FIBER OPTIC NETWORK CONSTRUCTION AND MAINTENANCE AGREEMENT
BETWEEN THE CITY OF MANKATO, THE COUNTY OF BLUE EARTH, AND
JAGUAR COMMUNICATIONS, INC.

This Fiber Optic Network Construction and Maintenance Agreement Between the City of Mankato, the County of Blue Earth, and Jaguar Communications, Inc. is entered into by and between the City of Mankato, Minnesota, located at 10 Civic Center Plaza, Mankato, Minnesota, and the County of Blue Earth, Minnesota, located at 204 South Fifth Street, Mankato, Minnesota (the “City/County”), and Jaguar Communications, Inc. (the “Provider”), located at 213 South Oak Avenue, Owatonna, Minnesota.

RECITALS

WHEREAS, Provider is a Minnesota corporation in the business of providing voice, data, internet services, implementation, maintenance, and other logistical services for fiber networks;

WHEREAS, Provider successfully responded to a Request for Proposals issued by the City/County on December 8, 2014 (the “RFP”);

WHEREAS, on ____________ and ____________, the Mankato City Council and the County of Blue Earth Board of Commissioners, respectively, accepted Provider’s proposal for fiber optic network construction and services;

WHEREAS, the City/County seek to enter into an agreement to provide for the construction and maintenance of the fiber optic network contemplated by this Agreement and as more specifically described in Section 2 below (the “System”).

NOW, THEREFORE, in consideration of the mutual covenants and agreements set forth in the Agreement, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

Section 1. Entire Agreement and Inclusion of Documents

It is understood and agreed that the entire agreement of the parties is contained herein and that this Agreement supersedes all oral agreements and negotiations between the parties relating to the subject matter hereof as well as any previous agreements presently in effect between the City/County and Provider relating to the subject matter hereof.

This Agreement, along with the following documents which are incorporated herein by reference, constitutes the entire understanding of the parties with respect to the System:

a. Request for Proposal (RFP) issued by the City/County on December 8, 2014 and associated addenda.

b. Provider’s response to the RFP issued by the City/County.
In the event of any inconsistency between this Agreement and the documents listed above, the order of precedence to resolve conflicts shall be this Agreement, the RFP and Provider’s response to the RFP.

Section 2. Scope of Provider’s Services

a. Construction Management Services

1. Provider agrees to furnish the following services in connection with the fiber network (“System”) as listed below. “System” for purposes of initial installation and testing includes a combination of new construction (South Loop) and shared conduit/innerduct in an existing path (North Route); refer to RFP Document 3, Article 6, and in Appendix D, Section 17430, Article 1.02.

2. Provider agrees further to meet regularly with City/County’s project manager(s) and project team to establish project timelines, initial construction documents, updates on the construction activities, and coordinate problem resolution. Provider shall include its subcontractor, A&A Electric Underground Construction, Inc., as part of the construction team.

3. Provider shall abide by all Federal, State, and local laws, Statutes, ordinances, rules and regulations now in effect or hereinafter adopted pertaining to this Contract or to the facilities, programs, and staff for which Provider is responsible.

4. Provider shall construct the North Route and South Loop as identified in RFP Appendix D specifications and Drawings sheets 1-45, as specified, modified, and/or expanded by this Agreement, as depicted on the attached map identified as Exhibit A. Construction shall be all underground.

5. Provider shall construct the lateral lines as identified in RFP Appendix D, Section 17430, Article 1.02, items C-F, as specified, modified, and/or expanded by this Agreement, as depicted on the attached map identified as Exhibit B. Construction shall be all underground.

6. Provide additional construction management services, including:
   a) Providing a dedicated technical/management resource to the project. The Provider has identified this resource as Michael Broadwater, Director of Outside Plant and Facilities—an employee of the Provider. Upon prior notification to the City/County, Provider is authorized to replace Michael Broadwater with a technical/management resource of equal or greater qualifications and expertise.
   b) Coordination with necessary personnel to obtain all permits.
c) Providing specifications, preparing bids for fiber vaults, and supervising construction.

d) Working with the City/County, City/County’s assigned personnel, and with Provider’s construction contractors to assure that the System is constructed according to specifications and in compliance with the project objectives.

e) Assuring that appropriate Provider resources as needed are available in a timely fashion.

f) Managing the selected sub-contractor(s) to conduct staking and performing inspections of the fiber network construction to assure that it meets RFP specifications.

g) Assisting in the development of testing and acceptance of the System per RFP Appendix D, Section 17430, Article 3.19.

h) Reviewing test results and following up with contractors in any re-testing needed to assure compliance with specifications.

i) Assuring that, upon completion of the System construction, mapping services from the Provider accurately update the System documentation using GPS coordinates.

j) Coordinating obtaining copies of the documentation and as-built maps and providing to the City/County. Ensuring that as-built documentation complies with RFP Appendix D, Section 17430, Article 1.04.D.6.

k) Working with the City/County and others as needed to develop maintenance, administrative, and support processes needed for ongoing operation of the System.

l) When planning new projects that may be useful to or have an impact on the other parties, Provider will make its best efforts to share this information.

7. Vaults, Fiber Splicing and Testing, including:

a) Constructing and being responsible for the cost of all new vaults as part of the System. The Provider shall review vault specifications with the City/County before proceeding with any procurement or construction activities.

b) Splicing ring and laterals fibers as per City/County’s specifications. These include splicing of fibers inside the buildings in termination panels.

c) Testing all fibers to verify proper splicing and provide Optical time-domain reflectometer (OTDR) test results. Testing shall be performed in compliance with RFP Appendix D, Section 17430, Article 3.19.

d) Providing splicing diagrams. Maintaining and updating splicing diagrams and OTDR results as appropriate as part of maintenance.
activities.

b. **Maintenance of System.**

Provider shall maintain the System for the term of this Agreement, except for any laterals in which the Provider has no fiber or is not using City/County conduit or innerduct. Maintaining the System includes the following:

1. **Locating and Routine Maintenance services, including:**
   a) Provider will perform locating services and routine maintenance for a period of 20 years at no cost to the City/County for the North Route and South Loop fiber system.

2. **Emergency Repair services, including:**
   a) When emergency repairs are required due to a fiber cut or other manmade damage for which a party can be identified, Provider would perform the repair and would pursue whoever caused the damage to pay for the repair. Unless the City/County were directly responsible for the fiber damage, the City/County would have no costs. If no billable party is identifiable, the cost of repair will be equally shared with Provider, City and County each being responsible for 1/3 of the cost.
   b) For emergency repairs necessitated by “Acts of God”, Provider will perform the repairs, and the parties will share the costs of the repairs.

3. **Re-location services, including:**
   a) When re-location of shared paths/fiber are necessary, Provider will assist the City/County with such re-location, at a cost to be divided equally among the three entities.
   b) In the event there is fiber that needs to be re-located, and in which Provider does not have an interest, Provider would perform such re-location at cost, which would then be billed to the City/County.

4. **Assistance with Fiber Asset Documentation, including:**
   a) Provider will provide at cost (no markup) time of its fiber technicians to assist the City/County to document the existing fiber (other than new South Loop) in a format that is compliant with industry best standards. The goal is that this would be an off-season project and be completed by March 2016.

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**Section 3. Ownership of System**

a. The City/County shall own its portion of the System, which includes:
1. All pre-existing fiber, vaults, duct, conduit and innerduct and any associated accoutrements in the existing North Route (as described in the RFP), with the exception of one (1) conduit/innerduct in the existing North Route (see b1, below)

2. New fiber, vaults, duct, conduit and innerduct in the South Route, as described in the RFP.

b. Provider shall own its system, which includes

   1. In the existing North Route, Provider will be allowed to own one innerduct or one conduit throughout the entire existing route. Where the innerduct is encased in a larger conduit, the City/County retains ownership of the large conduit, and Provider will be allowed to own the single innerduct it uses, after Final Acceptance of the construction of the System.

   2. A parallel fiber system that Provider installs for its own use along the South Loop path (as described in the RFP).

c. Backbone fiber in the North Route and in the new South Loop shall have clear separation of ownership. For other paths, the parties may evaluate and discuss each on a case by case basis.

d. If there are available, unused ducts in areas other than were described in the RFP, the City/County is amenable to discussion with Provider on potential use of those ducts. If the parties agree about such use, this Agreement may be amended to reflect that.

Section 4. City/County’s Responsibilities

The City/County shall take the following actions to assist Provider in the performance of its duties under this Agreement:

a. Designate and allow Provider to own one (1) conduit or innerduct in the entire existing North Route.

b. Designate and allow Provider to occupy one existing City/County duct from the intersection of Hwy 22 and Madison Ave. to the County Justice Center.

c. Allow Provider to construct vaults along the existing North Route in order to connect future laterals the Provider may choose to install. Provider shall notify City/County of such planned construction before seeking permits.

d. When City and/or County are planning projects that may be useful to or have an impact on the other parties, each entity will make its best efforts to share this information.
e. Meet with Provider as needed and provide all necessary information that is in the possession of the City/County and that is required to engineer and design the System.

f. Provide access to all of the City/County's buildings sufficient, as determined by the City/County and the Provider, to allow performance of Provider's duties, during regular business hours, or as mutually agreed by the City/County and Provider.

g. Work with the Provider in obtaining space for vaults on City/County’s property as identified in the RFP response. The City/County will make all reasonable efforts to accommodate the requests.

h. Review Provider's schedule and coordinate with Provider regarding implementation of the System.

Section 5. Governmental Approval Contingency

a. The Provider shall be bound by the requirements and standards contained in all applicable federal, state, and local telecommunications laws and regulations, except those requirements and standards which are not applicable to the Provider.

b. The Provider shall not proceed with construction or installation without first obtaining written approval from the City/County of the System's fiber route. The City/County’s written approval shall not be unreasonably withheld.

Section 6. Effective Date, Term of Contract, and Renewal

This Agreement shall be effective on the signature date of the last signatory to this Agreement (“Effective Date”). All Addenda or Amendments to this Agreement shall be effective on the signature date of the last signatory to such Amendment or Addendum.

The term of the ongoing service-related portions of this Agreement shall commence upon the Effective Date and shall remain in effect for twenty (20) years. The terms related to Jaguar’s ownership of innerduct and/or conduit shall be permanent upon Acceptance of the System by City/County.

During the 18th year of the initial Term of this Agreement, Provider and City/County shall begin discussions regarding the renewal terms under which the Parties will extend the service-related portions of this Agreement following expiration of the 20th year of the initial Term.

Section 7. Termination and Cancellation

This Agreement may be terminated by either party for cause, pursuant to the default provisions outlined in Section 23 of this Agreement. In the event of such termination, Provider shall be entitled to payment for work or services satisfactorily performed on or prior to the date of termination.
The City/County, upon their own act or if compelled to do so by another Federal, State or local agency, may terminate this Agreement immediately for any material violation of Federal, state or local laws, rules or regulations that are directly related to Provider's performance under this Agreement. City/County shall give Provider written notice describing the asserted violation and an opportunity to immediately cure such violation except in circumstances where the violation could be detrimental to the general health, safety, or welfare of the public and/or the termination is compelled by another Federal, State or local agency.

Any equipment owned by Provider remains the property of the Provider upon termination of the Agreement.

Section 8. Title to System; Warranty

Provider shall bear risk of loss to the System until title to the System is vested in the City/County upon the Date of Acceptance.

Provider warrants, for a period of two (2) years after the Date of Acceptance, that the materials and equipment included within the System shall be of good quality and new unless otherwise specified or permitted by this Agreement or the RFP and that the System will be free from material defects not inherent in the quality required or permitted. Any claims made by the City/County under this Agreement for defective work or materials shall be made within a reasonable period of time after the defect is discovered but in any event no later than the date sixty (60) days after the date of discovery. Provider's sole obligation under the warranty set forth in this Section is to correct, repair or replace, as necessary, any defective item caused by poor workmanship or materials if the City/County notify Provider of the defective item within the two year period.

Section 9. Restoration of Property

Upon completion of any work requiring the opening of any public ground, Provider shall restore the same, including paving and its foundations, to the same substantial condition as said public ground was in immediately prior to the work, and in such condition as may be required by applicable local and state ordinances, rules and regulations and in compliance with RFP Appendix D, Section 32 92 00. Said work shall be completed as promptly as weather permits, and if the Provider shall not promptly perform and complete the work, the City/County shall have the right, following ten (10) days’ written notice to the Provider, to put the right-of-way, public ground or any other public or private property damaged, disturbed or destroyed by Provider’s performance under this Agreement, in good condition at the expense of the Provider.

Section 10. Security/Access

  a. Provider shall notify the City/County in writing at least 48 hours prior to accessing any part of the existing infrastructure and/or excavating within 100 feet of existing infrastructure. However, in an emergency repair situation, required notice prior to access shall be 2 hours minimum.
b. Provider personnel (including subcontractors) must be accompanied by City/County personnel whenever accessing City/County vaults.

c. City/County hand hole/vault covers shall be locked or secured with tamper resistant bolt (if present) at all times except when actively working in a vault/hand hole.

d. Viruses and Malware:

1. Provider warrants and represents that, during the course of providing services to the City/County, its employee(s) will not intentionally or recklessly introduce any computer viruses or malware into the City/County's network. Computer viruses or malware" shall be defined as any harmful or hidden programs or data incorporated therein with malicious or mischievous intent (the 'Virus').

2. Provider shall indemnify and hold City/County harmless from all losses, damages, judgments, settlements, attorney's fees, costs and expenses incurred by City/County as a result of any Virus intentionally or recklessly introduced by Provider, and shall indemnify City/County for the resultant cost of: (i) curtailing the spread of said Virus; (ii) correction of all affected system(s) used for the benefit of City/County (and temporary replacement of those affected system(s) which can be corrected during period of correction). In addition, Provider shall, at its option, immediately replace all system(s) which cannot be corrected or cured within a reasonable period of time or shall immediately reestablish the affected system(s) to be functionally equivalent to that which existed prior to the introduction of the Virus.

Section 11. Compensation Terms and Conditions of Payment

a. The Provider agrees to construct the System as described in the RFP at no cost to the City/County, and to provide locating services for the System at no cost to the City/County as long as this Agreement is in force.

b. Maintenance and Repair fees. During the Term of this Agreement, Provider shall maintain and repair, including responding to Gopher State One Call tickets and other locate requests, the fiber ring constructed as per RFP at no charge to the City/County. In addition, Provider shall maintain all laterals of which Provider shares use at no charge to the City/County. The City/County, at their discretion, may choose to contract with Provider for the maintenance of laterals not used by the Provider. If the City/County chooses to renew the maintenance of the laterals, an annual fixed maintenance cost for the laterals shall be mutually negotiated.

c. Invoice Submittal. The City and the County shall be invoiced separately for their individual shares of any charges resulting from this contract.

d. Payment Terms. Any agreed-upon annual fixed maintenance costs (for example, for laterals in which Provider has no shared infrastructure) shall be billed annually
in advance and shall be due within thirty (30) days of the City/County’s receipt of
invoices.

e. Payment for billable services for non-recurring items (such as relocations).
Provider shall invoice the City/County for such services, and the City/County
shall pay their individual invoices within thirty (30) days of receipt.

f. Provider shall receive remittance payments from the City of Mankato and Blue
Earth County in an electronic format. Such payments will be automatic clearing
house (ACH) format compliant. As part of the contractual relationship, the
Provider shall submit to the City of Mankato Finance Department and the Blue
Earth County Finance Department the required banking routing transit number,
the business banking account number, and any other banking information
necessary to complete the ACH process. The City of Mankato ACH Enrollment
Form is available from the City or the city website: www.mankato-mn.gov. The
Blue Earth County ACH Enrollment Form is available from the Blue Earth
County Finance Department at 507-304-4182.

g. Acceptance and Date of Acceptance. The contract will be considered substantially
complete under the following conditions:

1. All of the work has been completed in accordance with the contract and
specifications.
2. The System tests within specifications and operates in conformance with
manufacturer’s published specifications.
3. Completion of 30 consecutive days of operation without major network
failure from and after the System or service is turned over to the
City/County for use. The City/County will use fiber electronics (e.g.
modems, switches, routers, etc.) and may use its own test equipment to
test the fiber network; provided, however that said failure must arise as a
result of a fault or defect in the System and not in the network equipment
used by the City/County to utilize the System. Failure within the
designated period would re-start the 30-day period.
4. All documents and manuals as specified and agreed upon, including “as
bults” and Fiber Test Results have been provided.

The Provider shall certify in writing to the City/County when the system or
service is installed, operational in accordance with the specifications stated
above, and ready for use. Upon receiving the certification, the City/County will
schedule acceptance testing. At the end of the acceptance period, the
City/County will notify the Provider of system acceptance. The date identified
in the letter constitutes Date of Acceptance.

h. Condition of Payment. All services provided by Provider pursuant to the
Agreement shall be performed to the reasonable satisfaction of the City/County
and in material compliance with all applicable federal, state and local laws,
ordinances, rules and regulations. Provider shall not be entitled to receive
payment for work found by the City/County, in its reasonable discretion, to be in material noncompliance with the applicable specifications. If the City/County determines that work performed by Provider does not substantially comply with the Agreement and this Amendment, the City/County shall provide written notice to Provider describing the work found to be noncompliant. Provider shall correct the noncompliance within thirty (30) days of said notice. Upon correction of the noncompliance, payment shall be made pursuant to the payment procedures in Item b outlined above.

Section 12. Permits, Filings and Agreements

As part of its services, the Provider shall obtain all permits.

Section 13. System Maintenance, Repair and Splicing

a. Maintenance and Repair. During the Term, Provider shall provide maintenance services for the System, twenty-four (24) hours a day, seven (7) days a week and shall provide a telephone number where problems can be reported. Such maintenance services shall include, but not be limited to, responding to Gopher State One Call tickets locate requests and repair (break and fix) services. Response to a Gopher State One Call to clear a ticket or locate the Cable shall be within the timelines established by the Gopher State One Call system. With respect to repair services, Provider shall provide Telephone Support and shall have personnel onsite within four (4) hours after receipt of a trouble report should restoration of the service require on-site presence.

b. Additional Maintenance. Additional maintenance may be performed from time to time on the System upon the City/County's reasonable request and at the City/County's expense with reasonable advance notice to Provider, provided that (i) the City/County shall have agreed to Provider's charges for requested additional maintenance in advance of Provider's performance of the work; and (ii) Provider agrees its charges shall be consistent with industry-standard charges for such work or comparable work.

c. Provider Fiber Maintenance. Provider shall provide to the City/County a minimum of fourteen (14) calendar days advance notice of maintenance or repairs relating to the Provider Fibers that may adversely affect the System. Provider acknowledges that the City/County fibers will be used to provide critical public safety communications and shall coordinate any maintenance and repairs so as not to impact such communications.

d. Splicing. After the acceptance of the System, and at the City/County's request and City/County's expense, Provider shall perform physical splicing of the City/County's fiber. The City/County agrees to give Provider not less than thirty (30) days prior notice of requested splicing. All such work shall be performed at the City/County's cost and expense; provided that (i) the City/County shall have agreed to Provider's charges for requested splicing in advance of Provider's
performance of the work; and (ii) Provider agrees its charges shall be consistent with industry-standard charges for such work or comparable work. The City/County or its designee may be present at such construction, but shall not interfere with or hinder the work of Provider or its designee in any way. In the event Provider fails to perform the work in a timely manner as requested by the City/County, the City/County reserves the right to contract with another Provider to perform the requested work.

Notice Regarding Fiber in a Shared Sheath. If Provider and City/County each have owned fiber residing in a shared sheath, Provider agrees to give the City/County a minimum of ten (10) calendar days of prior notice of splicing activities it intends to perform on the Provider fibers in a shared sheath, except in circumstances where giving advanced written notice is not reasonably feasible, such as in the event of an emergency, in which case Provider shall, at a minimum, provide verbal notification to Doug Storm, IT Director, City of Mankato at 507-387-8683 and Charles Berg, IT Director, Blue Earth County at 507-304-4204. The City/County may, through written notice to the Provider, change the contact person and number during the Term of this Agreement. All such work shall be performed at Provider's cost and expense. Provider shall notify the City/County of when the splicing will be performed, and the City/County or their designee may be present at such construction but shall not interfere with or hinder the work of Provider or its designee in any way. Provider shall take extreme caution in performing such splicing activities so as not to disrupt critical communications on City/County fibers for splicing occurring as a result of routine customer hook up, Provider will provide two-week advance written notice to City/County at least twice per month or in such other manner or interval as Provider and City/County may agree.

Section 14. Relocation or Replacement of System Segments

a. Relocation or Replacement. If a relocation or replacement of the System segment (or any of the appurtenant facilities used or required in its use) is required by reason of circumstances beyond the control of the City/County or Provider, then, so long as such work is not necessitated by a breach of City/County's obligations or warranties, Provider shall complete such relocation or replacement. The Provider shall use commercially reasonable best efforts to ensure that any such relocation or replacement will not result in an adverse change to the operations, performance or connection points of the System.

Prior to initiating any work, Provider shall develop a quote for such relocation or replacement. The City/County shall have the right to negotiate a market competitive rate with the Provider. In the event that a government entity or other third party (other than a customer of the Provider) reimburses either the City/County or Provider for all or a portion of the cost to perform such work, then the total costs shall be reduced, on a dollar for dollar basis.

Cost sharing for any unreimbursed relocations or replacements is governed by Section 2 of this Agreement.
b. Condemnation Proceeding. In the event any portion of the System becomes the subject of a condemnation proceeding by any governmental agency or other party cloaked with the power of eminent domain for public purpose or use, then and in such event, it is agreed that the City/County's interest shall be severed from the Provider’s interest in such proceeding. The City/County shall be entitled to independently pursue an award for its interest in such proceedings. In the event the City/County's interest in such proceeding cannot be severed from the Provider interest, the parties shall jointly pursue an award for the parties interest in such proceedings and the parties hereto agree to have any such condemnation awards specifically allocated between the City/County's interest and the Provider’s interest which for purposes of this Agreement shall be equal.

1. Notice. Upon its receipt of a formal notice of condemnation or taking, the City/County or the Provider shall notify the other party promptly (not to exceed thirty (30) days) of any condemnation proceeding filed against the System.

2. Application of Award. Any condemnation award shall first be applied toward the relocation or replacement of the System, unless the parties mutually agree not to relocate or replace the System in which case the award shall be allocated or applied as each party's interest appear.

Section 15. System Extension

If during the Term of this Agreement, the Provider extends the System by constructing additional fiber segments within the City/County or connects the System to adjoining counties, the Provider shall give an option to the City/County to add or obtain additional dark fibers, the cost for which to the City/County shall not exceed 50% of the construction cost for the extension. The quantity of fiber installed for the City/County's use and the specific cost shall be mutually agreed upon between the parties.

The Provider acknowledges that public entities may connect to the City/County’s fibers by constructing laterals. Such connections need to be approved by the City/County and managed by the City/County. The City/County may choose any provider to construct the laterals, subject only to Provider being allowed to splice the: connections at the lateral and ring connecting points or other points required to be spliced for the project upon the System. If Provider chooses to do the splicing, it shall be at the prevailing commercial rate.

Section 16. Taxes

a. Definition of Taxes. As used in this Agreement, "Tax" or "Taxes" shall mean any and all taxes, fees, assessments, charges or levies, together with any penalties fines, or interest thereon (hereinafter collectively referred to as "Taxes"), imposed by any authority having the power to tax, including any city, county, state or federal government or quasi-governmental agency or taxing authority.
b. Payment of Taxes. Commencing on the Effective Date, the City/County shall be responsible for any and all sales, use, income, gross receipts or other Tax assessed on the basis receipt of revenues by the City/County pursuant to their use of the System, and Provider shall be responsible for any and all sales, use, income, gross receipts or other Tax assessed on the basis of receipt of revenues by Provider pursuant to its use of the Provider Fibers. (Note: The City/County is exempt from Minnesota state sales tax.)

c. Good Faith Contest. Either party may, in good faith, contest the imposition of any Taxes imposed against it in accordance with this Agreement; provided, however, that the contesting party shall take all steps reasonably necessary to ensure that the non-contesting party's use of its fibers shall not be impaired, including, but not limited to, depositing the entire contested amount with the taxing authority.

Section 17. Authorized Agents

City/County shall appoint authorized agents for the purpose of administration of this Agreement. Provider is notified that the authorized agents of City/County are as follows:

Doug Storm, IT Director
City of Mankato
Intergovernmental Center
10 Civic Center Plaza
P.O. Box 3368
Mankato, MN 56002-3368
(507) 387-8683

Charles Berg, IT Director
Blue Earth County
204 South Fifth Street
PO Box 8608
Mankato, MN 56002-8608
507-304-4204

The City/County is notified the authorized agent for the Provider is as follows:

Mike Wilker, Chief Technical Officer (for technical matters)
Kristine Anderson, Corporate Attorney (for legal matters)
Jaguar Communications, Inc.
213 South Oak Avenue
Owatonna, MN
(507) 214-1000

Section 18. Assignment of Claims

Nothing contained herein shall operate as a limitation on the right of either party hereto to bring
an action for damages, including consequential damages, against any third party based on any acts or omissions of such third party as such acts or omissions may affect the operation or of the System or the Provider Fibers; provided, however, that each party hereto shall assign such rights or claims, execute such documents and do whatever else may be reasonably necessary to enable the injured party to pursue any such action against such third party.

Section 19. Indemnity

Provider shall indemnify, defend and hold the City/County, its elected officials, agents, officers, employees, volunteers and assigns harmless from and against any and all claims, demands, liability, loss, cost, damage or expense of any nature whatsoever, including all costs and attorney's fees, made against them on account of injury, sickness, death or damage to persons or property which is caused by or arises out of, in whole or in part, the willful, tortious or negligent acts, failures and/or omissions of Provider or its agents, servants, employees, contractors, subcontractors or assigns in the construction, operation or maintenance pursuant to this Agreement; provided, however, such indemnification shall not extend to injury or damage caused by the negligence or willful misconduct of the City/County, its agents, officers, employees, volunteers or assigns.

In the event any such claim or demand be presented or filed with the City/County, the City/County shall promptly notify Provider in writing of the claim thereof, and Provider shall have the right, at its election and sole cost and expense, to settle and compromise such claim or demand; provided further, that in the event any suit or action be begun against the City/County, the Provider shall likewise promptly notify the City/County thereof, and the City/County shall have the right, at their election and at their sole cost and expense, to settle and compromise such suit or action, or defend the same at their sole cost and expense, by attorneys of their own election.

Provider shall also indemnify the City/County from, and defend the City/County against, any and all liability or expenses (including attorney’s fees and expenses reasonably incurred) arising out of or relating to any claim that Provider’s software, hardware, services or maintenance/support infringe upon the intellectual property rights of a third party including, without limitation, patent, copyright, trademark, and trade secret rights.

Section 20. Limits of Liability

It is understood and agreed that the City/County's liability shall be limited by the provisions of Minnesota Statutes Chapter 466 and/or other applicable law.

PROVIDER AND THE CITY/COUNTY SHALL NOT BE LIABLE TO EACH OTHER OR TO ANY OTHER PERSON OR ENTITY, UNDER ANY CIRCUMSTANCE OR DUE TO ANY EVENT WHATSOEVER, FOR CONSEQUENTIAL OR INDIRECT DAMAGES, INCLUDING, WITHOUT LIMITATION, LOSS OF PROFIT, LOSS OF USE OR BUSINESS STOPPAGE

Section 21. Insurance

General Requirements:
Provider’s insurance shall be primary, and not excess, to any other coverage carried by the City/County.
Insurance companies must be acceptable to the City/County. Coverage needs to be in force for the complete term of the contract. If insurance expires during the term of the contract, a new certificate must be received by the City/County at least ten (10) days prior to the expiration of this insurance. This new insurance must still meet the terms of the original contract.
Provider is responsible for any deductible or self-insured retention contained within the insurance program.

Certificate of Insurance:
Provider shall furnish an original Certificate of Insurance as evidence of required coverage to the appropriate City/County representatives before work commences. A person authorized by the insurer to bind coverage should sign the Certificate. The Certificate should include a minimum 60-day written notice of intent to cancel, suspend, or reduce coverage. The Certificate should identify the City/County as Additional Insureds for relevant coverages, except workers’ compensation.
Insurance shall be placed with insurers with a current A.M. Best rating of no less than A:VII.

Commercial General Liability Coverage:
The minimum limits of liability should be:
- $3,000,000 Aggregate
- $3,000,000 Products and Completed Operations Aggregate
- $1,500,000 Personal Injury and Advertising Injury
- $1,500,000 Each Occurrence
- $100,000 Fire Damage Limit
- $5,000 Medical Expenses
The policy should be written on an occurrence basis, not a claims-made basis.
- Excess umbrella/liability coverage may be used to reach the total recommended limits.

Auto Liability Coverage:
The minimum limits of liability should be:
- A Combined Single Limit: $1,500,000 per occurrence
Auto coverage should include: Any Auto, including Hired and Non-Owned.
- Excess umbrella/liability coverage may be used to reach the total recommended limits.

Professional Liability Coverage:
- Minimum limits of liability should be:
  - $2,000,000 per Wrongful Act or Occurrence
  - $2,000,000 Annual Aggregate

Umbrella Liability Coverage:
An umbrella liability policy may be used in conjunction with primary coverage limits to meet the minimum limit requirement for each coverage. The City/County should be listed as an Additional Insured.

Workers’ Compensation and Employer’s Liability Coverage:
Workers’ Compensation limits are to be statutory per applicable state and federal laws.
Employer’s Liability Coverage:
Minimum Limits of:
- Bodily Injury by Accident: $500,000 each accident
- Bodily Injury by Disease: $500,000 each employee
- Bodily Injury by Disease: $500,000 policy limit

Section 22. Confidentiality

a. Confidentiality of Information. Provider and the City/County shall ensure that any and all information and documents obtained from the other party during the Term of this Agreement that are defined as confidential information pursuant to Minnesota Statutes Chapter 13, will be held in strict confidence and will not disclosed or used for any purpose other than a party’s performance required or permitted by this Agreement, and except for disclosures to Affiliates, directors, officers, employees, advisors and agents with a bona fide need to know any such information solely for the purpose of analyzing, investigating, or evaluating issues arising under this Agreement. The term "Affiliate" shall mean any person or entity controlling, controlled by, or under common control with a party.

b. Ownership and Return of Information. All documents, data or information furnished by Provider or the City/County is the sole property of that party. Upon the expiration of this Agreement, those documents, data, or information shall be returned to the owing party if readily available.

Section 23. Default

Except as specifically provided in this Agreement to the contrary, neither party shall be in default under this Agreement unless and until the other party shall have given the defaulting party written notice of such default and the defaulting party shall have failed to cure the default within thirty (30) days after written receipt of such notice; provided, however, that where a default cannot be reasonably cured within the thirty (30) day period, if the defaulting party shall promptly proceed to cure the default with due diligence, the time for curing the default shall be extended for a period of up to ninety (90) days from the date of receipt of the default notice.

Section 24. Subcontracting and Assignment

Except as set forth in Provider’s bid response, Provider shall not enter into any subcontract for the performance of any services contemplated under this Agreement without the prior written
approval of the City/County; and, such approval shall not be unreasonably withheld subject to such conditions and provisions as the City/County may deem necessary. In the event a subcontractor is approved, the Provider shall be responsible for the performance of all Subcontractors. Provider shall require that any subcontractor agrees to and complies with all of the terms of this Agreement. Any subcontractor of Provider used to perform any portion of the work under this Agreement shall report to and bill Provider directly. Provider shall be solely responsible for the breach, performance or nonperformance of any subcontractor.

The City/County cannot make final payment to Provider until the Minnesota Department of Revenue has certified that the Provider and any subcontractor have fulfilled the requirements of Minnesota withholding tax laws. The following Withholding Affidavit (Form IC134) must be submitted by the Provider to the Minnesota Department of Revenue for their approval before final payment:

http://www.revenue.state.mn.us/Forms_and_Instructions/ic134.pdf

No party may assign or transfer any rights or obligations under this Agreement without the prior consent of the other Parties and a fully executed Assignment Agreement, executed and approved by the same parties who executed and approved this Agreement, or their successors.

Section 25. Force Majeure

The City/County and Provider agree that neither party shall be liable for any delay or inability to perform this Agreement, directly or indirectly caused by, or resulting from, explosion, fire, flood, unusually severe weather, power failure, war, riot, civil commotion, acts of God, acts of public or quasi-public authorities, epidemic or other causes beyond the reasonable control of Provider. Both parties shall use all commercially reasonable efforts to mitigate any damages that might be suffered by reason of any event giving rise to remedy hereunder.

Section 26. Data Practices

a. Minnesota Government Data Practices Act (Minnesota Statutes Chapter 13 and related statutes). All data collected, created, received, maintained, or disseminated, in any form, for any purposes by the activities of Provider because of this Agreement is governed by this Act, as amended, the Minnesota Rules implementing such Act, as amended, and Federal Regulations on data privacy. The person responsible for release of all data under this Agreement shall be the authorized agent of the City/County as identified in Section 17.

b. Health Insurance Portability and Accountability Act (HIPAA- 45 C.F.R. §§160, 162, 164). If, under this Agreement, the exchange of Protected Health Information in any form is anticipated, the Provider shall comply with all regulatory obligations including signing any required agreements (e.g., Business Associate Agreement). Such agreements shall be attached to and incorporated into this Agreement.
c. Release. Except as otherwise required by law, no data may be released by either party to any third party, including any media relations, without the express consent of the non-releasing party or its authorized representative.

d. Ownership. Ownership of all data prepared for or by the City/County, whether having commercial value or not, shall remain with the City/County. All data prepared for or by the Provider, its contractors, or its subcontractors shall remain the property of the Provider unless it is part of the required documentation or specifications for the City/County, in which case Provider shall retain an unlimited license with respect to said data.

Section 27. Independent Contractor

a. Nothing contained in this Agreement is intended or should be construed as creating the relationship of co-partners or joint ventures between the Provider and the City/County. No tenure or any rights including worker's compensation, unemployment insurance, medical care, sick leave, vacation leave, severance pay, PERA, or other benefits available to City/County employees, including indemnification for third party personal injury/property damage claims, shall accrue to the Provider or employees of the Provider performing services under this Agreement.

b. Provider acknowledges and agrees that no withholding or deduction for State or Federal income taxes, FICA, FUTA, or other, will be made from any payments due Provider and it is Provider's sole obligation to comply with all federal and state tax laws.

c. Provider shall at all times be free to exercise initiative, judgment and discretion as to how to best perform or provide services identified in this Agreement.

d. Provider is responsible for hiring sufficient workers to perform the services required by this Agreement and withholding taxes and paying all other employment tax obligation on their behalf.

e. The Provider shall be solely responsible for the health and safety of its employees and subcontractor's employees in connection with the services performed in accordance with this Agreement. The Provider shall ensure that all employees, including those of all subcontractors, have received training required to properly and safely perform services outlined in this Agreement. Such training is to include, but not be limited to, all applicable sections of the State and Federal Occupation, Safety and Health Administration (OSHA) laws, Superfund Amendments and Reauthorization Act (SARA), Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), Uniform Fire Code and/or any other applicable health and safety regulations. Upon the request of the City/County, the Provider shall provide copies of any licenses and/or training records for Provider and/or Provider's employees or subcontractor's employees who perform services pursuant to
Section 28. Notices

Except as otherwise specifically provided in this Agreement, any notice to a party required or permitted hereunder shall be sufficiently given only when provided in writing, and either personally delivered, delivered by nationally recognized overnight courier (such as Federal Express) or sent via certified or registered mail addressed to Provider at its address stated herein, and to the authorized agent of the City/County at the address stated herein, or to such other address as either party may from time to time designate in writing to the other.

Section 29. Controlling Law

The laws of the State of Minnesota shall govern all questions and interpretations concerning the validity and construction of this Agreement, the legal relations between the parties and performance under this Agreement. The appropriate venue and jurisdiction for any litigation hereunder will be those courts located within the County of Blue Earth, State of Minnesota. Litigation in the federal courts involving the parties will be in the appropriate federal court within the State of Minnesota.

Section 30. Nondiscrimination

During the performance of this Agreement, the Provider agrees to the following: No person shall, on the grounds of race, color, religion, age, sex, disability, marital status, public assistance status, criminal record, creed or national origin be excluded from full employment rights in, participation in, be denied the benefits of or be otherwise subjected to discrimination under any and all applicable Federal and State laws against discrimination.

Provider agrees to abide by all provisions of Minn. Stat. § 181.59, as amended, entitled "Discrimination on Account of Race, Creed, or Color Prohibited in Contract," set forth herein:

Minn. Stat. § 181.59 DISCRIMINATION ON ACCOUNT OF RACE, CREED, OR COLOR PROHIBITED IN CONTRACT.

Every Contract for or on behalf of the State of Minnesota, or any county, city, town, township, school, school district, or any other district in the state, for materials, supplies, or construction shall contain provisions by which the Contractor agrees:

1. That, in the hiring of common or skilled labor for the performance of any work under contract, or any subcontract, no contractor, material supplier, or vendor, shall, by reason of race, creed, or color, discriminate against the person or persons who are citizens of the United States or resident aliens who are qualified and available to perform the work to which the employment relates;

2. That no contractor, material supplier, or vendor, shall, in any manner, discriminate against, or intimidate, or prevent the employment of any such person or persons identified in Clause 1. of this section, or on being hired, prevent, or conspire to prevent, the person or persons from the performance of work under any contract on account of race, creed, or color;

3. That a violation of this section is a misdemeanor; and

4. That this contract may be canceled or terminated by the state, county, city, town, school board, or any other person authorized to grant the contracts for employment, and all money due, or to
become due under the contract, may be forfeited for a second or any subsequent violation of the terms or conditions of this contract.

Section 31. Equal Employment and Americans with Disabilities

In connection with the work under this Agreement, Provider agrees to comply with the applicable provisions of state and federal equal employment opportunity and nondiscrimination statutes and regulations. Provider agrees that, in the hiring of common or skilled labor for the performance of any work under contract it shall not, by reason of race, creed, or color, discriminate against the person or persons who are citizens of the United States or resident aliens who are qualified and available to perform the work to which the employment relates. Further, it shall not, in any manner, discriminate against, or intimidate, or prevent the employment of any such person or persons, or on being hired, prevent, or conspire to prevent, the person or persons from the performance of work under any contract on account of race, creed, or color. Provider acknowledges that violation of Minnesota Statutes Section 181.59, Discrimination on Account of Race, Creed, or Color Prohibited in Contract, is a misdemeanor. Provider acknowledges that this contract may be canceled or terminated by the City/County and all money due, or to become due, under the contract may be forfeited for a second or any subsequent violation of the terms or conditions of this Section.

Section 32. Amendments and Changes

At any time the City/County may make changes within the general scope of the work by issuing a written amendment duly executed by authorized representatives of the City/County and the Provider.

Amendments to the Agreement shall be negotiated by the City/County with the Provider whenever necessary to address changes in the terms and conditions, costs, timetable, or increased or decreased scope of work. An approved amendment means one approved by the authorized signatories of the Contractor and the City/County as required by law.

The parties agree that no change or modification to this Agreement, or any attachments hereto, shall have any force or effect unless the change is reduced to writing, dated, and made part of this Agreement. The execution of the change shall be authorized and signed in the same manner as for this Agreement.

Section 33. Severability

In the event any provision of this Agreement shall be held invalid and unenforceable, the remaining provisions shall be valid and binding upon the parties unless such invalidity or Non-enforceability would cause this Agreement to fail its purpose. One or more waivers by either party of any provision, term, condition or covenant shall not be construed by the other party as a waiver of a subsequent breach of the same by the other party.

Section 34. No Remedy Exclusive

No remedy set forth in this Agreement is intended to be exclusive and every such remedy shall be cumulative and shall be in addition to every other remedy given under this Agreement. No
delay or omission to exercise any right or power accruing upon any default shall impair any such right or power or shall be construed to be a waiver thereof and any such right or power may be exercised from time to time as often as may be deemed expedient by the party exercising such right or power.

Section 35. Authority

By signing this Agreement, the Provider and the City/County hereby each represent and warrant that (a) it is an entity duly organized, validly existing and in good standing in the laws of the jurisdiction of its formation; (b) it has the requisite power and authority under the laws of the jurisdiction of its formation and the laws of the State of Minnesota to enter into this Agreement and the transactions contemplated hereby and to perform all of its obligations hereunder; (c) the execution, delivery and performance of this Agreement by it has been duly authorized by its resolution of its governing body or by other appropriate official action; (d) it has obtained all authorizations and consents necessary to execute, deliver and perform this Agreement and the transactions contemplated hereby; (d) the person executing this Agreement on its behalf is duly authorized to do so; and (e) this signed Agreement represents its legal, valid and binding obligation and is enforceable against it in accordance with the terms of this Agreement, except limited by any applicable bankruptcy, insolvency, reorganization, moratorium or other laws of general application relating to or affecting the enforcement of creditors’ rights and rules or laws concerning equitable remedies.

Section 36. Counterparts

This Agreement may be simultaneously executed in several counterparts, each of which shall be an original and all of which shall constitute but one and the same instrument.

Section 37. Binding Effect

This Agreement shall inure to the benefit of and shall be binding upon Provider and the City/County and their respective successors and permitted assigns.

Section 38. Captions

The captions or section headings in this Agreement are for convenience only and in no way defend, limit or describe the scope or intent of any provisions, sections or clauses of this Agreement.

Section 39. Waiver

No failure to exercise and no delay in exercising, on the part of either party hereto, any right, power or privilege hereunder shall operate as a waiver hereof, except as expressly provided herein. Any waiver by either party of a breach of any provision of this Agreement shall not be deemed to be a waiver of any other or subsequent breach and shall not be construed to be a modification of the terms of this Agreement unless and until agreed to in writing by both parties.
Section 40. Reasonable and Timely Action

All actions, activities, consents, approvals and other undertakings of the parties in this Agreement shall be performed in a reasonable and timely manner.

Section 41. Further Assurances

Provider and the City/County agree that they will from time to time, execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered, such supplements hereto and such further instruments as may reasonably be required to carry out the expressed intention of this Agreement.

Except as hereinabove amended, the terms, conditions and provisions of said Agreement shall remain in full force and effect.

IN WITNESS WHEREOF, the parties hereto have caused this Amendment to be duly executed intending to be bound thereby.
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