

COTTONWOOD HEIGHTS

ORDINANCE NO. 340

AN ORDINANCE GRANTING A TELECOMMUNICATIONS SYSTEM FRANCHISE TO UTOPIA

WHEREAS, UTOPIA, an interlocal entity of the state of Utah, on behalf of itself and its operating affiliates (“*Provider*”), desires to provide certain telecommunication services within the city of Cottonwood Heights (“*City*”) and in connection therewith to establish a fiber-optic cable telecommunications network in, under, along, over and across present and future public roads, streets, alleys and other rights-of-way (the “*Public Way*”) within City’s corporate limits (“*City Limits*”); and

WHEREAS, City’s governing body (the “*City Council*”) met in regular session on 18 February 2020 to consider, among other things, adopting an ordinance granting a non-exclusive franchise to operate such a telecommunications network within City Limits; and

WHEREAS, after careful consideration, the City Council, in the exercise of City’s police power, ownership, or use rights in, to, over and under the public roads, streets, alleys and public places within City Limits and pursuant to its other regulatory authority, believes it to be in the best interests of the health, safety and welfare of City’s residents to grant to Provider a non-exclusive franchise to operate a network for voice and/or data transmission services within City Limits;

NOW THEREFORE, be it ordained by the city council of the city of Cottonwood Heights as follows:

Section 1. **Grant of Franchise**. City hereby grants to Provider a non-exclusive right, privilege and franchise (the “*Franchise*”) to construct, maintain and operate in the present and future Public Way within City Limits a fiber-optic cable telecommunications system (the “*Facilities*”) to supply internet access, cell site back-haul capacity using fiber-optic cables, and leasing of conduit and dark fiber to third parties. The Facilities may be deployed to businesses and government entities to provide local exchange, internet access and data transport services. The Facilities may also be deployed to third party providers, each of whom City shall require to continuously hold separate franchises or license agreements from City. All Facilities shall be located and operated in full compliance with all applicable law, including, without limitation, Chapters 14.28 and 19.83 of the COTTONWOOD HEIGHTS CODE OF ORDINANCES (the “*Code*”). The Facilities will not include any wireless equipment and will not be deployed by Provider to provide cable service as such term is defined in 47 USC § 522(6). Further, the Franchise does not authorize Provider to utilize any City-owned buildings, poles or other structures to hold or support any Facilities unless separately agreed by City and Provider.

Although the Franchise does not grant to Provider the right, privilege or authority to engage in residential cable TV video service or personal wireless service, nothing contained herein shall preclude Provider from (a) permitting those with an appropriate franchise who are lawfully engaged in such business to utilize the Facilities for such purposes, or (b) providing such service

in the future if an appropriate franchise is obtained and all other legal requirements have been satisfied.

To induce City to grant the Franchise on the terms and conditions of this ordinance (this “*Ordinance*”), Provider hereby irrevocably represents, warrants and certifies to City that:

(x) Provider will not provide “wireless services” or act as a “wireless service provider” except pursuant to a separate franchise or license agreement with City, and

(y) except for any of the Facilities which are coaxial or fiber-optic cable that is immediately adjacent to or directly associated with a particular “collocation” which is owned and/or operated by a “wireless services provider,” none of the Facilities are or will be any type of “small wireless facility” or a “utility pole,”

for purposes of the “Small Wireless Facilities Deployment Act” codified as UTAH CODE ANN. 54-21-101 *et seq.* effective 1 September 2018, as the same hereafter may be amended (the “*Small Cell Act*”). The terms “wireless services,” “wireless service provider,” “collocation,” “small wireless facility” and “utility pole” as used above are all as defined in the Small Cell Act. Provider’s warranty that it will not provide “wireless services” or act as a “wireless service provider,” coupled with the limited practical impact of the Small Cell Act on “small wireless facilities” which are limited to such coaxial or fiber-optic cable owned or operated by someone other than a “wireless services provider,” cause Provider to hereby acknowledge and agree that this Ordinance is not, and will not become, invalid or unenforceable in whole or in part pursuant to UTAH CODE ANN. 54-21-602.

Section 2. **Acceptance.** If Provider desires to accept the Franchise, then within 60 days after the date of this Ordinance Provider shall file with City an unqualified written acceptance of the Franchise declaring its acceptance of the Franchise and its intention to be bound by its terms and conditions. In its written acceptance, Provider shall designate a representative authorized by Provider to receive and respond to issues and inquiries by City in connection with the Franchise. Provider may designate a new representative from time to time upon written notice to City.

Section 3. **Term.** The Franchise is granted for a term of ten years, commencing with the date on which it is accepted. Thereafter, the Franchise will continue in effect, in the absence of an express written objection by either party, from year-to-year in accordance with the terms of this Ordinance. Either party may request good-faith renegotiation of the Franchise upon written notice to the other given at least 120 days before the end of the initial term or any annual renewal period.

Section 4. **Regulatory Authority.** Provider’s use and enjoyment of the Franchise shall be subject to and in compliance with all applicable federal, state and City laws, rules and regulations, including, without limitation, Chapter 14.28 and Chapter 19.83 of the Code. City reserves the right to amend the Code and to adopt such additional ordinances and regulations, or amendments thereto, as may be deemed necessary or advisable in the exercise of its police power for the protection of the health, safety and welfare of its citizens and their properties or the exercise of any other rights, powers or duties required or permitted under the Constitution of the United States, the Constitution of the State of Utah, the laws of the United States, the laws of the State of Utah, or City’s ordinances.

Section 5. **Construction and Maintenance of Facilities.**

(a) **No Interference.** All Facilities shall be constructed so as to interfere as little as reasonably possible with traffic on, and other public and City-authorized uses of, the Public Way.

(b) **Compliance with Laws.** All Facilities shall be constructed in accordance with all applicable laws and established construction practices, and all Facilities that are installed as new or relocated Facilities during the term of the Franchise shall be sited (to the greatest extent reasonably possible without unreasonable additional cost to Provider) to be visually unobtrusive. Stealth Facilities are favored. Provider shall comply with all ordinances and regulations that are or may be prescribed by City with respect to the construction, maintenance and operations of all Facilities, including obtaining necessary building permits (which shall not be unreasonably withheld, conditioned or delayed), so long as such ordinances or regulations do not conflict with or prejudice Provider's rights under applicable law, this Ordinance, or the requirements of any other governmental bodies having jurisdiction over Provider. Notwithstanding the foregoing, however, Provider shall not be required to obtain a permit before performing emergency repairs.

(c) **Undergrounding.** Provider shall place newly constructed or relocated Facilities underground unless (i) it is not feasible to go underground at the time; (ii) overhead lines can be placed on already-existing poles; and (iii) Provider agrees to move it facilities underground when City directs so long as City, at the same time, directs other franchisees with overhead facilities in the same location to move their facilities underground.

(d) **Removal.** From and after any termination of the Franchise, Provider shall be (i) entitled to remove from the Public Way any or all of its Facilities; and (ii) obligated to remove from the Public Way any or all of its Facilities which would interfere with a public project planned and approved within three years after the date of such termination for the protection of the health, safety or welfare of City's residents or for another legitimate, permitted governmental purpose. Any such removal shall be at Provider's sole cost or otherwise at no cost to City, and, upon any such removal, Provider shall be obligated promptly to restore the Public Way affected by such removal to as near as reasonably practicable their same condition as immediately prior to such removal.

(e) **Damage.** If Provider causes damage to or alters any of the Public Way or any improvements (including, without limitation, wires, conduits, or other facilities owned by other franchisees of City), Provider shall at its own cost and expense and in a manner approved by City replace and restore such property to the same condition as existed before such damage occurred, excepting normal, reasonable wear and tear.

(f) **City Notice.** If required by applicable Utah law, before commencing any street improvements or other work within the Public Ways that may affect the Facilities, City shall notify Provider and give Provider a reasonable amount of time to mark and if necessary protect its Facilities.

Section 6. **Annexation.** Upon the annexation of any territory to City, the rights and obligations hereunder shall extend to the annexed territory to the extent City has such authority.

All Facilities owned, maintained or operated by Provider located within any public ways of the annexed territory shall thereafter be subject to all of the terms hereof. When any territory is approved for annexation to City, City shall endeavor to promptly notify Provider of such annexation and, in any event, shall provide to Provider, within ten business days after Provider's request, a copy of City's ordinance approving such annexation and a legal description of the annexation area.

Section 7. **Excavations.** Provider shall have the right to excavate the Public Way in accordance with City ordinance and other reasonable requirements. Before installing or relocating underground Facilities, Provider shall notify City as soon as reasonably possible (but in no event less than 30 days except in the case of a reasonably unforeseeable emergency) in advance of such work and shall allow City, at its own expense, to share the trench of Provider to lay its own conduit therein, provided that such action by City shall not unreasonably interfere with Provider's Facilities or materially delay completion, nor shall such notice be required in emergency situations. Provider shall maintain on deposit with City throughout the term of the Franchise a cash deposit, irrevocable letter of credit, or self-bond in the initial amount of \$10,000 to guaranty Provider's faithful performance of Provider's obligations under Chapter 14.16 of the Code.

Section 8. **Vegetation Management.** Provider may at its sole cost prune, or cause to be pruned, all trees, bushes and other vegetation (collectively, "Trees") which overhang the Public Ways, whether such Trees originate within or without the Public Ways, in such a manner and to such an extent as will prevent the branches, limbs or other parts of such Trees from touching or interfering with its Facilities, so long as such Trees are not pruned further than may be reasonably necessary to prevent such interference and to allow the proper operation and maintenance of such Facilities for the reasonably foreseeable future. Such pruning shall be performed in accordance with Provider standards and the American National Standard for Tree Care Operations (ANSI A300) ("ANSI"); provided, however, that if, at any time during the term of the Franchise, ANSI ceases to be published or ceases to be the standard for arboriculture techniques, then City reasonably may designate (in consultation with Provider) a substitute standard upon written notice to Provider. Provider shall use reasonable efforts to notify owners of property on which the Trees to be pruned are located at least 72 hours prior to doing the work. A growth inhibitor treatment may be used for trees and vegetation species that are fast-growing and problematic. Nothing contained in this section shall prevent Provider, when necessary and with the approval of the owner of the property on which they may be located, from cutting down and removing any Trees which overhang the Public Ways, whether such Trees originate within or without the Public Ways.

Section 9. **Annual Plan; Coordination.**

(a) **Annual Plan.** Upon request by either City or Provider not more often than once each calendar year, Provider and City shall meet for the purpose of exchanging information and documents regarding construction and other similar work within City Limits, with a view towards coordinating their respective activities in those areas where such coordination may prove mutually beneficial. Any information regarding future capital improvements that may involve land acquisition shall be treated with confidentiality upon request.

(b) **Coordination.** In order to prevent and/or minimize the number of cuts to and excavations within the Public Ways, Provider shall coordinate with City and other authorized

users of the Public Ways concerning when such cuts or excavations will occur. When possible, installation, repairs or maintenance of Facilities within the Public Ways shall be made in the same trench and at the same time as other installations, repairs or maintenance of facilities are conducted within the Public Way. City will endeavor to give Provider a schedule of street repairs in advance of City work, provided that such schedule will be subject to change based on, among other things, available funding.

Section 10. **Relocation.** City reserves the right (exercisable from time to time or at any time upon written notice to Provider) to require the relocation, removal or reinstallation (collectively, “*Relocation*”) of any of Provider’s Facilities located in, on, along, over, across, through, or under any street, road, alley or other Public Ways or any real property owned by City within City Limits, and installed or maintained pursuant to the Franchise and not an enforceable right-of-way or easement. Within a reasonable time after Provider’s receipt of such written notice, Provider shall effect such Relocation of its Facilities as may be reasonably necessary to meet City’s requirements.

Relocation of Facilities by Provider shall be at no cost to City if such request is for the protection of the public health, safety and welfare (which includes, without limitation, the placement, widening or realignment of streets; the placement or realignment of curb, gutter and/or sidewalks; the creation of a public park or plaza; or the placement, relocation, etc. of traffic signals, street lighting or the like). If City requires Relocation of any Facilities, the parties shall cooperatively work together to identify a reasonable realignment of the relocated Facilities, and Provider thereafter may maintain and operate such Facilities (and any necessary appurtenances) in a new location within City Limits without additional payment if the new location is a Public Way. Further, if a City project is funded by federal or state monies that specifically includes an amount allocated to defray the expenses of Relocation of Facilities, then City shall compensate Provider up to the extent of such specified amount for any reasonable Relocation costs mandated by the project to the extent that City actually receives such federal or state funds. In addition, the City shall bear the cost of relocation of facilities by Provider to the extent such request for relocation or disconnection is for purely aesthetic purposes or to benefit a third party.

Section 11. **Public Use Rights.** City shall have the right, without cost, to use all poles and other structures owned by Provider and located in City’s Public Ways for fire alarms, police signal systems, emergency communication systems, and any other lawful public use, provided that: (a) any such uses by City shall be for activities owned, operated or used by City for public purposes and shall not include the provision of telecommunication services to third parties; (b) such use by City shall not require Provider to alter the manner in which Provider operates and maintains its Facilities; (c) any City attachments shall be installed and maintained in accordance with Provider’s reasonable requirements and the requirements of the then current National Electric Safety Code; (d) any City attachments shall be installed only pursuant to Provider’s prior written approval, which shall not be unreasonably withheld, conditioned or delayed; and (e) City shall repair and maintain all City attachments at its sole cost.

Section 12. **Indemnification.** City shall not, in any way or for any purpose, be liable or responsible for any loss or damage to property or any injury to, or death of, any person that may occur as a result of the construction, maintenance or operation of the Facilities or Provider’s other activities within City Limits pursuant to the Franchise. Provider shall indemnify, defend and hold

City harmless from and against any and all claims, demands, liens, liabilities, damages, actions and proceedings of whatsoever type(s) on account of, in connection with, or arising from the grant of the Franchise, from the exercise of Provider of its related rights, or from Provider's operations within City Limits, and shall pay the cost of defense plus City's reasonable attorneys' fees. Provider's obligation to so defend, indemnify and hold City harmless shall include, without limitation, any such claims, etc. arising from Provider's negligent acts or omissions pursuant to the exercise of the Franchise (including, for example, the construction, operation and/or maintenance of the Facilities), whether or not any such use, act or omission complained of is authorized, allowed or prohibited by the Franchise. Notwithstanding any provision hereof to the contrary, however, Provider shall not be obligated to indemnify, defend or hold City harmless to the extent that any underlying claim, demand or lien arises out of or in connection with any negligent act or omission of City or any of its officers, agents or employees.

Except as provided above, neither party shall be liable to the other party for any special, consequential or indirect damages (including, by way of illustration, lost revenues and lost profits) arising out of its obligations under this Ordinance, whether in action for or arising out of an asserted breach of contract, tort or otherwise. Further, neither party shall be liable to the extent such claims are caused by the intentional conduct or negligent acts or omissions of the other party.

Section 13. **Insurance.** Provider shall maintain in full force during the entire term of the Franchise commercial general liability insurance in an amount or not less than \$2 Million per occurrence insuring against claims for bodily injury, death or property damage occurring as a result of the construction, maintenance or operation of the Facilities or Provider's other activities within City Limits pursuant to the Franchise. Provider may elect to assume such liabilities and risk of loss through deductibles and/or a qualified self-insurance program.

Section 14. **Assignment of Franchise.** Provider shall not transfer, assign or delegate any of its rights or obligations under the Franchise to another entity without City's prior written approval, which approval shall not be unreasonably withheld or delayed; provided, however, that inclusion of the Franchise as an asset of Provider subject to the liens and mortgages of Provider shall not constitute a transfer or assignment requiring City's prior written consent. Provider's assignment of its rights and delegation of its duties under the Franchise to Provider's parent, subsidiary, successor or affiliate (collectively, a "*Related Entity*") shall be effective upon written notice to City and shall not require City's prior written consent provided that such Related Entity (a) is under common ownership and control with Provider, and (b) is at least as creditworthy and financially viable as Provider.

Section 15. **Effect of Invalidity.** If any portion of this Ordinance is for any reason held illegal, invalid, or unconstitutional by a court of competent jurisdiction, such invalidity shall not affect the validity of any remaining portions of this Ordinance.

Section 16. **Termination.** City may terminate the Franchise if (a) Provider violates a material duty under this Ordinance and fails to cure such violation within 60 days after receiving City's written notice specifying such violation and the acceptable methods for curing such violation; or (b) Provider becomes insolvent, unable or unwilling to pay its debts when due, is adjudged bankrupt, or part or all of its Facilities within the Public Ways are sold under an instrument to secure a debt and are not redeemed by Provider within 60 days. Termination of the

Franchise is in addition to, and not in lieu of, any other rights or remedies available to City upon Provider's default hereunder. Notwithstanding anything contained in this Franchise to the contrary, Provider shall not be held in default under or in non-compliance with the provisions of this Franchise, nor suffer any enforcement or penalty relating thereto, for any such non-compliance or alleged defaults that are caused by strikes, acts of God, power outages, or other events reasonably beyond its ability to control.

Section 17. **Public Way Rate; Reservation of Right.**

(a) **Public Way Rate.** Provider shall pay to City an annual amount equal to three and one-half percent (3.5%) of Provider's gross revenues related to its use of the Public Way to the extent that any of the Facilities constitute small wireless facilities for purposes of the Small Cell Act.

(b) **Reservation of Right.** Nothing in this Ordinance shall affect City's right, under the "Municipal Telecommunications License Tax Act" (UTAH CODE ANN. §10-1-401 *et seq.*) or any other applicable law then in effect, at any time hereafter to prospectively impose upon, charge or collect from Provider any municipal telecommunications license tax on Provider's gross receipts from telecommunications service that are attributed to City or this Franchise under such act or any other rate, fee or compensation for the right to use or occupy City's public right of way, and/or City poles, structures or other facilities therein or thereon, which may be imposed by City under applicable state law so long as such compensation is charged on a uniform, non-discriminatory basis to all similar providers.

Section 18. **Notices.** Unless otherwise specified herein, all notices to City hereunder shall be delivered to the City Recorder's office, and all notices to Provider hereunder shall be delivered to UTOPIA, c/o General Counsel, 5858 South 900 East, Murray, UT 84121, or such other address as Provider may specify in written notice to City.

Section 19. **Severability.** It is hereby declared that all parts of this Ordinance are severable, and if any section, clause or provision of this Ordinance shall, for any reason, be held or found to be invalid or unenforceable, the invalidity or unenforceability of any such section, clause or provision shall not affect the remaining sections, clauses or provisions of this Ordinance.

This Ordinance, assigned no. 340, shall take immediate effect as soon as it shall be published or posted as required by law, deposited and recorded in the office of the City Recorder, and accepted as required herein.

PASSED AND APPROVED this 18th day of February 2020.

ATTEST:

COTTONWOOD HEIGHTS CITY COUNCIL

By: 
Paula Melgar, Recorder



By: 
Scott Bracken, Mayor Pro Tempore

VOTING:

Michael J. Peterson	Yea	Ex	Nay	<u>used</u>
Douglas Petersen	Yea	<u>x</u>	Nay	—
J. Scott Bracken	Yea	<u>x</u>	Nay	—
Tali C. Bruce	Yea	Ex	Nay	<u>used</u>
Christine Watson Mikell	Yea	<u>x</u>	Nay	—

DEPOSITED in the Recorder's office this 18th day of February 2020.

POSTED this 19 day of February 2020.