

GAATN SERVICE LEVEL AGREEMENT For Network Operations and Management

This Service Level Agreement for Network Operations and Management (“Agreement”) is between the Greater Austin Area Telecommunications Network Agency (“GAATN”) and the City of Austin, Texas (“City”).

WHEREAS, GAATN is an interlocal contract administrative agency formed under the Interlocal Cooperation Act, Texas Government Code Chapter 791 based on an interlocal agreement between the City of Austin, Austin Independent School District, Travis County, Austin Community College, Lower Colorado River Authority, the University of Texas and the State of Texas (“Participants”);

WHEREAS, GAATN operates a fiber optic telecommunications network in the Austin area including fiber-optic cable and related facilities (the “GAATN Network”) for the use of its Participants exercising their governmental functions;

WHEREAS, the operation of the GAATN Network is a governmental function for the purposes of the Interlocal Cooperation Act and other purposes;

WHEREAS, GAATN requires that certain network operations and management services be provided to ensure the efficient and reliable functioning of the GAATN Network;

WHEREAS, GAATN and the City of Austin are units of local government within the meaning of the Interlocal Cooperation Act, Chapter 791 of the Texas Government Code;

WHEREAS, the City of Austin has experience in network management, and personnel available to provide needed GAATN Network operation and management services to GAATN;

WHEREAS, the City of Austin is willing to provide the services specified in this Agreement for the compensation stated; and the Austin City Council approved the execution of this Agreement on March 5, 2015;

NOW THEREFORE, GAATN and the City of Austin agree and contract as follows:

1. SERVICES. The City shall provide the services (the “Services”) specified in the Service Level Agreement Requirements for the Operation and Management of the Greater Austin Area Telecommunications Network (“Service Requirements”) attached to this Agreement as **Attachment A**, which is incorporated into this Agreement for all purposes, as the Agreement, including Attachment A, may be amended from time to time. The City shall provide the Services according to the standards and procedures

specified in Attachment A. In the event of any conflict between this Agreement and Attachment A, the conflict shall be resolved by giving precedence to this Agreement.

2. COMPENSATION.

(a) **Initial Term.** In consideration for the Services to be provided by the City, GAATN agrees to pay the City the amount of not less than \$213,000 for the Initial Term and all renewal terms of this Agreement.

(b) **Refund upon termination.** All compensation is to be paid by GAATN from GAATN current revenues only. Nothing in this Agreement requires GAATN to create any debt or to commit the use of future GAATN revenues.

(c) **Invoices.** The City shall provide GAATN with an invoice on or before September 1 for the next contract year. Unless the Agreement has been terminated, payment shall be made by GAATN to the City on or before November 1 of the contract year.

(d) **Adjusted compensation.** The City may request additional compensation from GAATN if there are material changes in the scope of the Services or if GAATN, acting through its Board, requests additional Services. GAATN may request reduction of required compensation to the City, if there are material changes in the scope of the Services or if GAATN, acting through its Board, requests reduced or altered Services.

(e) **City staffing levels.** For the Initial Term, the parties agree that the City will utilize City personnel manpower totaling two (2) full-time equivalents (FTEs), and for any Renewal Term totaling three (3) FTEs, unless otherwise agreed.

3. TERM; RENEWAL.

The Initial Term of this Agreement shall be for one year, to commence on September 1, 2014 (Effective Date) and end on August 31, 2015, unless terminated earlier in accordance with this Agreement. This Agreement will automatically renew, subject to rights of termination as specified in this Agreement, on its anniversary date for up to four (4) one-year Renewal Terms unless either party gives written notice of its intent not to renew no later than March 15th in the year of the then-current Term.

4. TERMINATION.

(a) **Termination for convenience.** This Agreement may be terminated at any time by either party upon written notice to the other of at least one hundred twenty (120) days ("Notice of Cancellation").

(b) **Termination for cause.** If either party defaults in the performance of any obligation under this Agreement, the other party shall give notice in writing of the alleged default in sufficient detail for the party alleged to be in default to determine the character of the claimed default. The alleged defaulting party then shall have ten (10) business

days from the date of receipt of the notice, or such other time as may be agreed, to cure the alleged default. If the default is not timely cured, the other party may terminate this Agreement upon thirty (30) days' written notice.

(c) **Termination for non-appropriation.** GAATN may terminate this Agreement at any time if monies adequate to fund this Agreement have not been budgeted by GAATN, or if GAATN has for any reason not received timely payment in full by each of its Participants of their respective financial obligations to fund GAATN; provided, that GAATN shall remain liable to the City for any amounts owed to the City for the prorata period of the then-existing Term prior to the termination for which the City has provided the Services.

(d) **Refund of prepaid amounts.** In the event of termination for any reason, the City shall refund within thirty (30) days the prorata portion of any compensation that has been prepaid by GAATN that corresponds to the portion of the applicable contract Term not yet expired as of the date of termination.

5. RELEASE. To the extent permitted by the Constitution and laws of the State of Texas, GAATN releases the City from and waives any claim, loss, expense, or damage occurring to GAATN or the GAATN Network occurring in the course and scope of the City's performance of the Services, excepting only such claims, losses, expenses or damages that are caused by the willful misconduct or gross negligence of the City or City Personnel (as defined below) in the performance of the Services.

6. LIMITATION OF LIABILITY. In no event shall GAATN, or the City as service provider, be liable to the other for any special, consequential, incidental or punitive damages on any claim arising out of or concerning this Agreement.

7. NO WAIVER.

(a) **No waiver of rights as against third parties.** Nothing in this Agreement shall be deemed to limit the rights of the City, GAATN or GAATN Participants to assert claims against any third party (including but not limited to the right to seek contribution).

(b) **No waiver of immunity.** Nothing in this Section 7 shall be deemed to constitute a waiver by either party of its governmental immunity, or the sovereign or governmental immunity, as applicable, of any GAATN Participant.

8. FORCE MAJEURE. The failure of either party to perform its obligations in accordance with this Agreement shall be excused to the extent, and for the period of time, that such failure is caused by the occurrence of an event of Force Majeure. "Force Majeure" shall mean acts and events not within the reasonable control of the party claiming suspension; and which the party has been unable by the exercise of due diligence to avoid or prevent. Events of Force Majeure include but are not limited to acts of God; strikes, sabotage, domestic or foreign terrorism, lockouts or other industrial disputes; inability to obtain material, equipment or labor despite reasonable diligence;

epidemics, civil disturbances, wars, riots or insurrections; landslides, lightning, earthquakes, fires, storms, floods or washouts, or other natural disasters; arrests and restraint of rulers and people; interruptions by government or court orders; present or future orders of any regulatory body having proper jurisdiction and authority; explosions; and breakage or accident to machinery. The party invoking Force Majeure shall give prompt, timely, and adequate notice to the other party, by facsimile transmission or telephone confirmed promptly thereafter in writing of the event; and the invoking party shall use due diligence to remedy or otherwise avoid or mitigate the effects of Force Majeure as soon as reasonably possible. Nothing contained herein shall be construed to require a party to settle a strike or other labor dispute. Because of the critical importance of the GAATN Participants' use of the GAATN Network in furtherance of their respective governmental functions, including responses to public emergencies and other exercises of the Participants' police powers, the City as service provider agrees it will exercise its utmost best efforts to resume and continue performance and promptly to cure, mitigate, or avoid any event of Force Majeure.

9. DISPUTE RESOLUTION

(a) **Negotiation.** If a dispute arises out of or relates to this Agreement, or the breach hereof, the parties agree to negotiate prior to prosecuting a suit for damages. However, this section does not prohibit the filing of a lawsuit to toll the running of a statute of limitations or to seek injunctive relief. Either party may make a written request to the other for a meeting between representatives of each party, to occur within fourteen (14) calendar days after receipt of the request or such later period as agreed by the parties to seek a negotiated resolution. At every meeting, each party shall be represented by, at a minimum, one (1) senior level individual with decision-making authority regarding the dispute and with the authority to agree to resolve it, subject as may be required by law for approval by the governing body(ies) of the parties. The purpose of this and any subsequent negotiation meeting is to attempt in good faith to negotiate a resolution of the dispute. If, within thirty (30) calendar days after such meeting, the parties have not succeeded in negotiating a resolution of the dispute, they shall proceed to mediation as described below. Negotiation may be waived by a written agreement signed by both parties, in which event the parties may proceed directly to mediation as described below.

(b) **Mediation.** If the efforts to resolve the dispute through negotiation fail, or both the parties waive the negotiation process, the parties agree to submit to and participate in non-binding mediation before initiating any formal legal actions, unless both parties agree to waive this requirement. If mediation proceeds, the parties may select by mutual agreement, within thirty (30) calendar days of the final negotiation meeting or the mutual waiver of negotiation, as applicable, a mediator trained in mediation skills to assist with resolution of the dispute. The City and the GAATN Board agree to act in good faith in the selection of the mediator and to give consideration to qualified individuals nominated by the parties to act as mediator. Nothing in this provision prevents the parties from relying on the skills of a person who is trained in the subject matter of the dispute or is an agreement interpretation expert. If the parties fail to agree on a mediator within thirty (30) calendar days of initiation of the mediation process, the mediator shall be selected by

the Dispute Resolution Center (DRC) located in Austin, Texas. The first mediation session shall, unless otherwise mutually agreed, occur within thirty (30) days of the selection of a mediator; subsequent mediation sessions may occur as needed and as the parties agree. The parties agree to participate in mediation in good faith. The City and GAATN will share the direct costs of mediation (including mediation service fees and expenses, and the fees and expenses of the mediator) equally; provided, that each party shall bear its own costs of participation (including, without limitation, its own attorneys' fees or expert fees, and other expenses).

(c) **No arbitration.** Neither party will be required to submit to binding arbitration without the express written consent of its governing body.

10. NOTICES Any notice, request, or other communication required or appropriate to be given under this Agreement shall be in writing and shall be deemed delivered three (3) business days after postmarked if sent by U.S. Postal Service Certified or Registered Mail, addressed to the person designated for receipt of notice, postage prepaid and Return Receipt Requested. Notices delivered by any other means (fax, courier) shall be deemed delivered upon receipt of a successful fax or courier confirmation report by the addressee; provided, that the notice is specifically directed to the attention of the person designated for receipt of notice; and provided, further, that any fax notice shall be promptly followed by mailing or delivery by courier of a copy of the notice statement in hard-copy form, directed to the person designated for receipt of notice. Routine communication may be made by first class mail, facsimile, or other commercially accepted means. Notices to the City and GAATN shall be addressed as follows:

GAATN
c/o Judy Ochoa
Secretary to Director
AISD-Network Systems & Support
1111 W. 6th Street
Austin, Texas 78703
Phone: 512-414-3301
Facsimile: 512-414-1507

City of Austin
Chief Information Officer
COA CTM (Communications and
Technology Management)
1124 South IH 35, 3rd Floor
Austin, Texas 78704
Phone: 512-974-6424
Facsimile: 512-974-2091

With copies to:

John Kohlmorgan
AISD Director Network Services
1949 S IH35
Austin, Texas 78741
Phone: 512-414-0273
Facsimile: 512-414-0296

With copies to:

Mike LaMarre, Manager
Network Services Group
COA CTM (Communications and
Technology Management)
1124 South IH 35, 3rd Floor
Austin, Texas 78704
Phone: (512) 974-3323
Facsimile: (512) 974-2091

11. GENERAL PROVISIONS

(a) **Assignment.** A party to this Agreement may not assign or transfer its interests under this Agreement without the prior written consent of the other party other than to a lawful successor governmental agency and with prior written notice to the other party.

(b) **Severability.** If a term or provision of this Agreement is determined to be void or unenforceable by a court of competent jurisdiction, the remainder of this Agreement remains effective to the extent permitted by law.

(c) **Entire Agreement.** This Agreement constitutes the entire Agreement and understanding between the parties and supercedes all previous agreements, understandings, discussions, or representations concerning its subject matter. This Agreement may not be amended in whole or in part except in a written amendment executed by both parties to this Agreement.

(d) **Document Review.** This Agreement will be reviewed as directed by the GAATN Board and Technical Subcommittee annually prior to the end of the GAATN fiscal year and in conjunction with the evaluations called for in Attachment A. At that time the GAATN Board may determine whether there should be changes to this Agreement or Attachment A.

(e) **Governing Law; Venue.** This Agreement shall be construed and governed by the laws of the State of Texas, without giving effect to its choice of laws principles. The venue for a dispute arising under this Agreement shall be in Austin, Travis County, Texas.

(f) **Survival of Obligations.** All provisions of this Agreement that impose continuing obligations on the parties, including but not limited to provisions concerning compensation, indemnity, release, and limitation of liability, shall survive the expiration or termination of this agreement. Termination of this Agreement shall not excuse GAATN payment obligations to the City to compensate the City for any amounts accrued and due the City prior to termination under this Agreement, or obligations of the City to refund any prepaid amounts as required by this Agreement.

(g) **Public Information Act.** The parties recognize and agree that this Agreement is subject to the Texas Public Information Act. The Act shall control to the extent of any conflict between the terms of this Agreement and the Act.

(h) **Governmental Immunity.** Nothing in this Agreement shall be deemed to waive, modify, or amend any legal defense available at law or equity to either of the parties, nor to create any legal rights or claims on behalf of any third party. Neither the City nor GAATN waives, modifies, or alters to any extent whatsoever the availability of the defense of governmental (sovereign) immunity under the laws of the State of Texas.

(i) **Current Revenues.** This Agreement is authorized by and entered into by the parties under authority of the Interlocal Cooperation Act, Chapter 791 of the Texas Government Code. Each party's monetary obligations hereunder are payable only and solely from the current revenues appropriated and available for the performance of such obligation.

(j) **Independent Contractor** This Agreement shall not be construed as creating an employer/employee relationship, a partnership, joint enterprise, or a joint venture between the parties. The City is and at all times shall be considered to be an independent contractor concerning its provision of the Services, notwithstanding that it is a GAATN Participant.

(k) **Confidentiality.** All GAATN proprietary data or other information ("GAATN Information") provided to or obtained by the City in the course of provision of the Services remains the exclusive property of GAATN, and upon termination of this Agreement all copies of such GAATN Information in the possession or under the control of the City (or its right of possession or right of control), in whatever form or format, shall be returned promptly to GAATN by the City or destroyed, and the City shall certify within thirty days of termination the return or destruction of the GAATN Information.

(l) **Intellectual property.** No rights to use or possess any intellectual property of GAATN are conveyed or granted to the City except as such use is in relation to the provision by the City of the Services.

ACCEPTED AND AGREED:

**GREATER AUSTIN AREA
TELECOMMUNICATIONS
NETWORK AGENCY**

CITY OF AUSTIN

By: _____

By: _____

**Wayne Wedemeyer
Board Chairperson**

**Stephen Elkins
Chief Information Officer**

Date

Date