

**ORDINANCE NO. 3123**

**AN ORDINANCE OF THE CITY OF PAOLA, KANSAS, GRANTING JMZ COPORATION, DOING BUSINESS AS KWIKOM COMMUNICATIONS, A KANSAS CORPORATION, ITS SUCCESSORS AND ASSIGNS, A TELECOMMUNICATIONS FRANCHISE AND PRESCRIBING THE TERMS OF SAID GRANT AND RELATING THERETO.**

BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF PAOLA, KANSAS:

This Franchise Agreement (the “Agreement”) is entered into as of the 10th day of April, 2018 (“Effective Date”) by and between the CITY OF PAOLA, KANSAS, a municipal corporation (“City”), and JMZ CORPORATION, doing business as KwiKom Communications (“JMZ”).

**RECITALS**

A. JMZ owns, maintains, operates and/or controls, in accordance with any applicable regulations promulgated by the Federal Communications Commission and the Kansas Corporation Commission, telecommunications networks serving JMZ’s customers through advanced fiber facilities and other wireless carrier customers through fiber-fed facilities.

B. JMZ seeks to enter the City’s right-of-way (“ROW”), and other real property of the City, to install, maintain and operate a fiber optic network (the “Network”), so that JMZ and/or its customers (the “Customers”) may provide data, telecommunications and other services to the enterprises, residents and visitors of the City and others (the “Services”).

C. Some features of the Network include, without limitation, antenna nodes, poles, equipment cabinets, underground and above ground fiber optic cable, fiber handholes and enclosures, fiber repeaters and related equipment, and will include other equipment as technology evolves, in a configuration and at locations to be filed and identified through the City permit process (“Facility” or “Facilities”).

D. Certain systems of JMZ which are specific parts or types of the Facilities may be located on streetlights, stand-alone poles, third party utility poles, and other structures located on or within the Public ROW or City owned property as permitted under this Agreement.

E. JMZ desires to obtain from City as permitted by law, and the City is willing to grant JMZ as required by law, the right to access the Public ROW to locate, place, attach, install, bury underground, operate, use, control, repair, replace, upgrade, enhance and maintain the Facilities in a manner consistent with this Agreement.

In consideration of the Recitals set forth above, the terms and conditions of this Agreement and other valuable consideration, the adequacy of which is hereby acknowledged, the parties agree as follows:

## **SECTION 1 – INSTALLATION OF THE NETWORK**

**1.1 Permitted Installation.** JMZ may at JMZ's sole cost and expense and during the term of the Agreement, locate, construct, place, attach, install, bury underground, operate, use, control, repair, replace, upgrade, enhance and maintain the Facilities subject to the terms and conditions of this Agreement. JMZ shall undertake and perform work authorized by this Agreement in a skillful and workmanlike manner.

**1.1.1 Installation Specifications.** The installation of the Facilities shall be made in accordance with plans and specifications as may be approved by the City and after obtaining all necessary permits for all work in the ROW and/or on City property. Such approval review shall be made no later than forty-five (45) days from application date, and under exceptional circumstances the time may be extended an additional forty-five (45) days upon agreement of the Parties. The Parties understand and agree that Facilities outside of the Public ROW may require additional easements for underground fiber to connect to Network within Public ROW. Such additional easements shall be located so as not to interfere with the City's use of its property. For each installation of Facilities, JMZ shall provide to the City plans, specifications, a construction work breakdown, and anticipated construction time frames for the installation of Facilities no later than forty-five (45) days prior to the planned start of the installation. JMZ shall, at the written request of the City, attend a planning session regarding any installation proposed by JMZ. The location, depth of the fiber underground, and any other requirements shall be approved in writing by the City prior to construction of the Facilities at the specific location, approval of which shall not be unreasonable withheld, conditioned or delayed. Approval of plans and specifications and the issuance of any permits by the City shall not release JMZ from the responsibility for, or the correction of, any errors or omissions that may be contained in the plans, specifications or permits. JMZ shall be responsible for notifying the City and all other relevant parties immediately upon discovery of such errors or omissions and obtaining any amendments for corrected City-approved permits as may be necessary. JMZ shall be responsible for all costs associated with the permitting process, including, but not limited to, repairs and replacement of City ROW. Such permits and approval requirements detailed in this section shall not be unreasonably withheld, conditioned or delayed by the City and any conditions or requirements shall be in accordance with federal, state, and local laws.

**1.1.2 Temporary Construction.** The installation of the Facilities shall be performed in accordance with traffic control plans for temporary construction work that are approved by the City, which approval shall not unreasonably be withheld, conditioned or delayed.

**1.1.3 Construction Schedule.** If requested by the City, at least ten (10) days prior to the installation of the Facilities, JMZ shall deliver to the City a schedule for the proposed work related to the construction of the Facilities, as well as a list of the names of all JMZ agents and contractors authorized to access the City ROW and City owned property on JMZ's behalf.

**1.1.4 Coordination of Work.** JMZ shall be responsible for coordination of work to avoid any interference with existing utilities, substructures, facilities and/or operations within the City's ROW. JMZ shall be the City's point of contact and all communications shall be through JMZ. JMZ shall be solely responsible for communication with Kansas One-Call.

**1.1.5 Inspection by City.** The City shall have reasonable access to inspect any work conducted by JMZ during the installation, maintenance and/or repairs of the Facilities.

**1.1.6 Other Utility Providers.** When necessary, JMZ shall coordinate with other utility providers for other needed utility services. JMZ and the City will reasonably cooperate with the other utilities providers regarding the location of any meter, pole, and other apparatuses required for each Site.

**1.1.7 Existing Utility Poles.** JMZ may attach its Facilities to an existing City utility pole, or to a third-party utility pole pursuant to an agreement with the third-party utility pole owner, provided, however that any necessary replacement of the pole in order to accommodate the attachment shall be subject to the proper exercise of the City's police powers, and in no instance shall JMZ erect a new pole within an existing aerial pole line absent the City's or the third-party's prior authorization. There shall be no charge to JMZ associated with its use of an existing City utility pole.

**1.2 Compliance with Law.** This Agreement is subject to the terms and conditions of all applicable federal, state, and local laws and the Parties shall comply with any such laws in the exercise of their rights and performance of their obligations under this Agreement. Laws or Law as used in this agreement means any and all statutes, constitutions, ordinances, resolutions, regulations, codes, judicial decisions, rules, permits, approvals, or other applicable requirements of the City or other governmental entity or agency having joint or several jurisdiction over the Parties' activities under this Agreement or having jurisdiction that is applicable to any aspect of this Agreement that are in force on the Effective Date and as they may be enacted, issued, or amended during the term of this Agreement.

**1.2.1 Zoning Regulations.** Zoning regulations shall apply to installations within the City ROW.

**1.2.3 Permits.** JMZ shall obtain any necessary encroachment permits from the City for the installation of the Network and for any other work within the City's ROW or other real property of the City, as required by the Code or State Law at K.S.A. 17-1902(N), as amended.

**1.3 Compliance with Permits.** All work within the City's ROW or other real property of the City shall be performed in strict compliance with all applicable permits and all applicable regulatory requirements.

**1.4 Placement of JMZ Facilities.** JMZ shall coordinate the placement of its Facilities in the Public ROW in a manner that minimizes adverse impact on public improvements, as reasonably determined by the Public Works Director.

**1.5 New Streetlight Poles and Existing Streetlight Poles.** JMZ may build new poles or other such facilities required for the installation of the Facilities which would comply with all encroachment and building permits, applicable City, state and federal specifications, and Laws ("New Poles"). In areas where there are existing poles, JMZ will work with the owner of that existing pole to co-locate the Facility, but only when the pole owner is willing to allow such attachment and where such attachment is feasible from a safety, technical, and engineering (structural and radio frequency coverage) perspective.

**1.5.1 City Use of New Poles.** The Parties understand the City may use any New Poles for City purposes, including but not limited to streetlights and other lighting so long as such use does not interfere with JMZ's use of its Network or Facilities. JMZ shall reasonably cooperate with the City when using the New Poles.

**1.5.2 City-Owned Lights.** Except for the installation of the lights and ancillary equipment on or in the New Poles and/or as set forth in section 1.5.3 below, JMZ shall not be responsible for maintenance, repair, or replacement of City-owned lights, light bulbs and equipment or equipment owned by third parties authorized by the City on the New Poles.

**1.5.3 Damage to New Poles.** If a New Pole falls or is damaged such that there is an imminent threat of harm to persons or property, then the City may cause the New Pole to be removed to the side of the street or a location that City believes reasonably eliminates the right of such imminent threat or harm to persons or property. JMZ shall, after written notice from the City that any New Pole has been damaged or removed, cause the New Pole to be repaired or replaced within thirty (30) days after the City's written notice. The cost to repair and/or replace any New Pole, including the replacement City streetlight, bulb and ancillary equipment shall be paid by JMZ; provided, however, that if the New Pole is damaged or destroyed by the City or a third party user that the City has given the right to use the New Pole, then the City and/or its third party user shall pay the cost to repair and/or replace the New Pole. To the extent that JMZ seeks reimbursement from a third party either directly or through applicable insurance, the City shall assign JMZ any rights the City may have against such third party for such claims.

**1.6 Franchise and Permit Fees.** JMZ is solely responsible for the payment of all lawful franchise and permit fees in connection with JMS's performance under this Agreement.

**1.6.1 Franchise Fee; Audit.** During the term of this Agreement, JMZ agrees to pay the City a franchise fee each month for each JMZ fiber optic Customer who receives services within the City limits of Paola, Kansas (no franchise fee is due when the point of service is outside the City limits of Paola; mailing address alone does not determine City residency); during the first year the franchise fee is \$1.50 (one dollar and fifty cents), and during the second year and each year thereafter the franchise fee is \$2.50 (two dollars and fifty cents). The franchise fee will be based on who is shown on JMZ books as a City resident fiber optic Customer on the last day of each calendar month, with no pro-rate for a partial month Customer or adjustment for uncollectable accounts, and shall be paid to the City by the 15<sup>th</sup> day of the second month thereafter. Any payment not timely paid shall accrue interest at ten percent (10%) per annum until paid. JMZ agrees to keep accurate books for the purpose of determining the franchise fee, and no more than once per year, the City may, at the cost of the City and during regular business hours on thirty (30) days notice, inspect JMZ's books relative to calculation of the franchise fees, but only to the extent necessary to confirm the accuracy of payments due. The City agrees to hold in confidence any non-public information it learns from JMZ to the fullest extent permitted by Law.

**1.6.2 DAS Facilities.** A one-time permit and license fee of \$1,000.00 for each DAS Facility installed within the public right-of-way of the City shall be paid to the City by JMZ. JMZ shall pay a DAS Facility Fee of \$1,000.00 for the second and subsequent DAS Facilities the 15<sup>th</sup> day following the month after each DAS Facility is installed in the City's right-of-way.

**1.7 Access to the Facilities.** The City shall allow JMZ reasonable access to each of the Facilities in the City ROW or City owned property for purposes of installation, repair, maintenance or removal of Facilities. If any such maintenance activities have the potential to result in an interruption of any City services at the Facility, JMZ shall provide the City with a minimum of three (3) days prior notice of such maintenance activities. Such maintenance activities shall, to the extent feasible, be done with minimal impairment, interruption, or interference to City services. JMZ shall allow a representative of the City to observe any repair, maintenance or removal work performed at the Facilities.

## **SECTION 2 – TERM AND TERMINATION**

**2.1 Term.** This Agreement shall be effective for an initial term of five (5) years from the effective date of this ordinance. This Agreement will automatically renew for additional five (5) year terms thereafter unless either party notifies the other party of its intent to non-renew at least ninety (90) days prior to termination of the then current term. The additional term(s) shall be deemed a continuation of this ordinance and not as a new ordinance or amendment. Under no circumstances shall this ordinance exceed twenty (20) years from the effective date of the franchise ordinance. At the conclusion of the twenty (20) year period the parties agree to negotiate a new franchise in good faith in the event JMZ is still providing services hereunder. Except as otherwise provided, this Agreement may be terminated without any penalty or further liability, immediately upon written notice or as otherwise provided due to a default of any covenant or term of this Agreement or upon six months written notice to either party.

**2.2 90 Day Remedy Period.** If the Agreement is breached by JMZ, then the provisions of Section 8 (Default) shall govern the parties hereto.

**2.3 Termination of Use.** Notwithstanding Section 2.1 above, JMZ may terminate its use of any or all of the Network by providing the City with ninety (90) days prior written notice, and in such event, JMZ's payment obligations to the City shall terminate simultaneously with the termination of use.

## **SECTION 3 – REMOVAL AND RELOCATION**

**3.1 Removal due to Public Project.** Upon receipt of a written demand from the City pursuant to this Section 3, JMZ, at its sole cost and expense, shall remove and relocate any part of the Network constructed, installed, used and/or maintained by JMZ under this Agreement, whenever the City reasonably determines that removal and/or relocation is needed for any of the following purposes: (a) due to any work proposed to be done by or on behalf of the City or any other governmental agency, including, but not limited to, any change of grade, alignment or width of any street, sidewalk or other public facility, installation of curbs, gutters or landscaping and installation, construction, maintenance or operation of any underground or aboveground facilities used as sewers, water mains, drains, storm drains, pipes, gas mains, poles, power lines, telephone lines, cable television lines and tracks; (b) because any part of the Network is interfering with or adversely affecting the proper operation of City-owned light poles, traffic signals, or other City facilities or operations; or (c) to protect or preserve the public health and safety. The City shall cooperate with JMZ in relocating any portion of the Network removed pursuant to this Section 3.1 in a manner that allows JMZ to continue providing service to Customers, including, but not limited

to, expediting approval of any necessary permits required for the relocation of that portion of the Network relocated under this Section 3.1. No permitting or other fees may be charged by the City for a removal occurring under this Section.

**3.2 Removal Due to Termination.** No later than one-hundred and eighty (180) days after termination of this Agreement, JMZ shall, at its sole cost and expense, remove the Network or the terminated portion thereof and, if such removal disturbs the locations or adjacent property (including City ROW, City facilities added under Section 1.4.1, or City real property), restore each Facility and its adjacent property to its original condition, reasonable wear and tear excepted, and further excepting landscaping and related irrigation equipment, or other aesthetic improvements made by JMZ to the Facility or adjacent property, or as otherwise required by the City. For New Poles, JMZ shall install a new streetlight or facility as directed by City's Public Works Director, or his or her designee. Alternatively, JMZ shall abandon the Network, or any part thereof, in place and convey it to the City if either the City or JMZ elects to do so.

**3.3 Abandonment.** In the event JMZ ceases to operate and abandons the Network, or any part thereof, for a period of ninety (90) days or more, then JMZ shall, at its sole cost and expense and within the time period specified in Section 3.2, vacate and remove the Network or the abandoned part thereof. If such removal disturbs the Facility or adjacent property (including City ROW, City facilities added under Section 1.4.1 or City real property), JMZ shall also, at its sole cost and expense, restore the Facility or adjacent property to its original condition, reasonable wear and tear excepted, and further excepting landscaping and related irrigation equipment, or other aesthetic improvements made by JMZ to the Facility or adjacent property. Alternatively, JMZ shall abandon the Network, or any part thereof, in place and convey it to the City if either the City or JMZ elects to do so.

**3.4 No Relocation Compensation.** The City and JMZ are not entitled to compensation for any relocation of its Network that may be required under Section 3.1 – Removal due to Public Project. JMZ is not entitled to relocation assistance or any other compensation or benefits under the Uniform Relocation Assistance Act or any other applicable provision of law upon termination of this Agreement.

## **SECTION 4 – MAINTENANCE AND REPAIR**

**4.1 Electricity Use.** JMZ shall pay for the electricity and other utilities services it consumes in its operations at the rate charged by the servicing utility company.

**4.2 Maintenance and Repair.** JMZ shall, at JMZ's sole cost and expense, perform all maintenance and repairs reasonably needed to maintain the Network in good condition and neat and orderly appearance, and in compliance with all applicable Laws. In the event any part of the Network requires replacement because such part cannot be repaired, then JMZ shall, at JMZ's sole cost and expense, replace the irreparable part of the Network. JMZ shall not cause rubbish, garbage or debris on or around its Network or the Facilities and shall not permit rubbish, garbage or debris to accumulate on or around any enclosed areas around the Facilities. If the City gives JMZ written notice of a failure by JMZ to maintain the Facilities, JMZ shall use its best efforts to remedy such failure within forty-eight (48) hours after receipt of such written notice.

4.3 **Appearance.** JMZ shall cooperate with the City on all issues of aesthetics and appearance. JMZ shall follow all legally binding City policies, state and local ordinances with respect to aesthetics, including but not limited to, historic site and/or locations of significant importance. All locations of systems must be aesthetically approved by the Public Works Department in a manner consistent with other approvals within these Restrictions.

4.4 **Repair of ROW.** JMZ shall be responsible for any damage, ordinary wear and tear excepted, to street pavement, existing facilities and utilities, curbs, gutters, sidewalks, landscaping, and all other public or private facilities, to the extent caused by JMZ's construction, installation, maintenance, access, use, repair, replacement, relocation, or removal of the Network in the City's ROW. JMZ shall promptly repair such damage and return the City's ROW and any affected adjacent property to a safe and satisfactory condition to the City in accordance with the City's applicable street restoration standards. JMZ's obligations under this Section 4.4 shall survive for one (1) year past the completion of such reparation and restoration work and return of the affected part of the City's ROW by JMZ to the City.

4.5 **BOND.** JMZ shall provide a bond in the amount of \$100,000.00 during the construction of the network to represent the estimated cost of JMZ's construction obligations under Sections 3 and 4 of this Agreement, which may require JMZ to increase from time to time to reflect reasonable estimated costs of performing such obligations, to secure performance of JMZ's obligations under Sections 3 and 4.

## **SECTION 5 – TAXES**

5.1 **Taxes.** JMZ is responsible for payment of any taxes, fees and assessments levied on its ownership, use and maintenance of the Network. Pursuant to K.S.A. 79-5a01 *et. seq* of the Kansas Revenue and Taxation Code, the City hereby advises, and JMZ recognizes and understands, that JMZ's use of the City's ROW, the New Poles, and/or other non-ROW City property and facilities may create a possessory interest subject to real property taxation and that JMZ may be subject to, and responsible for, the payment of real property taxes levied on such interest. JMZ will cooperate with the Miami County Assessor in providing any information necessary for the Assessor to make a property tax determination. JMZ reserves the right to challenge any such assessment. JMZ shall hold the City harmless from payment of the same.

## **SECTION 6- INDEMINIFICATION**

6.1 **Indemnity.** JMZ shall indemnify, defend, and hold harmless the City, its council members, officers and employees, agents, and contractors, from and against liability, claims, demands, losses, damages, fines, charges, penalties, administrative and judicial proceedings and orders, judgments, and the costs and expenses incurred in connection therewith, including reasonable attorneys' fees and costs of defense to the extent resulting from activities undertaken by JMZ pursuant to this Agreement, except to the extent arising from or caused by the negligence or willful misconduct of the City, its council members, officers, employees, agents or contractors. The City shall promptly notify JMZ of any claim, action or proceeding covered by this Section 6.1.

6.2 **Waiver of Claims.** JMZ waives all claims, demands, causes of action, and rights

it may assert against the City on account of any loss, damage, or injury to any portion of the Network, or any loss or degradation of the services provided by the Network, resulting from any event or occurrence except for any loss, damage, or injury resulting from the gross negligence or willful misconduct of the City, its council members, officers, employees, agents or contractors.

**6.3 Limitation of City's Liability.** The City will be liable, if at all, only for the cost of repair to damaged portions of the Facilities arising from the negligence or willful misconduct of City, its employees, agents, or contractors. The City, its council members, officers, employees, agents or contractors, shall not be liable for any damage from any cause whatsoever to the Facilities, specifically including, without limitation, damage, if any, resulting from the City's maintenance operations adjacent to the Facilities or from vandalism or unauthorized use of the Facilities, except to the extent such damage is caused by the negligence or willful misconduct of City, its council members, officers, employees, agents or contractors. The City will in no event be liable for indirect or consequential damages.

**6.4 Limitation of JMZ's Liability.** In no event shall JMZ be liable for indirect or consequential damages in connection with or arising from this Agreement, or its use of the Network, New Poles, and ROW or other City real property.

## **SECTION 7 – INSURANCE**

**7.1 Minimum Insurance Requirements.** JMZ shall obtain and maintain at its sole cost and expense for the duration of this Agreement insurance pursuant to the terms and conditions described in this Section:

- a. Comprehensive General Liability Insurance, with minimum limits of \$2,000,000 combined per occurrence for bodily injury, personal injury, death, loss and property damage resulting from JMZ's wrongful or negligent acts.
- b. Comprehensive Vehicle Liability Insurance covering personal injury and property damage, with minimum limits of \$1,000,000 combined single-limit per accident for bodily injury and property damage covering any vehicle utilized by JMZ in performing the work covered by this Agreement.
- c. Workers' Compensation limits as required by the statutes of the State of Kansas and any other governmental entity having jurisdiction related to Workers' Compensation matters.

**7.2 Other Insurance Provisions.** The insurance policies shall contain, or be endorsed to contain, the following provisions:

- a. General Liability and Automobile Liability Coverage.
  - (1) The City, and its elected and appointed council members, board members, commissioners, officers and officials (the "Insureds") shall be named as additional insureds on all required insurance policies, except for Workers' Compensation and Employers' Liability policies.



- (2) JMZ's insurance coverage shall be primary insurance with respect to the matters covered by this Agreement. Any insurance or self-insurance maintained by the Insureds shall be in excess of JMZ's insurance.
  - (3) Any failure of JMZ to comply with reporting provisions of the policies shall not affect coverage provided to the Insureds.
  - (4) JMZ's insurance shall apply separately to each of the Insureds against whom a claim is made or suit is brought, except with respect to the limits of the insurer's liability. Each of the Insureds is subject to all policy terms and conditions and has an obligation, as an Insured, to report claims made against them to the insurance carrier.
- b. Workers' Compensation and Employers' Liability Coverage. The JMZ will agree to waive all rights of subrogation against the Insureds for losses arising from work performed by JMZ in the City's ROW.
  - c. All Coverages. Except for non-payment of premium, each insurance policy required by this clause shall be endorsed to state that coverage shall not be cancelled or reduced in coverage or limits by the insurer except after thirty (30) days' prior written notice has been given to the City. If for any reason insurance coverage is canceled or reduced in coverage or in limits, JMZ shall within two (2) business days of receipt of notice from the Insurer, notify the City by phone or fax of the changes to or cancellation of the policy and shall confirm such notice via certified mail, return receipt requested.

**7.3 Verification of Coverage.** JMZ shall furnish the City with certificates of insurance required by this Section 7. The certificates for each insurance policy are to be signed by a person, either manually or electronically, authorized by that insurer to bind coverage on its behalf. All certificates are to be received and approved by the City before work commences.

**7.4 Secondary Parties.** In the event JMZ hires any subcontractors, independent contractors or agents ("Secondary Parties") to locate, place, attach, install, operate, use, control, replace, repair or maintain the Network, JMZ shall require the Secondary Parties to obtain and maintain insurance at the same amounts JMZ is required to provide.

## **SECTION 8 – DEFAULT**

**8.1.1 Defined.** A "Default" shall be deemed to have occurred under this Agreement if a party fails to cure a breach of this Agreement within thirty (30) days after written notice specifying such breach, provided that if the breach is of nature that it cannot be cured within thirty (30) days, a default shall not have occurred so long as the breaching party has commenced to cure within said time period and thereafter diligently pursues such cure to completion.

**8.1.2 Remedies.** Upon the failure of a party to timely cure any breach after notice thereof from the other party and expiration of the above cure periods, then the non-defaulting party may, subject to the terms of Section 6.3 (Limitation of Liability), terminate this Agreement and pursue all remedies provided for in this Agreement and/or any remedies it may have under

applicable law or principles of equity relating to such breach.

**8.2 City Termination Right.** In addition to the remedies set forth in Section 8.1.2, the City shall have the right to terminate this Agreement if (i) the City is mandated by law, a final court order or decision, or the federal or state government to take certain actions that will cause or require the removal of the Facilities from the public right of way, or (ii) if any licenses that JMZ may be required to hold to perform its obligations under this Agreement are terminated, revoked, expired, or otherwise abandoned. Such termination rights shall be subject to JMZ's right to just compensation, if any, for any taking of a protected property right.

**8.3 No waiver.** A waiver by either party at any time of any of its rights as to anything herein contained shall not be deemed to be a waiver of any breach of covenant or other matters subsequently occurring.

## **SECTION 9 – INTERFERENCE**

**9.1 Non-Interference with Non-Public Safety Communications Systems.** JMZ shall operate the Network in a manner that will not cause interference with City non-public safety communications systems and to the services and facilities of other licensees or lessees of City property located at or near the Facilities that were in operation prior to the installation of the Network or that are in operation prior to any modifications JMZ may make to the Network.

**9.2 Non-Interference with Public Safety Communications Systems.** JMZ's Network and Facilities shall not cause interference with public safety communications systems operated by City or any other public agency, regardless of the date such systems or any Facilities cause interference with the City's use of the New Poles for their intended purpose as streetlights, traffic lights, and/or stand-alone light poles.

**9.3 Correction of Interference.** If interference with the Facilities described in Sections 9.1 and 9.2 should occur, JMZ shall, upon receipt of written notice thereof from the City, immediately commence commercially reasonable, diligent efforts to correct or eliminate such interference. If such interference cannot be corrected by JMZ to the reasonable satisfaction of City within the cure period set forth in the City's notice, which period shall not be less than ninety (90) days, such interference shall be deemed a material breach under this Agreement and City may terminate this Agreement. Interference caused by actions of JMZ's Customers remain the responsibility of JMZ. If the interference is an emergency or a danger to public health and safety, the City shall be entitled to require correction in a time period necessary to avoid the emergency or public health and safety issue.

## **SECTION 10 – MISCELLANEOUS PROVISIONS**

**10.1 Nonexclusive Use.** JMZ acknowledges that this Agreement does not provide JMZ with exclusive use of the City's ROW or any municipal facility and that City retains the right to permit other providers of communications services to install equipment or devices in the City's ROW and on municipal facilities. The parties specifically agree that all such franchises issued to telecommunications providers shall be competitively neutral and not unreasonable or discriminatory in nature.

**10.2 Most Favored Nation.** All of the benefits and terms granted by the City herein are at least as favorable as the benefits and terms granted by the City to any future franchisee of the public ROW engaged in the same or similar business described in this Agreement. Should the City enter into any subsequent agreement of any kind no matter what nomenclature is attached with any other franchisee during the term of this Agreement, which other agreement provides for benefits or terms more favorable than those contained herein, then this Agreement shall be deemed to be modified effective as of the date of such more favorable agreement to provide JMZ with those more favorable benefits and terms. The City shall notify JMZ promptly of the existence of such more favorable benefits and terms and JMZ shall have the right to receive the more favorable benefits and terms immediately. If requested in writing by JMZ, the City shall amend this Agreement to contain the more favorable benefits, terms and conditions.

**10.3 Notices.** All notices pursuant to this Agreement shall be in writing and sent by E-mail and by mailing a copy first class postage prepaid or by personal delivery to the following address or such other address of which a party may give by written notice:

City: The City of Paola, Kansas  
ATTN: City Manager  
19 E. Peoria  
Paola, Kansas 66071  
Phone: 1-913-259-3600  
E-mail: jwieland@cityofpaola.com

JMZ: JMZ Corporation,  
dba KwiKom Communications  
ATTN: Zachery Peres, Vice President  
800 W Miller Rd, Iola, Kansas 66749  
Phone: 1-620-365-7782 x100  
E-mail: zperes@kwikom.com

with a copy to: Kurt F. Kluin  
Attorney at Law  
P.O. Box G, Chanute, Kansas 66720  
Phone: 1-620-431-1601  
E-mail: kurtk@kluinlaw.com

Notice sent as provided herein shall be deemed given on the date of the E-mail. Actual notice shall be deemed adequate notice on the date actual notice occurred, regardless of the method of service.

**10.4 Sublease/Assignment.** JMZ may not assign or sublet its interest in this Agreement without prior written approval by the City, such approval not to be unreasonably withheld.

**10.5 Binding Effect.** This Agreement shall be binding upon and inure to the benefit of the parties and their respective heirs, legal representatives, successor, assigns and transferees.

**10.6 Entire Agreement; Modification; Waiver.** This Agreement constitutes the entire Agreement between the parties relating to the subject matter hereof. All prior and contemporaneous agreements, representations, negotiations, and understandings of the parties,

oral or written, relating to the subject matter hereof are merged into and superseded by this Agreement. Any modification or amendment to this Agreement shall be of no force and effect unless it is in writing and signed by the parties. No waiver of any of the provisions of this Agreement shall be deemed, or shall constitute, a waiver of any provisions, whether or not similar. No waiver or consent shall constitute a continuing waiver or consent or commit either party to provide a waiver in the future except to the extent specifically set forth in writing. No waiver shall be binding unless executed in writing by the party making the waiver.

**10.7 Severability.** If any one or more of the provisions of this Agreement shall be held by a court of competent jurisdiction in a final judicial action to be void, voidable, or unenforceable, such provision or provisions shall be deemed separable from the remaining provisions of this Agreement and shall in no way affect the validity of the remaining portions of this Agreement.

**10.8 Governing Law.** This Agreement shall be interpreted and enforced according to, and the parties' rights and obligations governed by the law of the State of Kansas or applicable federal law. Any proceeding or action to enforce this Agreement, or otherwise directly related to this Agreement, shall occur in the District Court of Miami County, Kansas.

**10.9 Survival of Terms.** All of the terms and conditions in this Agreement related to payment, removal due to termination or abandonment, indemnification, limits of City's liability, attorneys' fees and waiver shall survive termination of this Agreement.

**10.10 Captions and Paragraph Headings.** Captions and paragraph headings used herein are for convenience only and shall not be used in construing this Agreement.

**10.11 Drafting.** This Agreement is the project of joint draftsmanship and nothing herein shall be construed against a drafting party.

**10.12 Execution in Counterparts.** This Agreement may be executed in one or more identical counterparts and all such counterparts together shall constitute a single instrument for the purpose of the effectiveness of this Agreement.

**10.13 Authority to Execute This Agreement.** Each person executing this Agreement on behalf of a party warrants and represents that he or she has the full right, power, legal capacity and authority to execute this Agreement on behalf of such party and has authority to bind such party to the performance of its obligations under this Agreement without further approval or consent of any other person or entity.

**10.14 No Warranty by the City.** The City makes no representations or warranties regarding the suitability, condition or fitness of the locations for the installation, maintenance or use of the new Poles or Facilities.

**10.15 No Abrogation of Legal Responsibilities.** The City's execution of this Agreement shall not abrogate, in any way, JMZ's responsibility to comply with all permitting requirements or to comply with all Laws respect to its performance of the activities permitted under this Agreement.

**10.16 Contractual Interpretation.** In the interpretation and application of its rights

under this Agreement, the City will act in a reasonable, non-discriminatory, and competitively neutral manner in compliance with all applicable federal, state, and local laws and regulations.

10.17 **Application and Publication Fees.** JMZ shall pay to the City a one time application fee of \$250.00 (Two Hundred Fifty Dollars) and the actual expenses of publishing of the Ordinance adopted pursuant and set forth in K.S.A. 12-2001(e)(4) and K.S.A. 12-2001(g).

10.18 **Effective Date of Ordinance.** This Ordinance shall be effective upon its final passage and publication as required by law.

ADOPTED AND PASSED by the Governing body of the City of Paola, Kansas, on this 10<sup>th</sup> day of April, 2018.

**CITY OF PAOLA, KANSAS**

By: \_\_\_\_\_  
Artie Stuteville, Mayor

ATTEST: [seal]

\_\_\_\_\_  
Daniel Droste, City Clerk

**JMZ CORPORATION**, doing business as  
KwiKom Communications

By: \_\_\_\_\_  
Zachery Peres  
Vice President