensee shall be responsible for payment of a penalty \$100.00 for each day the restoration is not timely completed as set forth herein.
 - d. All work shall conform to all applicable safety, construction, and technical specifications and codes and standards as well as all federal, state, county, and city construction requirements.
 - e. Licensee shall participate in and use the Dig-Rite or Missouri One Call in advance of the commencement of work.
 - f.

City shall have the right to inspect or correct all construction and installation work of Licensee to ensure compliance with the terms of this Agreement, City Code, or Missouri law. Except in the event of an emergency as determined by the City in its sole discretion, notwithstanding the immediately preceding sentence, Licensee shall have first opportunity to timely make any repairs that are its responsibility hereunder upon notice from City (temporary repairs, if needed, must be completed within 24 hours from the sending of notice, with permanent repairs to be completed within 14 days from the sending of notice). Licensee shall never have the right to make repairs to (1) City Facilities, Communication Systems, or City utility infrastructure or (2) Facilities or Communication Systems of other Licensees

- g. Permission is hereby granted to Licensee to trim trees upon and overhanging streets, alleys, sidewalks, and public places of the City so as to prevent the branches of such trees from coming into contact with Licensee's wires and cables. All such trimming will be done under the supervision and direction of any City official to whom such duties have been or may be delegated.
- 2. An irrevocable standby letter of credit may be provided by Licensee to the City, in a form approved by the City Attorney, in lieu of any other bond requirement to guarantee completion and maintenance of any improvements installed or excavations made in public rights-of-way or easements in accordance with applicable permit, specifications and ordinances of the City. Licensee shall be subject to the requirements of this Agreement and applicable ordinance of the City Code, including but not limited to the ROW Code regarding such bonds, but such security shall be maintained with the City at all times during the Agreement and may be drawn on by the City where required to remedy damage, maintenance or costs of the City incurred due to Licensee's non-compliance with any provision herein or applicable provision of law regarding its use of the rights-of-way. Surety in the form of bonds or other security shall not be required to the extent and for such period during this Agreement as Licensee is exempted from such requirements pursuant to RSMo 67.1830(6)(a) and has on file with the City Clerk an affidavit certifying that Licensee has twenty-five million dollars in net assets.
- 3. Licensee acknowledges and agrees that pursuant to its obligation to pay all applicable taxes it shall pay the City's gross receipts license tax as a provider of exchange telephone services if telephone services are provided, and shall remit to the City such tax on gross receipts as required by the Municipal Code, or as may be amended, regardless of technology used by Licensee to provide such services, including but not limited to wire, wireless, internet-based transmissions, and switched or unswitched, to the extent permitted by law.
- 4. If the City, in its sole discretion, determines that prior to Licensee's installation there is insufficient space available in any City Right-of-Way to accommodate an installation or relocation of Licensee's cables, Licensee shall reroute its cables via City Right-of-Way where sufficient space is available.
- 5. All backfilling and surface restoration following any necessary open excavations shall

be accomplished by Licensee in accordance with City requirements in effect at the time of the excavation. Licensee shall, at its expense, replace and restore all Rights-of-Way to a condition substantially similar to the condition of the Right-of-Way existing immediately prior to the commencement of work. In the case of any disturbance of pavement, sidewalks, driveways, lawns, or any other surface within the Right-of-Way, Licensee shall, at its expense, promptly replace, restore, and maintain same to the same condition as required by the City's ROW repair specifications.

6. Before the commencement of operations, Licensee shall procure and maintain insurance in such amounts and kinds of coverage as may be required by the City Administrator or designee. All coverage shall comply with all of the terms of Section 7.2 (including all subparts thereto) to the Rights-of-Way Use Agreement For Communications Facilities Agreement.
7. Licensee shall not be entitled to damages from City resulting from the closing, vacation, or relocation of any streets, alleys, or right-of-way.
8. City shall have the right to inspect or correct all construction and installation work in order to ensure compliance with the terms of this Agreement, City Code, or Missouri law.
9. Licensee shall not be relieved of any of its obligations by reason of City's failure to enforce prompt compliance.
10. In the event that either party hereto shall be delayed or hindered in or prevented from the performance of any act required hereunder by reason of riots, insurrection, war, or other reason of a like nature not the fault of the party delayed in performing work or doing acts required under the terms of this Agreement, then the time allowed for performance of such act shall be extended by a period equivalent to the period of such delay.