

**ORDINANCE NO. 909**

AN ORDINANCE OF THE GOVERNING BODY OF THE CITY OF BURLINGTON, KANSAS, GRANTING JMZ CORPORATION, A KANSAS CORPORATION, DOING BUSINESS AS KWIKOM, A NON-EXCLUSIVE LICENSE AUTHORIZING KWIKOM TO ATTACH ITS NETWORK FACILITIES TO CITY FACILITIES FOR A PERIOD OF FIVE YEARS SUBJECT TO RENEWAL TO MAXIMUM TERM OF TWENTY YEARS REGULATING THE SAME AND PROVIDING FOR COMPENSATION TO THE CITY.

**BE IT ORDAINED BY THE GOVERNING BODY OF BURLINGTON, KANSAS:**

**The following Agreement is hereby adopted by this Ordinance 909:**

**Pole Attachment License Agreement**

[JMZ Corporation – City of Burlington]

This Pole Attachment License Agreement (the “Agreement”) dated this 18th day of September, 2024, is made by and between City of Burlington, a Kansas municipal corporation (hereinafter referred to as “City”), and JMZ Corporation, a Kansas corporation, doing business as KwiKom Communications (hereinafter referred to as “JMZ”).

A. WHEREAS JMZ proposes to install and maintain Network Facilities and associated communications equipment on City’s Poles to provide Communications Services to the public; and

B. WHEREAS, City is willing, when it may lawfully do so, to issue one or more Permits authorizing the placement or installation of JMZ’s Attachments on City’s Poles, provided that City may refuse, on a nondiscriminatory basis, to issue a Permit where there is insufficient Capacity or for reasons relating to safety, reliability, generally applicable engineering purposes and/or any other Applicable Standard; and

C. WHEREAS, City’s lease of City Facilities is a commercial transaction involving the rental of property and the City's intention to act in a non-discriminatory manner notwithstanding, such commitment shall only apply to this Agreement when viewed as a whole and nothing herein shall be construed as a requirement that any other license agreements be identical. Nor shall it be construed as an obligation to proactively ensure competitive neutrality or prevent the City from obtaining in-kind consideration in instances where it is mutually agreeable to the parties.

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

**SECTION 1 - DEFINITIONS.**

For purposes of this Agreement, the following terms, phrases, words, and their derivations, shall have the meaning given herein, unless more specifically defined within a specific Section or Paragraph of this Agreement. When not inconsistent with the context, words used in the present tense include the future tense, words in the plural number include the singular number, and words

in the singular number include the plural number. The words "shall" and "will" are mandatory and "may" is permissive. Words not defined shall be given their common and ordinary meaning.

1.1. **Applicable Standards:** means all applicable engineering and safety standards governing the installation, maintenance and operation of facilities and the performance of all work in or around electric City Facilities and includes the most current versions of National Electric Safety Code ("NESC"), the National Electrical Code ("NEC"), and the regulations of the Occupational Safety and Health Administration ("OSHA"), each of which is incorporated by reference in this Agreement, and/or other reasonable safety and engineering requirements of City or other federal, state or local authority with jurisdiction over City Facilities.

1.2. **Assigned Space:** means space on City's Poles that can be used, as defined by the Applicable Standards, for the attachment or placement of wires, cables and associated equipment for the provision of Communications Service or electric service. The neutral zone or safety space is not considered Assigned Space.

1.3. **Attaching Entity:** means any public or private entity, other than City or JMZ, who, pursuant to a license agreement with City, places an Attachment on City's Pole to provide Communications Service.

1.4. **Attachment(s):** means JMZ's Network Facilities that is placed directly on City's Poles. For billing purposes an Attachment is counted for each of JMZ's cables/wires on each Pole together with any associated equipment as to each cable/wire, including any Riser or service drop attached to a single Pole where JMZ has an existing Attachment on such Pole.

1.5. **Capacity:** means the ability of a Pole segment to accommodate an additional Attachment based on Applicable Standards, including space and loading considerations.

1.6. **City Facilities:** means all personal property and real property owned or controlled by City, including Poles.

1.7. **Communications Service:** means the transmission or receipt of voice, video, data, Internet or other forms of digital or analog signals over Network Facilities.

1.8. **Network Facilities:** means wireline or wireless equipment including but not limited to fiber optic, copper and/or coaxial cables, wireless antennas, receivers or transceivers, mounting hardware, power supplies, grounding or bonding wires, and other equipment utilized to provide Communications Services including any and all associated equipment comprising JMZ's system located within the public rights-of-way, and to the extent permitted under any applicable laws, statutes and/or regulations (including, but not limited to those relating to the construction and use of the public right-of-way or other public or private property), that are designed and constructed for the purpose of producing, receiving, amplifying, or distributing Communications Services.

1.9. **Make-Ready Work:** means all work, as reasonably determined by City, required to accommodate JMZ's Network Facilities and/or to comply with all Applicable Standards. Such work includes, but is not limited to, Pre-Construction Survey, rearrangement and/or transfer of City Facilities or existing Attachments, inspections, engineering work, permitting work, tree trimming (other than tree trimming performed for normal maintenance purposes), pole



replacement and construction.

1.10. **Permit:** means written or electronic authorization of City for JMZ to make or maintain Attachments to specific City Poles pursuant to the requirements of this Agreement.

1.11. **Pole:** means a pole owned by City used for the distribution of electricity and/or Communications Service that is capable of supporting Attachments for Network Facilities.

1.12. **Pre-Construction Survey:** means all work or operations required by Applicable Standards and/or City to determine the potential Make-Ready Work necessary to accommodate JMZ's Network Facilities on a Pole. Such work includes, but is not limited to, field inspection and administrative processing. The Pre-Construction Survey shall be coordinated with City.

1.13. **Reserved Capacity:** means capacity or space on a Pole that City has identified and reserved for its own electric utility requirements, including the installation of communications circuits for operation of City's electric system, pursuant to a reasonable projected need or business plan.

1.14. **Riser:** means metallic or plastic encasement materials placed vertically on the Pole to guide and protect communications wires and cables.

1.15. **Tag:** means to place distinct markers on wires and cables, coded by color or other means specified by City and/or applicable federal, state or local regulations, that will readily identify the type of Attachment (e.g., cable TV, telephone, highspeed broadband data, public safety) and its owner.

## SECTION 2 - SCOPE OF AGREEMENT

2.1. **Grant of License.** Subject to the provisions of this Agreement, City hereby grants JMZ a revocable, nonexclusive license authorizing JMZ to install and maintain Permitted Attachments to City's Poles.

2.2. **Permit Issuance Conditions.** City will issue a Permit(s) to JMZ only when City determines, in its sole judgment, exercised reasonably, that (i) it has sufficient Capacity to accommodate the requested Attachment(s), (ii) JMZ meets all requirements set forth in this Agreement, and (iii) such Permit(s) comply with all Applicable Standards.

2.3. **Reserved Capacity.** Access to Assigned Space on City Poles will be made available to JMZ with the understanding that such access is to City's Reserved Capacity only. On giving JMZ at least one-hundred and eighty (180) calendar days prior notice, City may reclaim such Reserved Capacity anytime during the period following the installation of JMZ's Attachment in which this Agreement is effective if required for City's future electric service use, including the attachment of communications lines for internal City operational or governmental communications requirements. City shall give JMZ the option to remove its Attachment(s) from the affected Pole(s) or to pay for the cost of any Make-Ready Work needed to expand Capacity so that JMZ can maintain its Attachment on the affected Pole(s). The allocation of the cost of any such Make-Ready Work (including the transfer, rearrangement, or relocation of third-party Attachments) shall be determined in accordance with Section 7.2.

2.4. **No Interest in Property.** No use, however lengthy, of any City Facilities, and no payment of any fees or charges required under this Agreement, shall create or vest in JMZ any easement or other ownership or property right of any nature in any portion of such Facilities. Neither this Agreement, nor any Permit granted under this Agreement, shall constitute an assignment of any of City's rights to City Facilities. Notwithstanding anything in this Agreement to the contrary, JMZ shall, at all times, be and remain a licensee only.

2.5. **JMZ's Right to Attach.** Nothing in this Agreement, other than a Permit issued pursuant to Section 6, shall be construed as granting JMZ any right to attach JMZ's Network Facilities to any specific Pole.

2.6. **City's Rights over Poles.** The parties agree that this Agreement does not in any way limit City's right to locate, operate, maintain or remove its Poles in the manner that will best enable it to fulfill its service requirements.

2.7. **Expansion of Capacity.** City will take reasonable steps to expand Pole Capacity when necessary to accommodate JMZ's request for Attachment. Notwithstanding the foregoing sentence, nothing in this Agreement shall be construed to require City to install, retain, extend or maintain any Pole for use when such Pole is not needed for City's service requirements.

2.8. **Other Agreements.** Except as provided herein, nothing in this Agreement shall limit, restrict, or prohibit City from fulfilling any agreement or arrangement regarding Poles into which City has previously entered, or may enter in the future, with others not party to this Agreement.

2.9. **Permitted Uses.** This Agreement is limited to the uses specifically stated in the recitals stated above and no other use shall be allowed without City's express written consent to such use. Nothing in this Agreement shall be construed to require City to allow JMZ to use City's Poles after the termination of this Agreement.

### **SECTION 3 - FEES AND CHARGES**

3.1. **Fees.** JMZ's payments shall comply with the terms and conditions specified herein. JMZ shall pay to City the fees that will consist of the following:

- a. Annual Attachment Fee. \$2.00 per attachment/per year.
- b. Unauthorized Attachment Penalty Fee. 3x annual attachment fee, per occurrence.

3.2. **Payment Period.** Unless otherwise expressly provided, JMZ shall pay any invoice its receives from City pursuant to this Agreement within thirty (30) calendar days after JMZ receives the invoice.

3.3. **Billing of Attachment Fees.** The initial annual rental period shall commence upon the execution of this Agreement and conclude on December 31 of this year, and each subsequent annual rental period shall commence on the following January 1 and conclude on December 31 of the subsequent year. The City's invoice shall set forth the total number of Utility's Poles on which JMZ was issued and/or holds a Permit(s) for Attachments during such annual rental period.



3.4. **Refunds.** No fees and charges specified shall be refunded on account of any surrender of a Permit granted hereunder.

3.5. **Inventory.** The City shall have the right to require a joint inventory of all Attachments no more frequently than once every five (5) years by the City and JMZ, unless both parties agree to a new inventory schedule. The cost of the inventory shall be shared equally between the City, JMZ and any other participating Attaching Entities, subject to the terms of any agreement with said Attaching Entities.

3.6. **Late Charge.** If City does not receive payment for any fee or other amount owed within thirty (30) calendar days after it becomes due, JMZ, upon receipt of fifteen (15) calendar days written notice, shall pay interest to City, at the rate of 1.5 % per month, on the amount due; provided, however, under no circumstance shall interest under this Agreement exceed the maximum interest allowable under applicable Kansas law.

3.7. **Payment for Work.** JMZ will be responsible for payment to City for all work City or City's contractors perform pursuant to this Agreement to accommodate JMZ's Network Facilities.

3.8. **Advance Payment.** At the discretion of City, JMZ may be required to pay in advance all reasonable costs, including but not limited to administrative, construction, inspections and Make-Ready Work expenses, in connection with the initial installation or rearrangement of JMZ's Network Facilities pursuant to the procedures set forth in Sections 6 and 7 below. If the City does not exercise this option, the Make-Ready Work Estimate will be paid as set forth in Section 7.2.

3.9. **True Up.** Wherever City, at its discretion, requires advance payment of estimated expenses prior to undertaking an activity on behalf of JMZ and the actual cost of activity exceeds the advance payment of estimated expenses, JMZ agrees to pay City for the difference in cost. To the extent that the actual cost of the activity is less than the estimated cost, City agrees to refund to JMZ the difference in cost.

3.10. **Determination of Charges.** Wherever this Agreement requires JMZ to pay for work done or contracted by City, the charge for such work shall include all reasonable material, labor, engineering and administrative costs and applicable overhead costs. City shall bill its services based upon actual costs, and such costs will be determined in accordance with City's cost accounting systems used for recording capital and expense activities. All such invoices shall include an itemization of dates of work, location of work, labor costs per hour, persons employed and materials used and cost of materials. If JMZ was required to perform work and fails to perform such work necessitating its completion by City, City may charge an additional ten percent (10%) to its costs.

3.11. **Work Performed by City.** Wherever this Agreement requires City to perform any work, JMZ acknowledges and agrees that City, at its sole discretion, may utilize its employees or contractors, or any combination of the two to perform such work.

3.12. **Default for Nonpayment.** Nonpayment of any amount due under this Agreement beyond ninety (90) days shall constitute a material default of this Agreement.

3.13. **Property Taxes.** JMZ is responsible for payment of any taxes, fees and assessments

levied on its ownership, use and maintenance of the Network Facilities. JMZ will cooperate with the Coffey County Assessor in providing any information necessary for the Assessor to make a property tax determination. JMZ reserves the right to challenge any such assessment, and the City agrees to cooperate with JMZ in connection with any such challenge.

#### **SECTION 4 - SPECIFICATION**

4.1. **Installation/Maintenance of Attachment.** Upon execution of a Permit pursuant to this Agreement, JMZ's Attachment(s) shall be installed and maintained in accordance with the City's applicable requirements and specifications and all applicable federal, State and local laws, rules and regulations. All of JMZ's Attachments must comply with all Applicable Standards. JMZ shall be responsible for the installation and maintenance of its Attachments. JMZ shall, at its own expense, make and maintain its Attachments in safe condition and good repair, in accordance with all Applicable Standards; and JMZ shall replace, remove, reinforce or repair any defective Attachments (unless otherwise agreed to by the City in writing).

4.2. **Tagging.** JMZ shall Tag all of its Network Facilities in accordance with any applicable federal, State and local regulations upon installation of such Attachment(s).

4.3. **Interference.** JMZ shall not allow its Attachment(s) to impair the ability of the City or any third party to use Utilities Facilities, nor shall JMZ allow its Attachment(s) to interfere with the operation of any City Poles

- a. JMZ shall comply with all Federal Communications Commission ("FCC") and other federal, state and local laws, rules, orders and regulations and all directives of the relevant regulatory agencies that are applicable in connection with the installation and operation of JMZ's Attachments.
- b. In the event that the installation, operation or maintenance of the Attachment(s), whether or not such operation is in compliance with the terms of JMZ's applicable FCC licenses, creates any interference with the operation of the City's or any other governmental entity's communication or other equipment, JMZ shall immediately, at JMZ's sole cost and expense, take such reasonable steps as may be necessary or recommended by the City or regulatory agencies to eliminate such interference. In the event that the installation, operation or maintenance of the Attachment(s) creates any interference with the operation of the pre-existing equipment of third parties using the Pole pursuant to an agreement with the City or any other pre-existing uses of electronic equipment, JMZ shall immediately, at JMZ's sole cost and expense, take such reasonable steps as may be necessary to eliminate such interference in accordance with FCC or other applicable regulatory requirements. If JMZ is unable or refuses to eliminate such interference, the City may require JMZ to power down its equipment to eliminate the interference. In the event JMZ is thereafter unable to take necessary action to eliminate such interference within a period of ninety (90) days or such period as the Parties otherwise agree to in writing, the City may terminate JMZ's use of or right to use the Pole upon which such interfering Attachment is located, and JMZ shall promptly remove the Attachment from the Pole.

- c. Notwithstanding the foregoing, if equipment installed on a Pole by any third party using the Pole pursuant to an agreement with the City subsequent to the installation of the JMZ's Attachment on the Pole causes interference, either electronically or physically, with JMZ's previously installed Attachments, JMZ shall immediately notify such third party and ensure that the third party takes such reasonable steps as may be necessary to eliminate such interference in accordance with FCC or other applicable regulatory requirements. Alternatively, JMZ may upon thirty (30) days written notice to the City terminate the affected Permit.

4.4. **Protective Equipment.** JMZ, and its employees and contractors, shall utilize and install adequate protective equipment to ensure the safety of people and facilities.

4.5. **Restoration of City Service.** The City's service restoration requirements shall take precedence over any and all work operations of JMZ on Utilities Facilities.

## **SECTION 5 - PRIVATE AND REGULATORY COMPLIANCE**

5.1. **Necessary Authorizations.** JMZ shall be responsible for obtaining from the appropriate public and/or private authority or other appropriate persons any required authorization to construct, operate and/or maintain its Network Facilities on public and/or private property before it occupies any portion of City's Poles. City retains the right to require evidence that appropriate authorization has been obtained before any Permit is issued to JMZ. JMZ's obligations under this Section 5 include, but are not limited to, its obligation to obtain all necessary approvals to occupy public/private rights-of-way and to pay all costs associated therewith. JMZ shall defend, indemnify and reimburse City for all loss and expense, including reasonable attorney's fees, that City may incur as a result of claims by governmental bodies, owners of private property, or other persons, that JMZ does not have sufficient rights or authority to attach JMZ's Network Facilities on City's Poles.

5.2. **Lawful Purpose and Use.** JMZ's Network Facilities must at all times serve a lawful purpose, and the use of such Facilities must comply with all applicable federal, state and local laws

5.3. **Forfeiture of City's Rights.** No Permit granted under this Agreement shall extend to any Pole on which the Attachment of JMZ's Network Facilities would result in a forfeiture of City's rights. Any Permit, which on its face would cover Attachments that would result in forfeiture of City's rights, is invalid.

## **SECTION 6 - PERMIT APPLICATION PROCEDURES**

6.1. **Permit Required.** JMZ shall not install any Attachments on any Pole without first applying for and obtaining a Permit pursuant to the applicable requirements of City. Attachments to or rights to occupy City Facilities not covered by this Agreement must be separately negotiated.

6.2. **City Review of Permit Application.** Upon receipt of a properly executed Application for Permit, which shall include the Pre-Construction Survey and plans for the proposed Attachments, City will review the Permit Application within fifteen (15) days of receipt; provided, the Parties agree and acknowledge that the grant or denial of JMZ's request may take longer than fifteen (15) days if the Parties are communicating and mutually proceeding diligently with the Application in



good faith. The City's response will either provide a written explanation as to why the Application is being denied or provide an approval including engineering or Make-Ready Work requirements associated with the Permit Application.

6.3. **Permit as Authorization to Attach.** After receipt of payment for any necessary Make-Ready Work, City will sign and return the Permit Application, which shall serve as authorization for JMZ to make its Attachment(s).

## **SECTION 7 - MAKE READY WORK/INSTALLATION**

7.1. **Make-Ready Survey.** When the City receives an attachment or placement request from JMZ, a make-ready survey (the "Make-Ready Survey") may be necessary, at JMZ's cost, to determine the adequacy or the capacity of the City Facilities to accommodate JMZ's Communications Equipment without jeopardizing the safety of the City Facilities or placing the City in violation of generally applicable zoning or other restrictions. JMZ shall be responsible for performing and paying all actual costs associated with the Make-Ready Survey. The City may perform a field inspection and structural analysis as part of the Make-Ready Survey. The City shall provide reasonable advance notice of such a field inspection and a representative of JMZ has the right to be present for the inspection.

7.2. **Make-Ready Work.**

- a. Except where the City denies the request, whenever any City Facility to which JMZ seeks attachment or occupancy requires modification or replacement to accommodate both JMZ's Attachment and the existing attachments or equipment of the City and other Attaching Entities, the City, at JMZ's cost, will provide JMZ with a detailed, good faith estimate of Make-Ready Work (the "Make-Ready Estimate") the City believes to be necessary to prepare the City Facilities for JMZ's Attachment. All actual costs for Make-Ready Work will be performed at the sole cost and expense of JMZ. The City will use its best efforts to provide JMZ with the Make-Ready Estimate within fifteen (15) days of JMZ's request. The Make-Ready Estimate shall include itemized estimates of the cost of each component of the Make-Ready Work. Any reference to costs or expenses borne by JMZ within Paragraphs 7.1 and 7.2 shall include all third-party out of pocket expenses incurred by the City and may also include expenses that third-party Attaching Entities are obligated to bear under pre-existing agreements.
- b. After receiving the Make-Ready Estimate, if JMZ still desires to make the Attachment, JMZ may within ninety (90) days of receiving the Make-Ready Estimate elect by written notice to the City any of the following alternatives:
  - i. Offer the City the option to perform such Make-Ready Work as called for in the Make-Ready Estimate (the "Option"), and if the City, in its sole and absolute discretion, agrees to perform such Make-Ready Work pursuant to the Option, JMZ will pay to the City fifty percent (50%) of the fees for Make-Ready Work specified by the Make-Ready Estimate (the "Down Payment"). JMZ shall pay the remaining fifty percent (50%) of the Make-Ready Estimate upon the City's completion of the Make-Ready Work. Notwithstanding this Subparagraph, the

City, at its option, may require advanced payment of the entire Make-Ready Estimate per Paragraph 3.8.

- ii. JMZ or JMZ's contractors may perform all the Make-Ready Work. The contractors shall be approved by the City to work on or in City Facilities. Approval shall be based upon reasonable and customary criteria employed by the City in the selection of its own contract labor.
  - iii. JMZ may retain its own contractors to perform part of the Make-Ready Work and utilize the City to perform part of the Make-Ready Work, but only where the City has, in its sole and absolute discretion, agreed to such Option described in Subparagraph 7.2(b)(i). The parties shall reasonably agree what portion of the Make-Ready Work each party will perform through this joint-build option. In the event JMZ retains contractors to perform part of the Make-Ready Work and utilizes the City to perform part of the Make-Ready Work, JMZ shall adjust the payments described in Subparagraph 7.2(b)(i) to include only the costs of the itemized components of the Make-Ready Estimate to be performed by the City.
- c. If the City, in its sole and absolute discretion, exercises its Option to perform any Make-Ready Work as described in Subparagraph 7.2(b)(i), the City shall use its best efforts to make sure that necessary Make-Ready Work, including the work necessary to rearrange the Attachments and equipment of other Attaching Entities, is completed within thirty (30) days from JMZ's remittal of the Down Payment. If Make-Ready Work is not completed by the City within the thirty (30) day period, any fees payable by JMZ for Make-Ready Work shall be waived and any Down Payment in connection with such Make-Ready Work shall be refunded promptly to JMZ, and JMZ may retain its own contractors perform the Make-Ready Work.
- d. If JMZ submits a request that affects existing Attaching Entities, the City will use commercially reasonable efforts to notify the existing Attaching Entities and coordinate the rearrangements of their Attachments. To the extent third-party equipment is affected by JMZ's request, the City will follow the procedure as described in Paragraphs 7.2(a), 7.2(b) and 7.2(c), but only to the extent such existing Attaching Entities do not elect to perform the rearrangement or are not already obligated to rearrange Attachments and bear the expense of such rearrangement and coordination under a pre-existing separate agreement.
- 7.3. **Scheduling of Make-Ready Work.** In performing all Make-Ready Work to accommodate JMZ's Network Facilities, City will endeavor to include such work in its normal work schedule. In the event JMZ requests that the Make-Ready Work be performed on a priority basis or outside of City's normal work hours, JMZ agrees to pay any resulting increased costs. Nothing herein shall be construed to require performance of JMZ's work before other scheduled work or City service restoration.
- 7.4. **JMZ's Installation/Removal/Maintenance Work.**
- a. All of JMZ's installation, removal and maintenance work shall be performed at JMZ's

sole cost and expense, in a good and workmanlike manner, and must not adversely affect the structural integrity of City's Poles or other Facilities or other Attaching Entity's facilities or equipment attached thereto. All such work is subject to the insurance requirements of Section 16.

- b. All of JMZ's installation, removal and maintenance work performed on City's Poles or in the vicinity of other City Facilities, either by its employees or contractors, shall be in compliance with all applicable regulations specified in Paragraph 4.1. JMZ shall assure that any person installing, maintaining, or removing its Network Facilities is fully qualified and familiar with all Applicable Standards, the provisions of Section 16, and the Specifications required by Section 4.

## **SECTION 8 - TRANSFERS**

If City reasonably determines that a transfer of JMZ's Network Facilities is necessary, JMZ agrees to allow such transfer. In such instances, City will, at its option, either perform the transfer using its personnel, and/or contractors and/or require JMZ to perform such transfer at its own expense within 60 calendar days after receiving notice from City. If JMZ fails to transfer its Facilities within 60 calendar days after receiving such notice from City, City shall have the right to transfer JMZ's Facilities using its personnel and/or contractors at JMZ's expense. City shall not be liable for damage to JMZ's Facilities except to the extent provided in Paragraph 14.3. The written advance notification requirement of this Section 8 shall not apply to emergency situations, in which case City shall provide such advance notice as is practical given the urgency of the particular situation. City shall then provide written notice of any such actions taken within ten (10) days of the occurrence.

## **SECTION 9 - POLE MODIFICATIONS AND/OR REPLACEMENTS**

9.1. **JMZ's Action Requiring Modification/Replacement.** In the event that any Pole to which JMZ desires to make Attachment(s) is unable to support or accommodate the additional facilities in accordance with all Applicable Standards, City will notify JMZ of the necessary Make-Ready Work, and associated costs, to provide an adequate Pole, including but not limited to replacement of the Pole and rearrangement or transfer of City's Facilities. JMZ shall be responsible for separately entering into an agreement with other Attaching Entities concerning the allocation of costs for the relocation or rearrangement of such entities' existing Attachments. If JMZ elects to go forward with the necessary changes, JMZ shall pay to City the actual cost of the Make-Ready Work, performed by City, per Paragraph 3.10. City, at its discretion, may require advance payment. JMZ shall also be responsible for obtaining and furnishing to City before the commencement of any Make Ready Work, agreements between JMZ and the other Attaching Entities concerning the relocation or rearrangement of their Attachments and the costs involved.

9.2. **Guying.** The use of guying to accommodate JMZ's Attachments shall be provided by and at the expense of JMZ and to the satisfaction of City. JMZ shall not attach its guy wires to City's anchors without prior written permission of City.

9.3. **Allocation of Costs.** The costs for any rearrangement or transfer of JMZ's Communications Facilities or the replacement of a Pole (including any related costs for tree cutting



or trimming required to clear the new location of City's cables or wires) shall be allocated to City and/or JMZ and/or other Attaching Entity on the following basis:

- a. If City intends to modify or replace a Pole solely for its own requirements, it shall be responsible for the costs related to the modification/replacement of the Pole. JMZ, however, shall be responsible for all costs associated with the rearrangement or transfer of JMZ's Communications Facilities. Prior to making any such modification or replacement City shall provide JMZ written notification of its intent in order to allow JMZ a reasonable opportunity to elect to modify or add to its existing Attachment. Should JMZ so elect, it must seek City's written permission per this Agreement. The notification requirement of this Paragraph shall not apply to routine maintenance or emergency situations. If JMZ elects to add to or modify its Communications Facilities, JMZ shall bear the total incremental costs incurred by City in making the space on the Poles accessible to JMZ.
- b. If the modification or the replacement of a Pole is the result of an additional Attachment or the modification of an existing Attachment sought by an Attaching Entity other than City or JMZ, the Attaching Entity requesting the additional or modified Attachment shall bear the entire cost of the modification or Pole replacement, as well as the costs for rearranging or transferring JMZ's Communications Facilities. JMZ shall cooperate with such third-party Attaching Entity to determine the costs of moving JMZ's facilities.
- c. If the Pole must be modified or replaced for other reasons unrelated to the use of the Pole by Attaching Entities (e.g., storm, accident, deterioration), City shall pay the costs of such modification or replacement; provided, however, that JMZ shall be responsible for the costs of rearranging or transferring its Communications Facilities.
- d. If the modification or replacement of a Pole is necessitated by the requirements of JMZ, JMZ shall be responsible for the costs related to the modification or replacement of the Pole and for the costs associated with the transfer or rearrangement of any other Attaching Entity's Communications Facilities. JMZ shall submit to City evidence, in writing, that it has made arrangements to reimburse all affected Attaching Entities for the cost to transfer or rearrange such Entities' Facilities at the time JMZ submits a Permit Application to City. City shall not be obligated in any way to enforce or administer JMZ's responsibility for the costs associated with the transfer or rearrangement of another Attaching Entity's Facilities pursuant to this Paragraph.

9.4. **City Not Required to Relocate.** No provision of this Agreement shall be construed to require City to relocate its Attachments or modify/replace its Poles for the benefit of JMZ, provided, however, any denial by City for modification of the pole is based on nondiscriminatory standards of general applicability.

## **SECTION 10 - ABANDONMENT OR REMOVAL OF CITY FACILITIES**

If City desires at any time to abandon, remove or place underground any City Facilities to which JMZ's Network Facilities are attached, it shall give JMZ notice in writing to that effect at least

sixty (60) calendar days prior to the date on which it intends to abandon or remove such City's Facilities. Notice may be limited to thirty (30) calendar days if City is required to remove or abandon its City Facilities as the result of the action of a third party and the greater notice period is not practical. Such notice shall indicate whether City is offering JMZ an option to purchase the Pole(s). If, following the expiration of the thirty-day period, JMZ has not yet removed and/or transferred all of its Network Facilities therefrom and has not entered into an agreement to purchase City's Facilities pursuant. City shall have the right, subject to any applicable laws and regulations, to have JMZ's Network Facilities removed and/or transferred from the Pole at JMZ's expense. City shall give JMZ prior written notice of any such removal or transfer of JMZ's Facilities.

## **SECTION 11 - REMOVAL OF JMZ'S FACILITIES**

At the expiration or other termination of this Agreement or individual Permit(s), JMZ shall remove its Network Facilities from the affected Poles at its own expense. If JMZ fails to remove such facilities within sixty (60) calendar days of expiration or termination or some greater period as allowed by City, City shall have the right to have such facilities removed at JMZ's expense

## **SECTION 12 - TERMINATION OF PERMIT**

12.1. **Automatic Termination of Permit.** Any Permit issued pursuant to this Agreement shall automatically terminate when JMZ ceases to have authority to construct and operate its Network Facilities on public or private property at the location of the particular Pole(s) covered by the Permit.

12.2. **Surrender of Permit.** JMZ may at any time surrender any Permit for Attachment and remove its Network Facilities from the affected Pole(s). If JMZ surrenders such Permit pursuant to the provisions of this Section 12, but fails to remove its Attachments from City's Facilities within thirty (30) calendar days thereafter, City shall have the right to remove JMZ's Attachments at JMZ's expense.

## **SECTION 13 - INSPECTION OF JMZ'S FACILITIES**

13.1. **Inspections.** City may conduct an inspection of Attachments at any time. JMZ shall correct all Attachments that are found not to be in compliance with Applicable Standards within thirty (30) calendar days of notification. If it is found that JMZ has made an Attachment without a Permit, JMZ shall pay an Unauthorized Access Penalty Fee as specified in Section 3 in addition to applicable Permit and Make-Ready charges.

13.2. **Notice.** City will give JMZ reasonable advance written notice of such inspections, except in those instances where safety considerations justify the need for such inspection without the delay of waiting until written notice has been received.

13.3. **No Liability.** Inspections performed under this Section 13, or the failure to do so, shall not operate to impose upon City any liability of any kind whatsoever or relieve JMZ of any responsibility, obligations or liability whether assumed under this Agreement or otherwise existing.



13.4. **Attachment Records.** Notwithstanding the above inspection provisions, JMZ is obligated to furnish City on an annual basis an up-to-date map depicting the locations of its Attachments in an electronic format.

#### **SECTION 14 - LIABILITY AND INDEMNIFICATION**

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

14.2. **Waiver of Claims.** JMZ waives all claims, demands, causes of action, and rights it may assert against the City on account of any loss, damage, or injury to any portion of the Communication Facilities, or any loss or degradation of the services provided by the Communication Facilities, resulting from any event or occurrence.

14.3. **Limitation of City's Liability.** City reserves to itself the right to maintain and operate its Poles in such manner as will best enable it to fulfill its service requirements. The City, its council members, officers, employees, agents or contractors, shall not be liable for any damage from any cause whatsoever to the Communication Facilities, specifically including, without limitation, damage, if any, resulting from the City's maintenance operations adjacent to the Communication Facilities or from vandalism or unauthorized use of the Communication Facilities. The City will in no event be liable for indirect or consequential damages.

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

#### **SECTION 15 - DUTIES, RESPONSIBILITIES, AND EXPULSION**

15.1. **Duty to Inspect.** JMZ acknowledges and agrees that City does not warrant the condition or safety of City's Facilities, or the premises surrounding the Facilities, and JMZ further acknowledges and agrees that it has an obligation to inspect City's Poles and/or premises surrounding the Poles, prior to commencing any work on City's Poles or entering the premises surrounding such Pole.

15.2. **Knowledge of Work Conditions.** By executing this Agreement, JMZ warrants that it has acquainted, or will fully acquaint, itself and its employees and/or contractors and agents with the conditions relating to the work that JMZ will undertake under this Agreement and that it fully understands or will acquaint itself with the facilities, difficulties and restrictions attending the execution of such work.

**15.3. DISCLAIMER. CITY MAKES NO EXPRESS OR IMPLIED WARRANTIES WITH REGARD TO CITY'S POLES, ALL OF WHICH ARE HEREBY DISCLAIMED,**



**AND CITY MAKES NO OTHER EXPRESS OR IMPLIED WARRANTIES, EXCEPT TO THE EXTENT EXPRESSLY AND UNAMBIGUOUSLY SET FORTH IN THIS AGREEMENT. CITY EXPRESSLY DISCLAIMS ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.**

15.4. **Duty of Competent Supervision and Performance.** JMZ shall ensure that its employees, agents, contractors and subcontractors have the necessary qualifications, skill, knowledge, training and experience to protect themselves, their fellow employees, employees of the City and the general public, from harm or injury while performing work permitted pursuant to this Agreement. In addition, JMZ shall furnish its employees, agents, contractors and subcontractors competent supervision and sufficient and adequate tools and equipment for their work to be performed in a safe manner.

## **SECTION 16 - INSURANCE**

16.1. **Minimum Insurance Requirements.** JMZ shall obtain and maintain at its sole cost and expense for the duration of this Agreement insurance pursuant to the terms and conditions described in this Section 16.

- a. Comprehensive General Liability Insurance, with minimum limits of \$2,000,000 combined per occurrence for bodily injury, personal injury, death, loss and property damage resulting from JMZ's wrongful or negligent acts.
- b. Comprehensive Vehicle Liability Insurance covering personal injury and property damage, with minimum limits of \$1,000,000 combined single-limit per accident for bodily injury and property damage covering any vehicle utilized by JMZ in performing the work covered by this Agreement.
- c. Workers' compensation limits as required by the Labor Code, and Employer's Liability limits of \$1,000,000 per accident.

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

- a. General Liability and Automobile Liability Coverage
  - i. The City, and its elected and appointed council members, board members, commissioners, officers and officials (the "Insureds") shall be named as additional insureds on all required insurance policies, except for Workers' Compensation and Employers' Liability policies.
  - ii. JMZ's insurance coverage shall be primary insurance with respect to the matters covered by this Agreement. Any insurance or self-insurance maintained by the Insureds shall be in excess of JMZ's insurance and shall not contribute with it.
  - iii. Any failure of JMZ to comply with reporting provisions of the policies shall not affect coverage provided to the Insureds.

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

16.3. **Verification of Coverage.** JMZ shall furnish the City with certificates of insurance required by this Section 16. The certificates for each insurance policy are to be signed by a person, either manually or electronically, authorized by that insurer to bind coverage on its behalf. All certificates are to be received and approved by the City before work commences.

16.4. **Secondary Parties.** In the event JMZ hires any subcontractors, independent contractors or agents ("Secondary Parties") to locate, place, attach, install, operate, use, control, replace, repair or maintain the Communication Facilities, JMZ shall require the Secondary Parties to obtain and maintain insurance commensurate to the work such Secondary Parties perform.

## **SECTION 17 - ASSIGNMENT**

17.1. **Limitations on Assignment.** JMZ shall not assign its rights or obligations under this Agreement, nor any part of such rights or obligations, without the prior written consent of City, which consent shall not be unreasonably withheld. It shall be unreasonable for City to withhold consent without cause to an assignment of all of JMZ's interests in this Agreement.

17.2. **Sub-licensing.** Without City's prior written consent, JMZ shall not sublicense or lease to any third party, including but not limited to allowing third parties to place Attachments on City's Facilities, or to place Attachments for the benefit of such third parties on City's Poles. Any such action shall constitute a material breach of this Agreement. The use of JMZ's Network Facilities by third parties (including but not limited to leases of dark fiber) that involves no additional Attachment is not subject to this Paragraph.

## **SECTION 18 - FAILURE TO ENFORCE**

Failure of City or JMZ to take action to enforce compliance with any of the terms or conditions of this Agreement or to give notice or declare this Agreement or any authorization granted hereunder terminated shall not constitute a waiver or relinquishment of any term or condition of this Agreement, but the same shall be and remain at all times in full force and effect until terminated, in accordance with this Agreement.

## **SECTION 19 - TERM AND TERMINATION**

19.1. This Agreement shall become effective upon its execution and, if not terminated in accordance with other provisions of this Agreement, shall continue in effect for an initial term of five (5) years. Either party may elect not to renew this Agreement at the end of the initial five (5) year term or any renewal term(s) by giving to the other party written notice of an intention to terminate this Agreement at least ninety (90) calendar days prior to the end of the then current term. If no such notice is given, this Agreement shall automatically renew for an additional five (5) year term. The additional term(s) shall be deemed a continuation of this Agreement and not as a new Agreement or amendment. Under no circumstances shall this Agreement exceed twenty (20) years from the effective date of the Agreement. At the conclusion of the twenty (20) year period the parties agree to negotiate a new Agreement in good faith in the event JMZ still maintains Attachments on the City's Poles.

19.2. Notwithstanding Paragraph 19.1 above, JMZ may terminate its use of any or all of the Communication Facilities by providing the City with ninety (90) days prior written notice, and in such event, JMZ's payment obligations to the City shall terminate simultaneously with the termination of use.

## **SECTION 20 - MISCELLANEOUS PROVISIONS**

20.1. **Non-exclusive Use.** City shall have the right to grant, renew and extend rights and privileges to others not party to this Agreement by contract or otherwise, to use City Facilities covered by this Agreement. Such rights shall not interfere with the rights granted to JMZ by the specific Permits issued pursuant to this Agreement

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

City: City of Burlington  
1013 North 4<sup>th</sup> Street, PO Box 207  
Burlington, KS 66839  
Phone: 620-364-5334  
Email: [abrown@burlingtonkansas.gov](mailto:abrown@burlingtonkansas.gov)

JMZ: JMZ Corporation,  
d/b/a KwiKom Communications  
Attention: Zachery D. Peres  
800 West Miller Rd



Iola, Kansas 66749  
Phone: 1-620-380-0068  
Email: zperes@kwikom.com

with a copy to JMZ counsel: Todd Barfield  
c/o WANRack, LLC  
4550 W. 109<sup>th</sup> St., Suite 115  
Overland Park, Kansas 66211  
Phone: 855-482-7225  
Email: todd.barfield@wanrack.com

Notice sent as provided herein shall be deemed given on the date of receipt of the E-mail or postmark.

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

20.4 **Entire Agreement; Modification; Waiver.** This Agreement constitutes the entire Agreement between the parties relating to the subject matter hereof. All prior and contemporaneous agreements, representations, negotiations, and understandings of the parties, oral or written, relating to the subject matter hereof are merged into and superseded by this Agreement. Any modification or amendment to this Agreement shall be of no force and effect unless it is in writing and signed by the parties. No waiver of any of the provisions of this Agreement shall be deemed, or shall constitute, a waiver of any provisions, whether or not similar. No waiver or consent shall constitute a continuing waiver or consent or commit either party to provide a waiver in the future except to the extent specifically set forth in writing. No waiver shall be binding unless executed in writing by the party making the waiver.

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

20.6 **Governing Law.** This Agreement shall be interpreted and enforced according to, and the parties' rights and obligations governed by the law of the State of Kansas or applicable federal law.

20.7 **Relationship of Parties.** Nothing in this Agreement shall be construed to create an association, joint venture, trust, or partnership, or impose a trust or partnership covenant, obligation, or liability on or with regard to either Party. Each Party shall be individually responsible for its own covenants, obligations, and liabilities under this Agreement and otherwise.

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

20.9 **Captions and Paragraph Headings.** Captions and paragraph headings used herein are for

convenience only and shall not be used in construing this Agreement.

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

20.11. **Execution in Counterparts.** This Agreement may be executed in one or more identical counterparts and all such counterparts together shall constitute a single instrument for the purpose of the effectiveness of this Agreement. Counterparts may be delivered via facsimile, electronic mail (including .pdf) or other transmission method, and any counterpart so delivered will be deemed to have been duly and validly delivered and be valid and effective for all purposes.

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

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

20.14. **Contractual Interpretation.** In the interpretation and application of its rights under this Agreement, the City will act in a reasonable, non-discriminatory, and competitively neutral manner in compliance with all applicable federal, state, and local laws and regulations.

## **SECTION 21 - FORCE MAJEURE**

21.1. In the event that either City or JMZ is prevented or delayed from fulfilling any term or provision of this Agreement by reason of fire, flood, earthquake or like acts of nature, wars, revolution, civil commotion, explosion, acts of terrorism, embargo, acts of the government in its sovereign capacity, material changes of laws or regulations, labor difficulties, including without limitation, strikes, slowdowns, picketing or boycotts, unavailability of equipment of vendor, or any other such cause not attributable to the negligence or fault of the party delayed in performing the acts required by the Agreement, then performance of such acts shall be excused for the period of the unavoidable delay, and any such party shall endeavor to remove or overcome such inability as soon as reasonably possible.

21.2. City shall not impose any charges on JMZ stemming solely from JMZ's inability to perform required acts during a period of unavoidable delay as described in Paragraph 21.1, provided that JMZ present City with a written description of such force majeure within a reasonable time after occurrence of the event or cause relied on, and further provided that this provision shall not operate to excuse JMZ from the timely payment of any fees or charges due City under this Agreement.

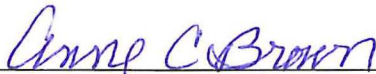
## **SECTION 22 - EFFECTIVE DATE**

This ordinance shall be in full force and effect upon its passage and publication of a summary of the ordinance in the official city newspaper and on the City's website.


ADOPTED AND PASSED by the governing body and APPROVED by the Mayor of the City of Burlington, Kansas, September 18, 2024.

  
Robert Stan Luke, Mayor



  
Anne C. Brown, City Clerk

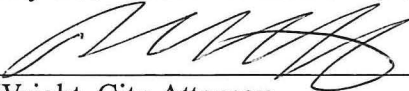
Approved as to form:

  
Philip Wright, City Attorney



**SUMMARY OF ORDINANCE 2024-909**

On September 18, 2024, the City of Burlington, Kansas, adopted Ordinance 2024-909, an ordinance granting JMZ corporation, a Kansas corporation, a non-exclusive license authorizing JMZ to attach its network facilities to City utility poles for a period of five years, subject to renewal to maximum term of twenty years, regulating the same, and providing for compensation to the city. A complete copy of this ordinance is available on the City's website at <https://burlingtonkansas.gov/> and at City Hall at 1013 N. 4th Street, Burlington, Kansas 66839.

This summary is certified by  \_\_\_\_\_  
Philip Wright, City Attorney

