**THE CITY OF PALM COAST FiberNET**

**BROADBAND ACCESS NETWORK AGREEMENT**

This nonexclusive Broadband Network Access Agreement (“Agreement”) is made and entered into on this 1st day of July, 2011, by and between the City of Palm Coast, Florida (“City”), a Florida municipal corporation, of 160 Cypress Point Parkway, Ste. B-106, Palm Coast, FL 32164, and the Flagler County School Board, of 1769 East Moody Blvd, Bunnell, Fl 32110 (“School Board”), and will remain in effect through the 30th day of June, 2014, unless extended in accordance with provisions in Section 2. School Board and the City may be referred to individually as a "Party" and collectively as the "Parties."

RECITALS

 WHEREAS, the City created an open access city fiber telecommunications network in the City (hereinafter referred to as “Network” or “Palm Coast FiberNET”) in order to:

Create new business opportunities for incumbent service School Boards;

Create new entrepreneurial business opportunities;

Encourage economic development; and

Provide an increased range of telecommunications services and options for the businesses, and institutions of the City of Palm Coast; and

WHEREAS, because of the City’s significant investment in its Network and the importance of achieving Palm Coast FiberNET’s goals, it is essential that the City and School Board share a clear understanding of their respective rights and responsibilities and maintain good working relationships during the term of this Agreement, both during normal operations and throughout all Network upgrades and expansions.

NOW, THEREFORE, in consideration of the above referenced recitals and the following mutual covenants, agreements, and obligations of the Parties, which constitute good and valuable consideration, and with the intention to be legally bound hereby, the City and School Board agree as set forth above and as follows:

1. Definitions.

1.1 “Access Service” means any service that permits the School Board, officers, agents, employees to obtain access to the Network locations as provided in Exhibit “C- Service Order Form” attached herein.

1.2 “Agreement” means this Broadband Network Access Agreement

1.3 “Coverage area” refers to that portion of the City of Palm Coast and the county of Flagler where the Palm Coast FiberNET and telecommunications services are available.

1.4 “Effective date" is July 1, 2011 for this Agreement.

1.5 “Force majeure” shall mean acts of God, acts of third parties, acts of terrorism, wars, insurrections, strikes, civil riots, storms, floods, material or labor restrictions by governmental authority, telecommunications, electricity or losses of essential services, utilities and any other cause not within the reasonable control of the City or School Board and occurring without its fault of negligence.

1.6 “Network Operator” shall mean the City Information Technology & Communications Department will act as Network Operator and will manage and maintain Palm Coast FiberNET. Upon entering into this agreement, the City will provide the School Board with the appropriate contacts for the Network Operator. The School Board will liaise with the Network Operator during the service setup, service changes, and during outages. If the City enters into a separate contract with a Network Operator, the School Board will be provided thirty (30) days notification.

 1.8 “Palm Coast FiberNET” shall mean the broadband network using Palm Coast FiberNET fiber optic technology and open network architecture (ONA) owned entirely by the City, and designed, built, tested, operated and maintained by the City and its agents. Palm Coast FiberNET is made available to the School Board through a monthly fee per circuit provided.

1.9 “Rate Sheet” means the fees, service charges and applicable installation charges that the City charges to the School Board as provided in **Exhibit “C”.**

1.10 “Service Level Agreement” (“SLA”) means a written agreement in the form attached as **Exhibit “B”** attached hereto and herein by this reference specifying such characteristics as time of day, day of week, and latency, bandwidth, and other quality of service factors associated with a distinctively different product offered over Palm Coast FiberNET.

1.11 “Term” means the initial 36-month or subsequent 12-month time period(s) covered under this Agreement, whichever is currently in effect.

2. Term.

2.1 This Agreement shall be operational on its effective date and shall continue for thirty six (36) months. However, either party has the right to terminate this Agreement pursuant to the terms laid out in Section 15.

2.2 This Agreement can be renewed for up to two (2) additional twelve (12) month terms if either party provides written notice no fewer than sixty (60) days prior to the expiration of the current term.

3. Rights & Responsibilities of the City.

3.1 The City will operate and maintain Palm Coast FiberNET within its Coverage Area and offer open access and transport capacity to the School Board. The City will periodically undertake to upgrade and expand Palm Coast FiberNET to meet its own needs, and those of the School Board, as provided in Section 4 of this Agreement.

3.2 The City will maintain a network operator to provide support for Palm Coast FiberNET twenty-four hours a day, seven days a week as documented in a Service Level Agreement to be entered into with the School Board.

3.3 The City will exclusively perform any and all network upgrades and routine and extraordinary maintenance and repairs, as well as emergency repairs to correct any failure, interruption, or impairment in the operation of Palm Coast FiberNET subject to the Force Majeure provision hereinafter.

3.4 Palm Coast FiberNET will meet the School Board facilities and/or services at a designated port in a Palm Coast FiberNET fiber cross connect panel in a designated Palm Coast FiberNET collocation facility.

3.5 Maintenance activities will be performed at the City’s discretion, but it shall consult the School Board in advance of scheduling such work and will make every reasonable effort to minimize the interruptions of the School Board service. Whenever possible, the City shall provide the School Board at least two (2) days notice of maintenance activities that may interrupt School Board service. In the event of an emergency, priority will be given to restoring the system and serving the emergency telecommunications needs for police, fire or rescue operations, and essential City services first, maintenance or repair to restore School Board and Provider’s services second, and all other City service and facilities third.

3.6 In all cases, the City shall retain ownership rights and title to Palm Coast FiberNET and each device and component thereof, as well as intellectual property, documents, data, studies, surveys, maps, models, photographs, designs, diagrams, equipment, software, reports or other materials prepared by the School Board or its subcontractors resulting from this Agreement.

3.7 The City shall retain all title to Palm Coast FiberNET and each device and component thereof. No portion of Palm Coast FiberNET shall become a fixture of the School Board.

4. Rights & Responsibilities of the School Board.

4.1 School Board agrees to the conditions imposed in the Acceptable Use Policy (the “AUP”) attached hereto as **Exhibit “A”** and incorporated herein by this reference.

4.2 This Agreement implies no rights to access Palm Coast FiberNET’s peering point or collocation facilities. Admission to, and use of, those facilities shall be governed by separate written agreements.

4.3 School Board shall comply with permitting, inspection, and notice requirements required by the City during Palm Coast FiberNET construction, maintenance, and testing activities.

4.4 School Board commits that it will keep Palm Coast FiberNET technically secure by using only industry standard equipment.

4.5 School Board shall not translate, modify, disassemble, or reverse engineer Palm Coast FiberNET or create derivative works based on any portion of Palm Coast FiberNET or authorize or permit others to do so.

 4.6 Criminal Investigation and National Security. To the extent required by applicable laws, City may, without prior notice to the School Board, disclose protected personal information to law enforcement as part of a criminal investigation or an investigation related to national security, provided that, to the extent permitted by applicable laws, City shall require court-ordered documentation before such disclosure. Additionally, City may, without prior notice to the School Board, disclose protected personal information to law enforcement if it has a good faith belief that such disclosure is reasonably necessary to: (a) satisfy any applicable laws, legal process or enforceable governmental request, (b) enforce applicable terms of service, including investigation of potential violations thereof, (c) detect, prevent, or otherwise address fraud, security or technical issues, or (d) protect against imminent harm to the rights, property or safety of City, its users or the public as required or permitted by applicable laws.

 5. Functionality Test. At least (15) days prior start of this Agreement, the City and School Board will conduct a network test of applications and interfaces to ensure the School Board that Palm Coast FiberNET is fully capable of supporting delivery of telecommunications services. Both parties will use good faith, commercially reasonable efforts to resolve any problems and/or provide alternatives or changes to produce test results that are acceptable to both parties. Should the network test not successfully meet the acceptance criteria agreed upon by both parties, the School Board will not be obligated to proceed to implementation of its use of Palm Coast FiberNET. Similar testing procedures will be followed after Palm Coast FiberNET system modifications.

 6. Service Level Agreements. One written Service Level Agreement(s) (SLA) in the form provided in **Exhibit “B”** attached hereto and incorporated herein by this reference, shall be executed between the City and School Board for each distinctively different product offered on Palm Coast FiberNET. The SLA shall specify such characteristics as time of day, day of week, and latency, bandwidth, and other quality of service factors and fees associated with services.

 7. Representations, Conditions & Acceptance. School Board’s receipt of Palm Coast FiberNET services and corresponding obligation to pay associated fees shall be conditioned upon meeting the following conditions, unless any are waived by mutual consent by the City of Palm Coast and School Board:

* School Board has secured from the City of Palm Coast all necessary approvals to operate on Palm Coast FiberNET
* There are no court actions or civil actions that have limited or restricted the School Board’s rights to perform as described in this Agreement.
* There are no laws, statutes, or regulations or any local ordinances that will have the effect of preventing or restricting the School Board’s rights and obligations to perform as described in this Agreement; and
* All of the previously agreed upon network conditions have all been successfully met and continue to be consistent with expectations established and agreed upon by both parties.

8. Fees, Billings & Payments.

8.1 Fees charged for Palm Coast FiberNET services are according to Exhibit "C" and the rates shall be subject to change after the initial Agreement term of three (3) years. The City will notify School Board at least thirty (30) days prior to scheduled rate adjustment actions by the City and will take into account written and verbal testimony by School Board before taking action, although the City will have final decision making authority.

8.2 Applicable installation charges and one-time service start-up fees shall be billed by the City to the School Board upon completion of associated work at the rates provided in **Exhibit “C”**.

8.3 Fees shall be calculated and billed at the end of each month. School Board shall pay the City all amounts owed within thirty (30) days of Invoice.

8.4 Failure to pay established fees by the School Board shall constitute a default of this Agreement. In the event of any dispute regarding any payment or portion thereof, payment of the non-disputed amount shall be made on schedule while resolution of the dispute is undertaken. Should the School Board fail to meet obligations in paying such fees, the City may, at its option, negotiate with the District to allow continued access to the Palm Coast FiberNET at current or reduced “lifeline” levels so as minimize service impacts.

9. Modifications to Palm Coast FiberNET.

9.1 The City will periodically expand and modify the Network to meet its own needs, as well as those of the School Board. The City agrees to use cost effective efforts to design and implement modifications in a fashion that minimizes service disruptions.

9.2 Should the School Board require specific network modifications to meet its specific needs, the City shall review said request, and may agree to enter into an agreement with the School Board identifying the nature of the desired changes, outlining how improvements will be financed and implemented, how testing will be undertaken to ensure that intended functionality is achieved, and specifying the method of acceptance of completed modifications.

9.3 The City and School Board may conduct a network test of applications and interfaces following modifications made to Palm Coast FiberNET to ensure the School Board that the Network is fully capable of supporting delivery of the School Board’s telecommunications services.

10. Warranties.

10.1 The City warrants that Palm Coast FiberNET will operate in material compliance with the terms for Network operation as provided in the individual Service Level Agreement.

10.2 Each party warrants that it has the authority to enter into this Agreement and that doing so does not violate any other right, duties, or obligations, contractual or otherwise, it has to a third party.

10.3 NO WARRANTIES. THE ONLY WARRANTIES CONCERNING THE PALM COAST FIBERNET, AND OTHER SERVICES AND DELIVERABLES PROVIDED UNDER THIS AGREEMENT, ARE THOSE CONTAINED HEREIN, 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, TITLE, NON­INFRINGEMENT OR OTHERWISE. CITY ALSO SPECIFICALLY DISCLAIMS ANY WARRANTIES OR REPRESENTATIONS RELATED TO THE INTERNET OR SECURITY-RELATED FEATURES OF THE PALM COAST FIBERNET. CITY DOES NOT GUARANTEE COMPLETE SECURITY VIA THE INTERNET OR THE PALM COAST FIBERNET. CITY SHALL HAVE NO LIABILITY FOR THE CONDUCT OF SUBSCRIBERS USING OR ACCESSING THE PALM COAST FIBERNET. CITY EXERCISES NO CONTROL OVER AND HAS NO RESPONSIBILITY WHATSOEVER FOR THE CONTENT TRANSMITTED OR ACCESSIBLE THROUGH THE SERVICE AND CITY EXPRESSLY DISCLAIMS ANY RESPONSIBILITY FOR SUCH CONTENT. EXCEPT AS SPECIFICALLY SET FORTH IN THIS AGREEMENT, THE SERVICE, CITY EQUIPMENT AND CITY MATERIALS ARE PROVIDED “AS IS,” WITHOUT WARRANTIES OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO WARRANTIES OF TITLE, NON-INFRINGEMENT, SYSTEM INTEGRATION, DATA ACCURACY, QUIET ENJOYMENT, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. CITY DOES NOT REPRESENT OR WARRANT THAT THE SERVICE WILL MEET CUSTOMER’S REQUIREMENTS, PREVENT UNAUTHORIZED ACCESS BY THIRD PARTIES, WILL BE UNINTERRUPTED, SECURE, ERROR FREE, WITHOUT DEGRADATION OF VOICE QUALITY OR LOSS OF CONTENT, DATA OR INFORMATION OR THAT ANY MINIMUM TRANSMISSION SPEED IS GUARANTEED AT ANY TIME. CITY DOES NOT WARRANT THAT ANY SERVICE OR EQUIPMENT PROVIDED BY CITY WILL PERFORM AT A PARTICULAR SPEED, BANDWIDTH OR THROUGHPUT RATE. CITY SHALL NOT BE RESPONSIBLE FOR ANY LOSSES OR DAMAGES ARISING AS A RESULT OF THE UNAVAILABILITY OF THE SERVICE, INCLUDING THE INABILITY TO REACH 911 OR OTHER EMERGENCY SERVICES, THE INABILITY TO CONTACT A SECURITY SYSTEM OR REMOTE MEDICAL OR OTHER MONITORING SERVICE PROVIDER OR ANY FAILURE OR FAULT RELATING TO CUSTOMER-PROVIDED EQUIPMENT, FACILITIES OR SERVICES.

11. Indemnity.

11.1 School Board shall indemnify, hold harmless, and defend the City, from and against any and all claims, damages, losses, and expenses including, but not limited to, attorney’s fees, arising out of or resulting from the performance or provision for services required under this Agreement, including damage to persons or property, provided that same is caused in whole or part by the error, omission, negligent act, failure to act, malfeasance, misfeasance, conduct, or misconduct of the School Board, its agents, servants, officers, officials, employees, or subcontractors.

11.2 Infringement Indemnity. The School Board shall indemnify and hold City harmless from all loss and liability, including attorneys’ fees, court costs, and all other litigation expenses for any infringement of patent rights, copyright, trade secret, or any other proprietary right or trademark, and all other intellectual property claims or by any person or persons in consequence of the use by City, or any of its officers or agents, of services enabled by the Palm Coast FiberNET.

11.3 Nothing in this Agreement shall be deemed to affect the rights, privileges, and immunities of the City as set forth in Section 768.28, Florida Statues.

11.4 In claims against any person or entity indemnified under this Section by an employee of the School Board or its agents or subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under this Section shall not be limited by a limitation on amount or type of damages, compensation, or benefits payable by or for School Board or its agents or subcontractors, under Workers Compensation acts, disability benefits acts, or other employee benefit acts.

11.5 The execution of this Agreement by School Board shall obligate the School Board to comply with the indemnification provision in this Agreement; however, School Board must also comply with the provisions of this Agreement relating to insurance coverages.

12. INSURANCE.

12.1 School Board shall obtain or possess and continuously maintain the following insurance coverage, from a company or companies, with a Best Rating of A- or better, authorized to do business in the State of Florida and in a form acceptable to the City and with only such terms and conditions as may be acceptable to the City:

12.1.1 Workers Compensation/Employer Liability. School Board shall provide Worker Compensation insurance for all employees engaged in the work under this Agreement in accordance with the laws of the State of Florida. Employers' Liability Insurance shall be provided at limits not less than the following:

$100,000 Each Accident $100,000 Disease Each Employee

12.1.2 Comprehensive General Liability. School Board shall provide coverage for all operations including, but not limited to, contractual, independent contractors, products and complete operations and personal injury with limits not less than the following:

$1,000,000 Bodily Injury & Property Damage - each occurrence

12.1.3 Comprehensive Business Automobile Liability. School Board shall provide complete coverage of Bodily Injury and Property Damage in accordance with the laws of the State of Florida, as to the ownership, maintenance, and use of all owned, non-owned, leased or hired vehicles.

12.1.4 Professional Liability. School Board shall provide professional liability insurance as well as errors and omission insurance in a minimum amount of $1,000,000 CSL or its equivalent, with a combined single limit of not less than $1,00,000, protecting School Board against claims of the City for negligence, errors, mistakes, or omissions in the performance of services to be performed and furnished by School Board.

12.2 All insurance other than Workers Compensation and Professional Liability that must be maintained by the School Board shall specifically include the City as an additional insured. All insurance minimum coverages extend to any subcontractor, and School Board shall be responsible for all subcontractors.

12.3 School Board shall provide Certificates of Insurance to the City evidencing that all such insurance is in effect prior to the effective date of this Agreement. These Certificates of Insurance shall become part of this Agreement. Neither approval by the City nor failure to disapprove the insurance furnished by School Board shall relieve School Board of School Board’s full responsibility for performance of any obligation including School Board’s indemnification of the City under this Agreement. If, during the period which an insurance company is providing the insurance coverage required by this Agreement, an insurance company shall: (1) lose its Certificate of Authority, (2) no longer comply with Section 440.57, Florida Statutes, or (3) fail to maintain the requisite Best’s Rating and Financial Size Category, School Board shall, as soon as School Board has knowledge of any such circumstance, immediately notify the City and immediately replace the insurance coverage provided by the insurance company with a different insurance company meeting the requirements of this Agreement. Until such time as the School Board has replaced the unacceptable insurer with an insurer acceptable to the City, the School Board shall be deemed to be in default of this Agreement.

12.4 The insurance coverage shall contain a provision that requires that prior to any changes in the coverage, except increases in aggregate coverage, thirty days prior notice will be given to the City by submission of a new Certificate of Insurance.

12.5 School Board shall provide Certificates of Insurance directly to the City Manager. The certificates shall clearly indicate that School Board has obtained insurance of the type, amount, and classification required by this Agreement.

12.6 All insurance shall be primary to, and not contribute with, any insurance or self-insurance maintained by the City.

12.7 Subcontractors. If a subcontractor will be used to complete any portion of this Agreement, the School Board shall ensure that the subcontractor is covered by insurance that complies with the above requirements and the policy or an endorsement shall name the City, its officers, agents and employees and School Board as additional insureds. Third Party Beneficiaries. The City shall not be obligated or liable under the terms of this Agreement to any party other than the School Board. There are no third party beneficiaries to this Agreement.

13. School Board is an independent contractor and not an agent, representative, or employee of the City. The City shall have no liability except as specifically provided in this Agreement.

14. Force Majeure. Neither party shall be liable or responsible for a force majeure event beyond its control including, but not limited to, acts of God, terrorism, flood, fiber cuts, natural disaster, regulation or governmental acts, fire, power surges or outages, civil disturbance, weather, or any unauthorized access to or destruction or modification of the Service, in whole or in part (each a “Force Majeure Event”). In no event shall the School Board be entitled to monetary payment or compensation of any kind from the City for any costs or damages incurred as a result of force majeure disruptions or delays. It is understood and explicitly acknowledged that Palm Coast FiberNET is operated by the City, and in the event of an emergency or qualifying force majeure incident, priority will be given to meeting the emergency telecommunications needs for police, fire or rescue operations before any maintenance or repair is performed for School Board’s access to operations dependent upon the Palm Coast FiberNET, as more fully provided in Section 3.

15. Termination of Agreement.

15.1 The City shall have the absolute right to terminate this Agreement without cause. The City will issue written notification to School Board thirty (30) days prior to termination.

15.2 The City shall have the right to terminate this Agreement in the event that the School Board defaults in meeting its obligations. In the event of the School Board’s default, the City will issue written notification to the School Board thirty (30) days prior to the termination and will provide the School Board thirty (30) days to correct the specific deficiencies.

15.3 School Board shall be entitled to terminate all of its obligations hereunder if, by sixty

(60) days after the effective date of this Agreement, implementation conditions have not been successfully completed, or if the Network has not continued to be operational, and if such failures were not caused by the actions or inactions of the School Board. Should the School Board wish to terminate this Agreement under such circumstances, it shall send a written notice of termination to the City no later than ten (10) days prior to the intended termination date.

15.4 If subsequent Network performance does not meet the conditions set forth in applicable SLAs, then either party shall be entitled to terminate this Agreement upon thirty (30) days prior written notice of termination. Prior to any notice of termination, however, the School Board shall provide written notification to the City of unsatisfactory Network performance of the Palm Coast FiberNET. Upon such notice, the City shall be granted thirty (30) days to undertake all reasonable efforts to correct operational problems. Should the City fail to correct the operational problems cited in the notice, the School Board shall be entitled to initiate termination of this Agreement by giving an additional 30 days written notice to the City.

15.5 Under no circumstances shall the City be liable for any costs, expenses, claims, suits or losses sustained by the School Board as a result of termination of access to Palm Coast FiberNET or of this Agreement.

15.6 The City may terminate this Agreement for copyright infringement.

15.7 There will be no fees associated with termination of FiberNET services after 12 months of recurring service payments have been received for the School Board sites listed in Exhibit "B."

15.8 Should Palm Coast FiberNET services not adhere to security, quality, up-time, support, and performace standards outlined in the Palm Coast FiberNET SLA (Exhibit B), termination of FiberNET services prior to 12 months of recurring service payments will not incur fees for early termination of service.

15.9 Should the School Board terminate Palm Coast FiberNET services prior to 12 months of recurring service payments from the effective date of this Agreement, without cause per Section 15.8 and Exhibit B, School Board shall pay the remaining monthly service fees up to the conclusion of the 12 month term in-line with service pricing reflected in the 1 year Agreement Term option listed in Appendix B of the RFP 11-04.

 16. Dispute Resolution. The parties shall attempt to resolve any controversy, claim, problem or dispute arising out of, or related to, this Agreement through good faith consultation in the ordinary course of business. In the event that the project managers of the parties do not resolve a dispute, either party may, upon written notice to the other, request that the matter be referred to senior management officials within each respective organization with express authority to resolve the dispute. Senior management officials shall, within thirty (30) days, meet or confer at least once in good faith, to negotiate a mutually acceptable resolution. Should the parties be unable to settle the dispute, both parties shall be entitled to fully pursue their claim through the courts.

17. Miscellaneous.

17.1 Non-Discrimination. In performing this Agreement, neither the City nor the School Board shall discriminate or permit discrimination against any person because of race, color, religion, national origin, gender, or sexual orientation. In the event of such discrimination, the City may, in addition to any other rights or remedies available, terminate the Agreement.

17.2 Consent to Jurisdiction. This Agreement and the performance thereof shall be governed by and enforced under the laws of the State of Florida, and if legal action by either party is necessary for or with respect to the enforcement of any or all of the terms and conditions hereof, then exclusive jurisdiction and venue therefore shall lie in the Seventh Judicial Circuit Court in and for Flagler County, Florida.

17.3 No Partnership. Nothing contained herein shall be deemed or construed by the parties hereto or by any third person to create the relationship of principal and agent, partnership, joint venture or any association between the parties.

17.4 Assignment. Neither party to this Agreement shall assign this Agreement, or any portion of it, without the prior written permission of the other party, which permission shall not be unreasonably withheld or delayed, and any such assignment made without such consent shall be void and shall not operate to relieve either Party from any of its obligations or liabilities under this Agreement.

17.5 Subcontractors. Any subcontractor used by the School Board in the performance of this Agreement must be properly licensed pursuant to applicable law. Each subcontractor shall have the same obligations with respect to its work as School Board would have if School Board performed the work. School Board shall ensure that all subcontractors and all employees who perform work for it are trained and experienced. The School Board shall be responsible for ensuring that the work of subcontractors is performed consistent with this Agreement and other applicable law, shall be responsible for acts or omissions of subcontractors under this Agreement to the same degree it is responsible for the acts of its employees, shall be responsible for promptly correcting acts or omissions by any subcontractor, and shall implement a quality control program to ensure that the work contemplated by this Agreement is properly performed.

17.6 Waiver & Remedies. Failure of either party to enforce any provision of this Agreement or the waiver thereof in any instance shall not be construed as a general waiver or relinquishment on its part of any such provision but the same shall nevertheless be and remain in full force and effect. The remedies expressly provided in this Agreement shall be in addition to any other remedies available at law or in equity.

17.7 Confidentiality. Each party will use reasonable efforts, to the extent it does for its own proprietary and confidential information of like nature, to prevent any Confidential Information of the other party from being disclosed to third parties except as set forth in this Agreement or as authorized by a party in writing or as required by law, including but not limited to disclosures made pursuant to the Federal Freedom of Information Act and the Florida Public Records Act, or similar law requiring disclosure of public records or information, nor shall the City be liable for disclosure of information pursuant thereto. If School Board shares any information with the City that School Board wishes to have held in confidence, School Board shall prominently mark such information as a “Trade Secret.”

17.8 Disclosure of Confidential Information. To the extent permitted by applicable law, and specifically Chapter 119 of the Florida Statutes, the City will not disclose any of the confidential information of School Board marked “Trade Secret” during the term, and any renewal term of this Agreement. If applicable law, a court order, or subpoena requires disclosure of the School Board's confidential information, then the City will promptly give the School Board written notice and the City will promptly disclose said confidential information.

17.9 Compliance with Applicable Laws. In addition to all requirements contained herein, the Parties will comply with all applicable laws, including but not limited to the Federal and Florida Freedom of Information Act and the Florida Public Records Act, as they currently exist and as they may be amended from time to time. School Board is subject to Chapter 119 of the Florida Statutes. This Agreement will be terminated if the School Board fails to comply with the requirements of Chapter 119, Florida Statutes. The City shall also comply with any lawful court order or subpoena and the School Board agrees to indemnify the City against any action as agreed to in Section 11 above and the School Board further agrees to take no action against the City as a result of the City following said law, court order or subpoena.

17.10 Approvals. 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.

17.11 Integrated Document. This Agreement is intended as the complete integration of all understandings between the parties as to the subject matter of this Agreement. No oral communications or prior or contemporaneous addition, deletion, or other amendment hereto shall have any force or affect whatsoever, unless embodied herein in writing.

17.12 Limited authority. Nothing in this Agreement, expressed or implied, is intended or shall be construed to confer upon or give to any person, firm, corporation, or legal entity, other than School Board and the City any rights, remedies, or other benefits under or by reason of the Agreement.

 18. Notice.

 18.1 Except as otherwise set forth herein, all notices given or which may be given pursuant to this Agreement must be in writing and delivered in person or by nationally recognized overnight delivery service postage pre-paid as follows:

City of Palm Coast Attn: City Manager 160 Cypress Point Parkway Suite B-106 Palm Coast, FL 32164

Flagler County School Board 1769 East Moody Blvd, Bunnell, FL 32110

 18.2 Notice may also be provided to such other address as either Party may from time to time designate in writing. Notice shall be deemed received on the date of delivery or refusal of delivery. Attorneys for either Party may give notice.

19. Rights to Intervention. City’s Rights to Intervention. School Board agrees not to oppose intervention by the City in any suit or proceeding to which the School Board is a party, concerning or involving the City’s rights under this Agreement.

20. Renegotiation Clause. In the event of a material change in federal or state law(s) or Federal Communications Commission Rules, the City and School Board mutually agree to renegotiate those particular terms of this Agreement affected by changes in said law(s) or rule(s). This Agreement shall remain in full force and effect until any negotiated amendments have been duly approved by both the City and the School Board.

21. School Board shall at all times be subject to and shall comply with all applicable federal, state and, to the extent not inconsistent with those laws, with this Agreement and local laws. The School Board shall at all times and without limitation by this Agreement shall be subject to the lawful exercise of the police power of the City to adopt and enforce generally applicable ordinances, resolutions, rules, regulations, written policies and practices necessary to the convenience, health, safety and welfare of the public, and shall comply with all applicable ordinances, resolutions, rules, regulations, written policies and practices by the City pursuant to such power.

 22. Amendments.

 22.1 This Agreement may be amended from time to time only by amendments that are written and executed on paper by both Parties to this Agreement.

22.2 Counterparts. This Agreement may be executed in duplicate counterparts, each of which shall be deemed an original.

 IN WITNESS WHEREOF, the Parties grant, acknowledge, and accept the terms, conditions and obligations of this Agreement as evidenced by the following signatures of their duly authorized representatives.

**CITY OF PALM COAST**

*ATTEST:* By:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 Jim Landon, City Manager

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Date executed:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Virginia A. Smith, City Clerk

Approved as to form and content

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

William E. Reischmann, Jr., Esq.

*ATTEST:* **FLAGLER COUNTY SCHOOL BOARD**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ By:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Attestor’s Signature Sue Dickinson, Chairman

Approved as to form and content by:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Kristy Gavin, School Board Attorney

EXHIBIT “A”

ACCEPTABLE USE POLICY

Acceptable Use Policy (AUP) for Palm Coast FiberNET.

School Board may not use Palm Coast FiberNET’s systems to engage in, foster, or promote illegal, abusive, or irresponsible behavior, including:

1.1. Illegal or unauthorized access to or use of data, systems or networks, including any attempt to probe, scan or test the vulnerability of a system or network or to breach security or authentication measures without express authorization of the City of the system or Network;

1.2. Monitoring data or traffic on any network or system without the express authorization of the City of the system or Network;

1.3. Interference with service to any user of the Palm Coast FiberNET or other network including, without limitation, mail bombing, flooding, deliberate attempts to overload a system and broadcast attacks;

1.4. Use of an Internet account or computer without the City's authorization;

1.5. Collecting or using email addresses, screen names or other identifiers without the consent of the person identified (including, without limitation, phishing, Internet scamming, password robbery, spidering, and harvesting);

1.6. Collecting or using information without the consent of the City of the information;

1.7. Use of any false, misleading, or deceptive TCP-IP packet header information in an e-mail or a newsgroup posting;

1.8. Use of the Network to distribute software that covertly gathers information about a user or covertly transmits information about the user;

1.9. Use of the Network for distribution of advertisement delivery software unless:

1.9.1 The user affirmatively consents to the download and installation of such software based on a clear and conspicuous notice of the nature of the software, and

1.9.2. The software is easily removable by use of standard tools for such purpose included on major operating systems; (such as Microsoft's "ad/remove" tool); or

1. Any conduct that is likely to result in retaliation against Palm Coast FiberNET or the City of Palm Coast’s website, or the City ’s employees, officers or other agents, including engaging in behavior that results in any server owned and/or maintained by the City being the target of a denial of service attack (DoS).
2. School Board must take reasonable security precautions in the use of Palm Coast FiberNET.
3. School Board must comply with the CAN-SPAM Act of 2003 and other laws and regulations applicable to bulk or commercial e-mail.

4 School Board may not publish or host via Palm Coast FiberNET’s network and equipment any content or links to any content that the City reasonably believes:

4.1. Constitutes, fosters, or promotes child pornography, incites violence, threatens violence, or contains harassing content or hate speech; is unfair or deceptive under the consumer protection laws of any jurisdiction, including chain letters and pyramid schemes; is defamatory or unlawfully violates a person's privacy; creates a risk to a person's safety or health, creates a risk to public safety or health, compromises national security, or interferes with an investigation by law enforcement; improperly exposes trade secrets or other confidential or proprietary information of another person; is intended to assist others in defeating technical copyright protections; infringes on another person's copyright, trade or service mark, patent, or other property right; promotes illegal drugs, violates export control laws, promotes, conducts or supports illegal gambling, or illegal arms trafficking; is otherwise illegal or solicits conduct that is illegal under laws applicable to the School Board or to Palm Coast FiberNET; or is otherwise malicious, fraudulent, or may result in retaliation against the City.

4.2 Content "published or hosted" via Palm Coast FiberNET’s network or equipment is defined as Web content, e-mail, bulletin board postings, chat, video, audio and any other type of posting or transmission that relies on Palm Coast FiberNET.

4.3 School Board may not use Palm Coast FiberNET’s network or equipment to download, publish, distribute, or otherwise copy in any manner any text, music, software, art, image, or other work protected by copyright law unless:

5.1. School Board has been expressly authorized by the City of the copyright for the work to copy the work in that manner;

5.2. School Board is otherwise permitted by established United States copyright law to copy the work in that manner.

6. School Board must comply with the Digital Millennium Copyright Act.

7. Consequences of Violation of this AUP

7.1. City may, without notice to the School Board, suspend School Board’s service or remove any content transmitted via the Palm Coast FiberNET if the City discovers facts that lead it to reasonably believe the School Boards service is being used in violation of this AUP. The School Board must cooperate with Palm Coast FiberNET’s reasonable investigation of any suspected violation of the AUP. The City will attempt to contact the School Board prior to suspension of network access to School Boards’s server(s), however, prior notification is not assured.

7.2. School Board is strictly responsible for the violation of this AUP, including violations that occur due to unauthorized use of School Board’s service (but not including unauthorized use that results from Palm Coast FiberNET’s failure to perform its obligations under the City of Palm Coast FiberNET Broadband Network Agreement or a Service Level Agreement).

8. Amendments to this AUP

8.1. The Internet is still evolving, and the ways in which the Internet may be abused are also still evolving. Therefore, City may from time to time amend this AUP in accordance with this Agreement to further detail or describe reasonable of use of the Network.

9. Disclaimer. The City is under no duty, and does not by this AUP undertake a duty, to monitor or police the School Board, and disclaims any responsibility for any misuse of Palm Coast FiberNET.

*ATTEST:* **FLAGLER COUNTY SCHOOL BOARD**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ By:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Attestor’s Signature Sue Dickinson, Chairman

Approved as to form and content by:

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Kristy Gavin, School Board Attorney

EXHIBIT “B”

SERVICE LEVEL AGREEMENT

The City of Palm Coast (herein called “City”) is committed to providing Fiber Optic Internet Protocol Services to **Flagler County Public School Board** (herein called “School Board”) with superior service and support through City’s fiber optic broadband network (“Palm Coast FiberNET”). This Service Level Agreement for Fiber Optic Services (herein called “SLA”) is an agreement made between both parties specified above which provides guarantees to the School Board concerning security, quality, support, uptime and performance of City’s Services. The stipulations of the Services Agreement between the same parties shall remain in full force and effect during the term of this Agreement.

RECITALS

SECTION 1. DESCRIPTION OF SERVICE

MetroEthernet Transport Services: If School Board selects to receive metro Ethernet Service, City shall provide a fiber connection to School Board and deliver Metro Ethernet service per site as set forth in the Order. City will provide School Board with switched Ethernet services between Customer locations as set forth in the Order. Metro Ethernet Service bandwidth requirements will be set forth in the applicable Order(s).

SECTION 2. FEES

Fees are set in accordance with **Exhibit “C”** Rate Sheet

SECTION 3. DEFINITIONS:

“Demarcation Point”: City owned CPE equipment located in a School Board facility.

“School Board’s Circuit”: routed connection over Fast Ethernet or Gigabit Ethernet.

“Network Availability Status”: That status when the Palm Coast FiberNET is functioning in accordance with any performance standards set forth in this Service Level Agreement, and is available to use by the School Board, subject to limitations due to network congestion, and subject to any rights and remedies available to the City and/or Network Operator as described in Paragraph 4 of this Agreement.

“Network Operator”:- The City Information Technology & Communications Department will act as Network Operator and will manage and maintain Palm Coast FiberNET. Upon entering into this agreement, the City will provide the School Board with the appropriate contacts for the Network Operator. The School Board will liaise with the Network Operator during the service setup, service changes, and during outages. If the City enters into a separate contract with a Network Operator, the School Board will be provided thirty (30) days notification.

SECTION 4. QUALITY – SERVICE AVAILABILITY GUARANTEE

Scope: The Network Operator shall ensure that the Palm Coast FiberNET remains available 99.999% of the time, for the services described in Section 1 of this SLA. A 15 day “shakedown” period after initial installation of a fiber client is not covered by the Service Availability Guarantee to allow time for proper service adjustments and troubleshooting.

Each of these service levels is subject to the following performance and measurement limitations: (1) Customer must contact City’s IT&C’s Deparment to open a ticket and to request a service level remedy (credit); (2) the total amount credited may not exceed the applicable monthly recurring charge (MRC) for the affected Service and is the sole remedy for the Outage; (3) City’s service levels are provided for MetroEthernet services only; and (4) service level measurements will not include the following:

 1. Outages planned by City to carry out emergency maintenance with as much notice as possible given.

2. Outages planned by the School Board for the purpose of allowing City to carry out planned or routine maintenance at times to be agreed with School Board.

3. Outages due to the non-release of the affected service element by School Board to City for the purpose of fault verification and/or restoration of availability.

Maintenance: For purposes of notification, maintenance will be designated as one of two types — (1) Scheduled Maintenance is any maintenance at a Palm Coast demarcation point to which the School Board’s circuit is connected that is performed and scheduled according to School Board’s or Network Operator’s request and mutually agreed upon by both Parties. Service the School Board will receive at least 48 hours advance notice of service-impacting Scheduled Maintenance. (2) Emergency Maintenance is performed in order to promptly respond and resolve emergency issues associated with service-affecting conditions. School Board will be contacted when Emergency Maintenance has been performed on service-impacting work.

Process: The Palm Coast FiberNET shall be deemed unavailable (Network Unavailability) when the entire Palm Coast FiberNET was not available to the School Board, provided that such unavailability is attributable to a cause on the City’s side of the demarcation point. This term includes unavailability associated with any maintenance performed at the Palm Coast demarcation point to which the School Board’s circuit is connected, other than Scheduled Maintenance. This term shall not include unavailability attributable to, Scheduled Maintenance or, third party or School Board applications or equipment, School Board initiated maintenance, acts or omissions of School Board, or other events of force majeure (unavoidable natural disasters, war or “Acts of God”). Outages will be counted as Network Unavailability only if the School Board opens a trouble ticket with the Network Operator’s Repair Operations Center within five days of the outage.

Remedy: For each cumulative full hour of Network Unavailability in any calendar month, at School Board’s request, School Board’s account will be credited an amount equal to the pro-rated charges of the monthly fees for the Service with respect to which the Service Availability Guarantee has not been met. A maximum of one month’s credit will be given for all combined remedies for any given calendar month. No credit shall be available for Network Unavailability occurring within the initial 15 days after installation. Partial outages of the Palm Coast FiberNET shall not constitute Network Unavailability, but shall be subject to the Mean Time to Repair guarantees contained in Article 6 below.

SECTION 5. OUTAGE REPORTING

School Board shall be responsible to monitor its own equipment to ensure that it is functioning properly, and that the School Board’s network connections are available. As a courtesy, the Network Operator shall endeavor to notify the School Board upon the Network Operator’s determination that the School Board’s connections are unavailable. The Network Operator’s standard procedure is to periodically probe the School Board’s Premise Equipment (SPE). SPE must be set up by School Board to respond to probe or no outage notification shall be sent. If the School Board’s network interface does not respond to periodic pings, Network Operator will deem service unavailable and will contact the School Board’s designated point of contact.

Network Operator shall perform outage reporting as a courtesy to School Board, to act as a redundant layer of monitoring, however, neither Network Operator nor City shall be liable in any way for a failure in the School Board’s equipment, or for a failure to notify the School Board of any such failure.

Outages due to the malfunction of Customer equipment and wiring beyond the service demarcation point including LAN and voice equipment and outages due to or extended as a result of denial of access to any site.

SECTION 6. MEAN TIME REPAIR (MTTR)

Process: At School Board’s request, Network Operator will calculate the mean time that was taken by Network Operator to make repairs relating to the trouble tickets opened by the School Board within a calendar month. MTTR is calculated as the monthly average time taken to repair all such trouble tickets required to return Service to a Network Availability status. The length of each Network Unavailability instance on a specific service is totaled at the end of each billing month and divided by the corresponding number of Network Unavailability instances for the Service for that month.

Remedy: If the MTTR is more than 8 hours in one billing month, at School Board’s written request, The School Board’s account shall be credited, for each day in which the actual MTTR exceeded eight hours an amount equal to the charges for one full day of the monthly fees for the Service described in this SLA; School Board may obtain no more than one credit per day. Maximum credit that may be given for all combined remedies within any given month will be equal to the monthly fee for the Service. No credits shall be applied to the School Board’s account under this section for repairs made during the 15 day “shakedown” period after initial installation of a dedicated circuit, to allow time for proper service adjustments and troubleshooting.

Limits on Scope of Support: The support defined by this SLA cannot cover all platforms, software, and services. There may be requirements for which the common infrastructure is not suited. Given the goals and services covered, there must also be some limits on the scope of support. Conditions caused by bandwidth or packet saturation, or security events (i.e.: denial of service attacks, distributed denial of service attacks, virus activity, or capacity consumption) are not considered network failures. Following is a partial listing of services this SLA does not include: desktop workstation support; issues arising from the failure of the School Board to notify the Network Operator in a timely manner of connectivity issues or of changes to authorized the School Board contact information; issues arising from the School Board failing to grant the Network Operator timely access to network equipment located on the School Board’s Premises as requested by the Network Operator for addressing service requirements; and connectivity issues attributable to or involving School Board-initiated maintenance and/or the School Board’s cabling, hub, router, and/or server infrastructure.

SECTION 7. SCHOOL BOARD RESPONSIBILITIES

The School Board, as part of this SLA, shall carry certain responsibilities including the following: provide input to the City on the quality and timeliness of support by the Network Operator; notify the Network Operator in advance of all system and application updates performed; provide initial and expected operational capacity estimates for bandwidth and drive space; identify authorized School Board contacts and report changes to the School Board contact information for purposes of coordination in problem resolution; provide accurate information for the School Board account information; accept the minimum security requirements specified by the City; and report all service problems to the Network Operator School Board shall not be entitled to reimbursement under Articles 4 and 6, above, when such network unavailability or failure to meet repair time guarantees cited therein were attributable in whole or in part to a failure of the School Board to meet its obligations under this Article 8, or under Articles 4 and 6 above.

SECTION 8. EMERGENCY INTERVENTION.

The Network Operator reserves the right to intervene and limit or restrict the School Board’s network connection or customers network connection to prevent the network from becoming saturated if a customer’s or School Board’s connection is consuming more than its allocated amount of network bandwidth due to an unexplained event; such as a computer virus, malicious intent, broadcast storms, or other activity which would interfere with the management network traffic or impede other subscriber’s or other School Board’s traffic.

*ATTEST:* **FLAGLER COUNTY SCHOOL BOARD**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ By:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Attestor’s Signature Sue Dickinson, Chairman

Approved as to form and content by:

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Kristy Gavin, School Board Attorney