

**COMMUNITY WIRELESS NETWORK MANAGEMENT AND SERVICES
AGREEMENT BETWEEN THE CITY OF MILPITAS AND SILICON VALLEY
UNWIRED, INC.**

THIS AGREEMENT is entered into between the CITY OF MILPITAS (“Milpitas” or “City”), a municipal corporation, and SILICON VALLEY UNWIRED, INC. (“SVU”), a non-profit corporation of the State of California, on this _____ day of _____, 2008 (“Effective Date”). The City and SVU may sometimes be referred to collectively herein as the “Parties.”

RECITALS

WHEREAS, the City wishes to spur economic development, enhance local neighborhoods, increase community cohesion, overcome the digital divide between different income levels, and minimize the cost of government; and

WHEREAS, the City currently owns a city-wide wireless network; and

WHEREAS, the City solicited proposals for the management and support of such network and to also make available utility poles and other City infrastructure as possible sites for future enhancements to said wireless networks to both for-profit and non-profit entities; and

WHEREAS, following evaluation and negotiation with interested parties, SVU, a non-profit organization dedicated to the spread of electronic communication throughout the San Francisco Bay region, was deemed a qualified operator by the City; and

WHEREAS, SVU desires to manage and support the City-wide wireless network and utilize City-owned fiber optic cable in order to connect certain radio antennae and provide free wireless internet access to City residents, businesses, visitors and employees of the City; and

WHEREAS, the Parties desire to set forth the terms and conditions of SVU’s management and operation of the free wireless internet system during an initial three-year Base Term and beyond, and the possible conveyance of wireless City-owned equipment to SVU ownership and mangement after the end of said Base Term, in accordance with the terms, provisions, and conditions contained in this Agreement; and

NOW THEREFORE, For And In Consideration Of The Mutual Promises, Covenants And Conditions Herein Contained, The Parties Hereto Agree As Set Forth In The Recitals Above And As Follows:

1. DEFINTIONS.

Defined terms not otherwise defined in this Agreement will have the meanings set forth below.

- a. "Council" or "City Council" means the City Council of Milpitas.
 - b. "Party" means either of Milpitas or SVU.
 - c. "Parties" means both Milpitas and SVU.
 - d. "Person" means any individual natural person, firm, partnership, joint venture, entity, society, organization, club, association, trustee, trust, corporation, company or organization of any kind.
 - e. "Services" includes the products and services described in any Statement of Work, including without limitation the Wireless Services made available to City residents, businesses and visitors, and the consulting, design, installation, implementation and maintenance services.
 - f. "Schedule of Performance" means any event described in the Schedule of Performance Exhibit.
 - g. "Network" is the city-wide wireless network, made up of radio antennae and City-owned fiber optic cable, that provides free wireless internet access to City residents, businesses and visitors and employees of the City; and
 - h. "Underlying Rights" means all deeds, leases, easements, rights-of-way agreements, licenses, franchises, permits, grants and other rights, titles and interests that are necessary for the construction, installation, maintenance, operation, use or repair of the Network.
 - i. "Users" means the individual computers authorized by a Milpitas resident, business, or visitor to access or use the Wireless Services.
 - j. "Wireless Services" means the services that enable a computer to communicate through a wireless network using the Network without cable or wire lines connecting the computer to the Network.
2. **TERM OF AGREEMENT** — The Base Term of this Agreement shall be for one (1) year. SVU shall have the option to renew for three (3) additional renewal terms of two (2) years each ("Extension Terms"). SVU shall give written notice of non-renewal to one another at least six (6) months prior to the end of the Base Term or an Extension Term.
 3. **MANAGEMENT AND OPERATION OF NETWORK AND USE OF CITY SITES**

- A. Throughout the Term of this Agreement, SVU shall provide the following services in order to provide free internet access to residents and visitors to the City: (a) operation of the existing City-owned wireless radios, antennas and equipment which comprise the wireless network (“City-Owned Equipment”), the inventory and location of which are shown in Exhibit A, and any SVU wireless equipment or upgrades (“SVU-Owned Equipment”) that may later be installed by SVU or assigned to SVU pursuant to this Agreement; (b) provision of free internet service over the City-owned and any SVU-owned network equipment; and (c) monitoring, repair and maintenance of the City-owned and SVU-owned network.
- B. During the Term of this Agreement and prior to any assignment of City-Owned Equipment pursuant to Section 4 of this Agreement, SVU shall have a limited license to manage, repair and maintain City-Owned Equipment and SVU-Owned Equipment pursuant to the terms of this Agreement.
- C. In the event of an assignment of City-Owned Equipment pursuant to Section 4 of this Agreement, SVU shall have a non-exclusive, limited license to mount, install, operate, repair and maintain SVU-Owned Equipment on sites and property pre-approved by City. Subject to Milpitas’s prior approval, which will not be unreasonably withheld or delayed, and all applicable Federal, State, and local ordinances, laws and regulations, SVU may use streetlight poles and traffic signal poles located within all of the public rights of way owned by Milpitas together with the traffic signals and street lights owned by Milpitas (“Poles”) in order to provide the services contemplated by this Agreement. Use of City streetlight poles and traffic signal poles located within all of the public rights of way owned by Milpitas together with the traffic signals and street lights owned by Milpitas shall not be exclusive.
- D. SVU is also entitled to mount SVU-Owned Equipment and equipment upgrades (“Upgrades”) on Poles in any part of the City and to increase or decrease the number of Poles containing Equipment from time to time as determined by SVU, both before and after, if accepted, any assignment of City-Owned Equipment. For the Term of this Agreement, SVU is authorized to use public rights of way owned by Milpitas for access to Poles owned by the City to which communications equipment is or will be attached pursuant to this Agreement. Such access shall be twenty-four (24) hours per day, every day, subject to applicable restrictions and regulations relating to traffic, noise, public safety and other requirements. Upon completion of each task, installation and phase of work to be performed under this Agreement, SVU shall promptly restore all work site areas to a clean and safe condition.

- E. Milpitas will cooperate with SVU to identify City-owned streetlight poles, traffic signal poles and streetlight arms to be used for the Network. If the City is unable to provide the necessary rights to City assets in any location, then SVU will be entitled to use other Poles that are close to that location. SVU's ability to provide the Network is dependent upon SVU's obtaining the Underlying Rights from the City and all applicable third parties. Installation of Upgrades to the Network shall not require approval or further permits from the City as long as the Upgrades are not substantially more burdensome in terms of weight and size. SVU shall give the City notice of any upgrade work. The City will obligate all third parties that are installing devices on the Poles to not physically block the Equipment of SVU and to cooperate in reducing radio interference. The City will not, subsequent to approving SVU's use of a Pole, authorize other persons or entities to place radio devices on or near a Pole if such additional radio device(s) will cause radio frequency interference or physical interference with the operation of the SVU Equipment.
 - F. SVU's licensed use of City-owned fiber optic cables is non-exclusive and may be modified at the City's sole discretion from time to time.
 - G. The Parties contemplate the possible assignment of the City-Owned Equipment pursuant to the terms stated herein. Even in the event of such assignment, SVU's continued right to maintain, update, and manage such Equipment and any Equipment it may install in the future shall be subject to the limited license provisions to use City sites stated in this Agreement. Failure by SVU or its successors to comply with the terms and obligations of this Agreement or in the event of a termination at will of this Agreement by the City shall also terminate the limited license to use City-owned Poles provided for herein and trigger the obligation to remove all Equipment at SVU's or its successor's sole cost.
4. **ASSIGNMENT OF CITY-OWNED EQUIPMENT.** If SVU provides service for at least three (3) years under this Agreement, the City may at its sole discretion assign any City-Owned Equipment to SVU, subject to SVU's continued compliance with and performance of the terms of the limited license to use underlying City Poles or other facilities set forth herein and the service quality and other provisions of this Agreement. In the event of an assignment, this Agreement shall remain in full force and effect, save for the allocation of equipment ownership rights set forth herein. If SVU is willing to accept such assignment, SVU shall take on all rights and responsibilities of ownership, including liabilities, for such equipment. All accepted equipment shall become "SVU-Owned Equipment" for purposes of this Agreement.
5. **SVU CONFORMITY WITH INDUSTRY CUSTOMER SERVICE AND PERFORMANCE STANDARDS.** During the term of this Agreement, SVU shall use diligence and best efforts to update and manage the Network to industry

standards for wireless networks and to current industry standards for security. SVU shall also use best efforts to ensure high quality customer service in terms of network reliability and the availability of online and/or telephonic “help desk” services.

6. **AUTHORIZATIONS OBTAINED BY MILPITAS** - Milpitas represents and warrants, to the best of its actual knowledge that all Poles identified in the Coverage Areas are owned by Milpitas, including the lights and signals attached thereto, and Milpitas has the full authority and right to grant to SVU and its successors the rights for Pole attachments set forth herein. Milpitas grants to SVU all other authorizations and rights and easements and other Underlying Rights to Milpitas owned poles appropriate for SVU to perform the installation and maintenance of the Network as described in this Agreement. SVU will not mount, install, operate, repair or maintain any radio or antenna on any property of Milpitas, except as expressly authorized by and in strict compliance with this Agreement. The City will provide alternative mounting locations for SVU in areas containing decorative street lights.
7. **AVAILABILITY** – Milpitas receives electric utility service from Pacific Gas Electric Corporation (PG&E) to provide power to all of the City’s traffic signals, street lights and Poles 24 hours a day, every day. To the best of Milpitas’s knowledge, the relatively few street lights which are not supplied power 24 hours per day are not suitable for SVU’s use under this Agreement and SVU will not be required to offer service coverage in areas containing such street lights without electricity 24 hours per day. Milpitas cannot and will not guarantee an uninterrupted supply of power, nor can it guarantee the quality of power provided by PG&E. Notwithstanding anything to the contrary, SVU’s performance under this Agreement in the Initial Coverage Area require an adequate supply of electricity 24 hours per day every day. SVU shall not be deemed to be in default during such time and in such areas as are directly affected by the lack of power. Milpitas will be responsible for any payment or payments to PG&E or any other electricity provider of electrical usage by SVU.
8. **STEERING COMMITTEE** — SVU and the City will form a Steering Committee to monitor the operation of the Network and the quality of customer service. The Steering Committee will be comprised of representatives of Milpitas appointed by the City Manager (or his designee) and an equal number of representatives named by SVU (collectively the “Steering Committee”). At least two of the City’s representatives and two of SVU’s representatives must be present at any meeting (by phone or in person) to constitute a quorum and allow for any business of the Steering Committee to be conducted. The Steering Committee’s purview shall include, but not be limited to, review of Network performance according to customer service metrics and then-prevailing industry technical standards.
9. **MARKETING COOPERATION** – SVU shall be responsible for marketing and administering the operations of the Network. Milpitas shall cooperate in

marketing, advertising and promotional plans, schedules and materials regarding the Network in accordance with a mutually agreed upon marketing plan. SVU and Milpitas shall work jointly and in cooperation to make the public aware of services enabled by the Network to the extent possible under local ordinances, laws and regulations.

10. PERMITS, FEES AND DEPOSITS — SVU and Milpitas will cooperate and assist each other in performing the following and any delay arising from the other party shall permit the delayed party an extension equal to the period of delay:

Obtain all applicable permits and licenses, including a City business license, as required for SVU to comply with applicable laws, regulations and ordinances in a manner that will not impact SVU's deployment of the Network. SVU shall pay to Milpitas all applicable deposit fees, permit fees and other fees or amounts required, provided such fees and charges are not higher than the lowest of such fees and charges actually charged to any others. When possible, the City will attempt to waive deposit fees, permit fees and other such fees.

11. WORK STANDARDS — SVU agrees to perform the Services in accordance with all applicable ordinances, laws and regulations, including all traffic laws and regulations including, without limitation, those set forth as California DOT standards. SVU shall comply with all applicable laws, ordinances and regulations. SVU shall use commercially reasonable efforts to notify affected residents, property owners and businesses prior to commencement of work that could affect the quiet enjoyment of their property. SVU acknowledges that Milpitas has made no warranties, guarantees or representations regarding the fitness, safety, or suitability of any of Milpitas's property for the installation of SVU's equipment or for this Network and that any performance of work or costs incurred by SVU or provision of Services contemplated under this Agreement by SVU is at SVU's sole risk. Further, SVU's work under this Agreement shall be fully in compliance with the requirements set forth in Exhibit F.

12. REMOVAL OF EQUIPMENT—Unless Milpitas and SVU enter into an agreement that provides otherwise, upon the expiration, completion or earlier termination of the Term of this Agreement, SVU shall promptly, safely and carefully remove all radio antennas owned by and/or installed by SVU from all Milpitas property and return Milpitas property to the condition in which the property existed immediately prior to SVU's installation. SVU acknowledges and agrees that it bears all risk of loss or damage of its equipment and materials installed on Milpitas property or in Milpitas's public rights of way, except for damages arising from the negligence or wrongful acts of Milpitas or its employees, agents or contractors. SVU will identify to the City any pre-existing damage to City property and shall not be liable for such damage. All Equipment shall be removed within six (6) months from the expiration, completion or earlier termination of the Term of this Agreement. Failure to remove any equipment

after this six-month period shall constitute an abandonment of said property by SVU and subject said equipment to removal by the City at SVU's cost.

13. **RELOCATION OF NETWORK** – From time to time it may be necessary to remove or relocate a Network element, and SVU shall, at Milpitas's direction, remove or relocate the specified piece of equipment upon a request from Milpitas based on the specific configuration or re-configuration of the right of way or roads in the right of way, e.g. a removal or relocation caused by widening of the road, provided that where a removal or relocation is required the City will provide a suitable alternative for SVU to re-locate the equipment of SVU. Notwithstanding the above, such removal or relocation shall only apply to the Pole that is directly affected by the configuration or re-configuration of the right of way and shall not permit the removal or relocation of any other Equipment on other Poles. The City may at its discretion in cases of relocation or in urgent situations remove any equipment either existing or installed by SVU and shall notify SVU of such removal. Milpitas shall notify SVU immediately of any Underlying Rights known to Milpitas related to the Milpitas owned assets that may interfere with the Network or SVU's obligations in connection with this Agreement. Upon the expiration, non-recognition or other termination of an Underlying Right that is necessary in order to grant, continue or maintain an Underlying Right required for any portion of the Network or provision of the Services, Milpitas will notify SVU in writing, and Milpitas shall use commercially reasonable efforts to obtain a renewal of the Underlying Right.
14. **BREACH BY SVU AND TERMINATION FOR CAUSE.** If SVU materially breaches any of the terms of this Agreement, City's remedies shall include, but not be limited to, immediate cancellation of the Agreement for cause and/or assignment of Equipment licensing or antennae Pole-site licensing rights to a third party. Such right does not affect the right of either Party to terminate for convenience, as set forth in Paragraph 22.
15. **PAYMENT OF TAXES** — SVU will pay all taxes applicable to its provision of service to customers. Milpitas will not enact any taxes that would apply only to the Network or SVU. SVU will pay any and all taxes which may be levied against SVU by any tax authority.
16. **INDEPENDENT CONTRACTOR** — SVU, in the performance of the work and Services agreed to be performed pursuant to this Agreement, shall act as and be an independent contractor and not an agent or employee of Milpitas. SVU shall have the discretion to operate the Network as SVU determines provided that such operation shall at all times be in accordance with the requirements of this Agreement and any and all applicable Federal, State and local laws, statutes, rules, regulations and ordinances.
17. **FORCE MAJEURE** - Neither party shall be responsible for any of its obligations under this Agreement prevented or delayed by reasons which are not reasonably

foreseeable and not reasonably avoidable, including Acts of God, floods, fires, hurricanes, tornadoes, earthquakes or other unavoidable casualty, acts of public enemy, insurrection, war, riot, sabotage, epidemic, strike or other labor disputes, freight embargoes, shortages or unavailability of materials or supplies, delays or restrictions due to governmental action, unusually severe weather conditions, concealed and unknown conditions below the surface of the ground differing materially from those ordinarily encountered and generally recognized as inherent in construction work or which are not reflected on current maps or drawings of underground conditions, or wrongful physical obstruction by any Person at any installation site (“Force Majeure Event”). The time within which any obligation must be performed under the terms of this Agreement shall be extended for a reasonable period to be determined jointly by the City and SVU where timely performance is prevented due to a Force Majeure Event. SVU or the City shall promptly notify the other party of any Force Majeure event described in this Section and, in such notice, shall indicate the anticipated extent of such delay and shall indicate whether, and to what extent, if any, the delayed party anticipates that such event shall affect the timely performance of such party’s obligations under this Agreement.

18. **ASSIGNABILITY** — SVU shall not have the right to assign or otherwise transfer this Agreement, in whole or in part, without the prior, written consent of the City. This Agreement shall be binding upon and inure to the benefit of the Parties and their successors and permitted assigns.

19. **INDEMNIFICATION** — As respects bodily injury, death, personal injury, or third-party property damage, SVU agrees to indemnify, defend with counsel to whom Milpitas does not have reasonable objections, and hold harmless Milpitas, its officials, officers, employees, agents, and representatives from and against any and all claims, losses, damages, defense costs, or liability, of any kind or nature (collectively referred to hereinafter as “Claims”), arising out of or in connection with SVU’s (or SVU’s contractors’ or subcontractors’, if any) (i) acts, errors, omissions, or unsafe acts, or (ii) work performed by, or on behalf of, SVU, relative to this Agreement; except to the extent those Claims arise out of the gross negligence or willful misconduct of Milpitas. As respects any damage or loss which does not arise out of bodily injury, death, personal injury, or third-party property damage, SVU agrees to indemnify, defend with counsel approved by Milpitas, and hold harmless Milpitas, its officials, officers, employees, agents, and representatives from and against any and all claims, losses, damages, defense costs, or liability, of any kind or nature (collectively referred to hereinafter as “Claims”), arising out of or in connection with SVU’s (or SVU’s contractors’ or subcontractors’, if any) negligent or wrongful performance under this Agreement; except to the extent that such Claims arise out of the gross negligence or willful misconduct of Milpitas. The obligations set forth in this Indemnification provision (i) shall be in effect without regard to whether or not Milpitas, SVU, or any other person maintains, or fails to maintain, insurance coverage, or a self-insurance program, for any such Claims; and (ii) shall survive the termination of

this Agreement. Nothing herein shall prevent SVU's insurer(s) from satisfying SVU's obligations under this Section.

20. INSURANCE - SVU will procure and maintain, at its sole cost and expense, insurance coverage with insurance companies possessing an *A. M. Best's* rating of A-VII or higher that satisfies or exceeds the below minimum:

Workers Compensation and Employers Liability

Workers Compensation: Statutory limits

Employers Liability: \$1,000,000 each Accident - Bodily Injury by Accident; \$1,000,000 Each Employee - Bodily Injury by Disease; and \$1,000,000 Policy Limit - Bodily Injury by Disease.

Commercial General Liability Insurance

Limit of liability: \$1,000,000 per occurrence combined single limit for bodily injury (including death) and property damage liability; \$1,000,000 personal and advertising injury; \$2,000,000 general aggregate and \$2,000,000 aggregate for products and completed operations. Also Contractor has a \$1,000,000 umbrella/excess liability policy that is on top of the above coverage. Contractor is entitled to allow a combination of primary and excess policies to meet these requirements.

Coverage: Premises liability; Contractual liability; Personal and Advertising Injury liability; Products and Completed Operations;

Commercial Automobile Liability

Limit of liability: \$1,000,000 per occurrence combined single limit for bodily injury (including death) and property damage liability.

Coverage: Owned, non-owned and hired vehicles.

Umbrella or Excess Liability

Limit of liability: \$1,000,000 per occurrence

SVU will submit, at the City's request, certificates of insurance and endorsed copies of insurance policies evidencing the required coverages prior to the commencement of work.

SVU may obtain any part or all of the insurance policies required under this Section with a deductible or self-insured retention chosen by SVU, or by a combination of primary and excess policies, without the prior written approval of the City or any other entity. If at the time of commencement of the work under this Agreement, SVU self-insures its workers' compensation or automobile liability, SVU may, in lieu of the foregoing, furnish to the City a current copy of the state certification form for self-insurance or a current copy of the State letter of approval, whichever is appropriate.

The parties agree the insurance (including self-insurance) requirements of this Section are not intended to, and do not, (a) expand or limit the indemnifications made in this Agreement by SVU to the City, or (b) expand or limit SVU's liability to the City as provided in this Agreement.

21. **TERMINATION** — This Agreement may be terminated by either Party for convenience upon sixty (60) days written notice.
22. **DISSOLUTION**—If SVU takes any steps to dissolve itself as a corporation or to declare bankruptcy, the City may terminate this Agreement and revoke any and all license rights provided hereunder. If the dissolution or bankruptcy occurs during SVU’s licensed management and operation of City-Owned Equipment, the City shall have the right to assign SVU’s rights and obligations under this Agreement, including management and license rights to said City-Owned Equipment and underlying Pole site space, to a third party of the City’s choosing.
23. **LITIGATION.** The City and SVU shall mutually cooperate in the event there is litigation commenced by a third party with respect to actions undertaken under this Agreement.
24. **GOVERNING LAW** — This Agreement shall be governed by, construed and enforced in accordance with the laws of the State of California, without regard to the conflict of law provisions thereof. Any action brought relating to the interpretation or enforcement of this Agreement may be brought in any court located in Santa Clara County, California, or the Federal Court for the Northern District of California.
25. **COMPLIANCE WITH LAWS** – SVU will comply with all applicable laws, ordinances and regulations as set forth anywhere in this Agreement. Milpitas agrees to facilitate the process of approvals by departments of Milpitas so that additional costs or delays do not occur.
26. **APPROVAL** – If the approval or consent of any party is required under this Agreement, such approval or consent may only be given in writing, and shall not be unreasonably withheld or delayed.
27. **WAIVER** - The failure of a Party at any time or times to require performance of any provision hereof shall in no manner affect its right at a later time to enforce the same. No waiver by a Party of any condition or of any breach of any term, covenant, representation or warranty contained in this Agreement shall be effective unless in writing, and no waiver in any one or more instances shall be deemed to be a further or continuing waiver of any such condition or breach in other instances or a waiver of any other condition or breach of any other term, covenant, representation or warranty. The headings preceding the text of articles and sections included in this Agreement and the headings to exhibits and schedules attached to this Agreement are for convenience only and shall not be deemed part of this Agreement or be given any effect in interpreting this Agreement. Unless otherwise indicated, words describing the singular number shall include the plural and vice versa, and words denoting each gender shall include the other gender and words denoting natural persons shall include

- corporations and partnerships and vice versa. The use of the terms “including” or “includes” shall in all cases herein mean “including, without limitation” or “include, without limitation,” respectively. Unless otherwise indicated, references to articles, sections, subsections, exhibits or schedules shall refer to those portions of this Agreement. This Agreement shall be construed without regard to any presumption or rule requiring construction or interpretation against the party drafting or causing any instrument to be drafted.
28. **BOOKS AND RECORDS**—SVU shall maintain any and all records as agreed to by the parties in signed paper writing and as required by law.
29. **CONFLICT OF INTEREST** — Milpitas and SVU shall avoid all conflicts of interest or appearance of conflicts of interest in the performance of this Agreement.
30. **RESERVATION OF RIGHTS** — This Agreement grants SVU the right to use the equipment, Poles and facilities owned by Milpitas in the manner provided herein, including all Milpitas owned streetlights and traffic signals, for Wireless Broadband Internet services for use in connection with providing and maintaining a broadband wireless Internet network. Except as provided herein, Milpitas and SVU agree that nothing contained in or contemplated by this Agreement is intended to confer, convey, create or grant to Milpitas any interest in any of SVU’s tangible or intangible property or intellectual property.
31. **NO WARRANTIES – THE ONLY WARRANTIES CONCERNING THE SERVICES AND SYSTEM PROVIDED UNDER THIS AGREEMENT ARE THOSE CONTAINED HEREIN, AND ARE MADE FOR THE BENEFIT OF MILPITAS ONLY IN LIEU OF ALL OTHER WARRANTIES AND REPRESENTATIONS, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE OR OTHERWISE. SVU ALSO SPECIFICALLY DISCLAIMS ANY WARRANTIES OR REPRESENTATIONS RELATED TO THE INTERNET; SECURITY-RELATED FEATURES OF THE SYSTEM AND/OR SERVICES CANNOT GUARANTEE COMPLETE SECURITY VIA THE INTERNET OR WIRELESS SERVICES AND SVU SHALL NOT BE LIABLE FOR BREACHES OF SUCH SECURITY OR ANY OTHER RELATED WARRANTIES, EITHER EXPRESSED OR IMPLIED, INCLUDING WITHOUT LIMITATION, INTERNET FUNCTION AND/OR PERFORMANCE WARRANTIES. SVU SHALL HAVE NO LIABILITY FOR THE CONDUCT OF PERSONS USING OR ACCESSING THE SYSTEM OR SERVICES.**
32. **NOTICES** - Any notice, request, instruction or other document to be given hereunder by a party pursuant to this Agreement shall be in writing and shall be deemed to have been given: (a) when received if given in person or by courier or a courier service; (b) on the date of transmission if sent by telex, facsimile or

other wire transmission; or (c) three (3) business days after being deposited in the U.S. mail, certified or registered mail, postage prepaid.

If to Milpitas:
City Clerk
455 E. Calaveras Blvd
Milpitas, CA 95035

with a copy to:
City Manager
455 E. Calaveras Blvd
Milpitas, CA 95035

If to SVU:

or to such other individual or address as a Party may designate for itself by notice given as herein provided.

33. PRIOR AGREEMENTS AND AMENDMENTS — This Agreement constitutes the entire agreement between the Parties. Except as set forth herein, there are no promises, representations or understandings between the parties of any kind or nature whatsoever. Electronic communications and documents will not be sufficient to modify this Agreement however a facsimile transmission of signed paper writing is sufficient and shall be deemed to be a signed writing on paper.
34. EFFECTIVE DATE AND AUTHORITY – This Agreement shall become effective as of the Effective Date of this Agreement upon the authorized execution on behalf of both parties.
35. UPGRADES. SVU shall make best efforts to include Upgrades and new technology to the Network it operates under this Agreement to retain market competitiveness and match industry standards.
36. DISPUTE RESOLUTION PROCESS—
Any dispute between the Parties which arises during the Term of this Agreement and which the Parties cannot then resolve shall be subject to the following administrative remedy prior to termination of this Agreement for cause or any litigation occurring between the Parties. Termination of this Agreement for convenience shall not be subject to the procedures set forth below.

The Parties shall attempt to resolve any controversy, claim, problem or dispute arising out of, or related to, this Agreement (a “Dispute”) through good faith consultation in the ordinary course of business. In the event that the Dispute is not resolved by the project managers of the Parties, either Party may upon written notice to the other Party request that the matter be referred to the senior

management official within each respective organization with express authority to resolve the Dispute ("Request for Internal Resolution"). A written Request for Internal Resolution shall be given by either Party within thirty (30) calendar days of the Parties' knowledge that the project managers were unable to resolve the Dispute. Senior management officials shall meet or confer at least once in good faith, to negotiate a mutually acceptable resolution within ten (10) business days of the Request for Internal Resolution. For the purposes of this paragraph, the designated project manager for Milpitas shall be designated by the City Manager and for SVU shall be the SVU General Manager. The senior management official for Milpitas shall be designated by the City Manager; and for SVU shall be the VP of SVU. The project managers and/or senior management officials may be changed by notice given by the Party changing its personnel.

37. Notice. Project managers and senior management officials are each required to meet only once but either group may mutually agree to meet more than once if it appears that further meetings may successfully resolve the Dispute. If the Dispute is not resolved to the mutual satisfaction of the Parties by the project managers or senior management officials, then either Party may provide written notice to the other Party requesting mediation of the Dispute ("Request for Mediation"). A Request for Mediation shall not be given prior to the –required meeting of the senior management officials regarding the Dispute, or at least fifteen (15) business days after the request for Internal Resolution, whichever is earlier, and shall not be given any later than ninety (90) calendar days following the date of the first senior management officials meeting. The Request for Mediation shall set forth all of the issues that Party deems outstanding that must be submitted to mediation. The Party in receipt of the Request for Mediation shall respond within twenty (20) business days listing any issues it deems appropriate for submission to the Mediator.
38. Mediation. Any Disputes, except those for which the remedy requested is injunctive relief, shall be mediated in non-binding mediation within sixty (60) calendar days of the date on the written Request for Mediation, or the soonest date thereafter that the mediator is available.
39. Mediator. The Mediator shall not be employees or contractors for either Party or in any way have an economic interest in the success or failure of the business of either Party. If the Parties are unable to agree upon a Mediator within ten (10) business days following the date of the Request for Mediation, that matter shall be submitted to the Judicial Arbitration and Mediation Service (JAMS) which shall provide the Parties with the names of three potential Mediators. Within two (2) business days following receipt of such names, SVU shall strike one of the names and notify Milpitas of the name stricken. Within two (2) business days thereafter, Milpitas shall strike one of the remaining names and notify SVU of the name stricken. The remaining name shall be the person who shall serve as the Mediator and JAMS shall immediately be so notified and a mediation date determined.

40. Costs. The costs of mediation shall be borne by the Parties equally.
41. Condition Precedent to Filing Suit. Except for equitable remedies, including without limitation, injunctive relief and specific performance, Mediation under this section is a condition precedent to a Party filing any judicial proceedings unless either: (i) that Party has made demand for mediation and the other Party has failed or refused to engage in mediation, or (ii) such judicial proceedings are necessary to avoid the expiration of a limitations period that would otherwise bar such judicial proceedings after the end of any dispute resolution process provided herein.
42. Attorney Fees. In the event of litigation arising out of any dispute related to this Agreement, the Parties shall each pay their respective attorneys fees, expert witness costs and cost of suit, regardless of the outcome of the litigation.
43. Survival. All obligations arising prior to the termination of this Agreement and all provisions of this Agreement allocating liability between City and SVU shall survive the termination of this Agreement.

IN WITNESS WHEREOF, the Parties acknowledge and accept the terms, conditions and obligations of this Agreement as evidenced by the following signatures of their duly authorized representatives. It is the intent of the Parties that this Agreement shall become operative on the Effective Date.

CITY OF MILPITAS:

SVU:

Thomas C. Williams, City Manager

By:

Name: _____
Title: _____

ATTEST:

Mary Lavelle, City Clerk

APPROVED AS TO FORM:

Michael J. Ogaz, City Attorney

EXHIBIT A

The following is a listing of City-Owned Equipment. At the City's option, the Equipment may be assigned to SVU after the provision of three years of service by SVU, pursuant to the terms of this Agreement.

Exhibit B—Network Description

The Network shall consist of Wi-Fi nodes, a point-to-multipoint fixed wireless backhaul network, and use of terrestrial fiber optic cable and/or microwave point-to-point high capacity backhaul links and the SVU backbone POP and Internet backbone connectivity.

The Wi-Fi layer shall initially be in a mesh configuration and shall include mesh Wi-Fi router nodes and backhaul radios which shall be compatible with standard 802.11 b/g networking devices. Nothing herein shall prevent SVU from upgrading the network to include emerging industry standards and specifications to meet market demands.

SVU shall specify recommended equipment for customer premises equipment in order to achieve indoor coverage. The purchase of such equipment is at the option of the network users and is not a responsibility of SVU or the City.

The point to multipoint backhaul connectivity shall include devices that operate in 5.7 GHz, 5.2 GHz, and 900 MHz unlicensed spectrum. SVU may utilize devices that operate in other unlicensed or licensed spectrum bands in order to meet the Service Level Goals in Exhibit F and network demands.

SVU may upgrade the network from time to time at its sole expense in order to take advantage of technology improvements.

Exhibit C—Schedule of Performance

1. Product Roll Out Schedule. All timelines shall be contingent on SVU and the City of Milpitas fulfilling their obligations in the Network Agreement. All timelines set forth in this Exhibit C are estimates that may be adjusted from time to time and SVU will endeavor to provide the City of Milpitas notice of such changes.
2. Statement of Work. Prior to the build out of the Milpitas Wireless Broadband Network, SVU shall provide for approval to the City of Milpitas, a detailed statement of work that will include specific time frames for assumption of the operation of the Wireless Network. It is anticipated that the detailed statement of work will include the following schedule:
 - a. Milestone One – Project Plan Completed – Minimum amount of time of completion will be in Month 1 and the maximum in Month Three (3) following execution of the Network Agreement.
 - b. Milestone Two – Consumer Network Availability Completed – Three (3) months following completion of the Project Plan– Production versions of the SVU Wi-Fi Broadband Service, the Government Wi-Fi Broadband Service shall be made available throughout the coverage area.

Exhibit D— Initial Coverage Area Map



Licenses

Upon the written request of SVU, the City Manager will be entitled to execute without further City Council approval an addendum to this Agreement indicating that any of the following locations are available to SVU for installation of radios and antennae and collocation telecommunications equipment and associated facilities, utilities and utility rooms and enclosures, pursuant to the license and other provisions set forth in this Agreement. Security deposits and application fees will not be charged to SVU.

- a. City Hall roof
- b. Library roof
- c. Data Center roof and cage space inside Data Center
- d. Roof penetration at Data Center or possibly other locations
- e. Police Radio Tower
- f. Milpitas Sports Center
- g. Milpitas Community Center
- h. Milpitas Senior Center
- i. Milpitas Library (when constructed)
- j. Other City facilities to be identified

Exhibit E—Services Provided

Services Provided by SVU:

SVU shall provide the City of Milpitas access to the network for Public Safety and General Government use. The public safety services will not be for mission critical systems but will be used as backup to other public safety communications systems. Milpitas and SVU understand and agree to use commercially reasonable efforts to reach a mutually agreeable technical solution that will provide Milpitas Public Safety users of the above described accounts with prioritization of their service and a non-broadcast SSID on the Network. SVU will provide Internet service to the residents of Milpitas at no cost within the coverage area and subject to the capacity of the network to provide such service.

SVU will supply indoor Wi-Fi service in each of the following four facilities (but only if such facility is located in the Coverage Area). At SVU's discretion, SVU may utilize the city's existing fiber optic connections to the buildings to provide backhaul to the SVU Network. SVU and the City will determine mutually acceptable parameters for this service, including but not limited to session length, customer experience and duration of use. SVU may display information and promotional materials at each of these locations in a form and manner acceptable to the City.

Milpitas Sports Center
Milpitas Community Center
Milpitas Senior Center
Milpitas City Council Chambers

SVU may display information and promotional materials at each of these locations in a form and manner acceptable to the City. SVU will provide customer support and technical information by means of on-line resources and e-mail.

Services and Equipment Provided by City of Milpitas:

The City shall provide the equipment and facilities identified in Exhibit A to SVU at no cost for the purpose of providing the services detailed in this agreement. Use of City owned fiber optic cabling, network facilities or other City assets not listed within this agreement will be provided at the City's discretion at no cost to SVU. The City will provide up to 20 hours per month of staff resources to assist in the maintenance of the network.

Exhibit F – Additional Work and Safety Requirements

This Exhibit F contains minimum requirements and specifications governing use and occupancy of Milpitas's utility poles, traffic light poles and arms, traffic lights, street light poles and arms, and any other such equipment owned by Milpitas or the utilities.

SVU's facilities shall be placed and maintained in accordance with the requirements and specifications of the rules and regulations of the California Public Utilities Commission, including General Order No. 95 (G.O. 95), the National Electrical Code (NEC), the National Electrical Safety Code (N.E.S.C.), the rules and regulations of the Occupational Safety and Health Act (OSHA), all of which are incorporated by reference into this Exhibit F, and of any governing authority having jurisdiction over the subject matter. Where difference in specifications may exist, the more stringent shall apply.

All requirements of the National Electrical Safety Code referred to in this Agreement shall mean the current edition of such code and shall include any additional requirements of any applicable Federal, State, County or Municipal Code or regulatory body, including the California Public Utilities Commission, with jurisdiction over Milpitas. Reference to either the Safety Code, or to N.E.S.C., have the same meaning.

SVU's wiring, cable, equipment and facilities shall be compatible with Milpitas's facilities so as not to damage any facilities of Milpitas.

Upon completion of work, SVU shall remove all of its tools, unused materials, wire clippings, cable sheathing and any other similar matter.

All of SVU's wiring, cables, equipment and facilities shall be firmly secured and supported to the satisfaction of Milpitas's authorized representative.

All of SVU's cables, equipment and facilities shall be plainly identified with a firmly affixed tag of a type and wording satisfactory to Milpitas.

SVU shall require that all its work crews or any of its contractors and subcontractors:

- (i) are familiar with all power line rules, requirements, regulations, standards and guidelines under G.O. 95 and N.E.S.C.; (ii) survey the area in which work is to be performed before commencing such work and make a determination that the required work can be completed safely; (iii) survey the area in which work is to be performed before commencing work and make a determination that any electrical power lines are in conformance with G.O. 95 and N.E.S.C.; and (iv) proceed with such work only upon making such determinations.

SVU shall immediately notify Milpitas Emergency Dispatch Center at (408) 586-2420 of any emergency situation related to Milpitas's poles, traffic lights, or street lights, or SVU's facilities.