

TOWN OF SUPERIOR
RESOLUTION NO. R-48
SERIES 2019

A RESOLUTION OF THE BOARD OF TRUSTEES OF THE TOWN OF
SUPERIOR APPROVING AN OVER THE AIR RECEPTION DEVICE
AGREEMENT WITH CENTURYLINK, LLC

BE IT RESOLVED BY THE BOARD OF TRUSTEES OF THE TOWN OF
SUPERIOR, COLORADO, as follows:

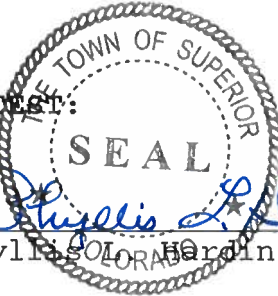
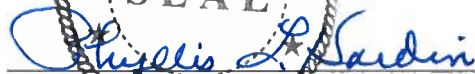
Section 1. The Over the Air Reception Device Agreement
between the Town of Superior and CenturyLink, LLC is hereby
approved in substantially the same form as attached hereto,
subject to final approval by the Town Attorney.

ADOPTED this 26th day of August, 2019.



Clint Folsom, Mayor

ATTEST:

Phyllis Hardin, Town Clerk-Treasurer

OVER THE AIR RECEPTION DEVICE AGREEMENT

This OVER THE AIR RECEPTION DEVICE AGREEMENT (the "Agreement") is made and entered into as of August 26, 2019 (the "Effective Date"), by and between the Town of Superior, a Colorado municipal corporation with an address of 124 East Coal Creek Drive, Superior, Colorado 80027 (the "Town"), and Qwest Corporation, LLC d/b/a Centurylink, Inc. ("Centurylink") (each a "Party" and collectively, the "Parties").

WHEREAS, pursuant to Chapter 16, Article XXXI of the Superior Municipal Code, the Town regulates wireless communication facilities within its jurisdiction, including wall-mounted and roof-mounted facilities;

WHEREAS, Centurylink wishes to install a small antenna facility on a residential property within the Town at its own expense and upon the consent of the residential property owner, to allow the receipt and transmission of a wireless signal from its Colorado headquarters, as more particularly described in **Exhibit A**, attached hereto and incorporated by this reference (the "Facilities"); and

WHEREAS, CenturyLink may wish to install, in the future, a five (5) inch tall receiving panel or ten (10) inch mesh node on certain residential properties within the Town at its own expense, and upon the consent of the residential property owner(s), to allow the receipt and/or transmission of a wireless signal from the Facilities (the "Receiving Facilities"); and

WHEREAS, the Town has agreed to permit installation of the Facilities and the Receiving Facilities subject to the terms set forth in this Agreement.

NOW THEREFORE, for the consideration hereinafter set forth, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. Definitions. For purposes of this Agreement, the following terms shall have the following meanings:

- a. *Commencement Date* means the date a Site Supplement becomes effective.
- b. *Facility* or *Facilities* means any antenna, satellite structure, panels or other appurtenances or combination thereof meeting the specifications and limitations provided in 47 C.F.R. § 1.4000, commonly referred to as the Over-the-Air-Reception Device (OTARD) Rule, for the purpose of receiving and transmitting a wireless signal.
- c. *FCC* means the Federal Communications Commission.
- d. *Interference* means physical interference and radio frequency interference.
- e. *Laws* means any and all applicable federal, state, and local laws, statutes, constitutions, code, ordinances, resolutions, regulations, judicial decisions, rules, permits, approvals or other applicable requirements of the Town or other governmental entity, agency or judicial authority, including without limitation all current and future federal, state and local statutes, regulations, ordinances and rules relating to: the emission, discharge, release or

threatened release of a hazardous material into the air, surface water, groundwater or land; the manufacturing, processing, use, generation, treatment, storage, disposal, transportation, handling, removal, remediation or investigation of a hazardous material; and the protection of human health, safety or the indoor or outdoor environmental, including without limitation the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601, *et seq.* ("CERCLA"); the Hazardous Materials Transportation Act, 49 U.S.C. § 1801, *et seq.*; the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, *et seq.* ("RCRA"); the Toxic Substances Control Act, 15 U.S.C. § 2601, *et seq.*; the Clean Water Act, 33 U.S.C. § 1251, *et seq.*; the Clean Air Act; the Federal Water Pollution Control Act; the Occupational Safety and Health Act; all applicable environmental statutes of the State of Colorado; and all other federal, state or local statutes, laws, ordinances, resolutions, codes, rules, regulations, orders or decrees regulating, relating to, or imposing liability or standards of conduct concerning any hazardous, toxic or dangerous waste, substance or material, as now or at any time hereafter in effect.

f. *Over-the-Air-Reception Device Rule (OTARD)* means the rule promulgated by the FCC pursuant to 47 C.F.R. § 1.4000.

g. *Radio Frequency Interference* means the emission or conduction of radio frequency energy (or electronic noise) produced by electrical and electronic devices at levels that interfere with the operation of adjacent or nearby equipment.

h. *Receiving Facility* means a five (5) inch tall receiving panel or ten (10) inch mesh node installed on residential properties within the Town at its own expense, allowing the receipt and/or transmission of a wireless signal from a Facility.

i. *Site Supplement* means the form of site supplement set forth in **Exhibit B**, attached hereto and incorporated herein by this reference, for use with the installation of Facilities.

j. *Wireless Site* means a location selected and approved for Centurylink's deployment of its Facilities.

2. Use and Installation of Facilities and Receiving Facilities.

a. The Parties hereby acknowledge that this Agreement is contingent upon Centurylink's compliance with all Laws, and that any Facility or Receiving Facility pursuant to this agreement is consistent with OTARD, which provides that installation and use of certain qualifying antennas are afforded protection from restrictions that impair its installation, maintenance and use. Should any of the Facilities or Receiving Facilities used by Centurylink fail to comply with the limitations provided pursuant to OTARD, Centurylink shall be required to submit a separate application pursuant to the Superior Municipal Code Chapter 16, Article 31. The Parties understand and agree that this Agreement is a limited grant of authority subject in all respects to the Laws; provided that, unless required by federal or state law or as necessary to protect the public health, safety and welfare of citizens, Centurylink shall not be required to modify its existing Facilities or Receiving Facilities to comply with future changes to the Superior Municipal Code.

b. Centurylink further acknowledges and agrees that the installation of any Facilities or Receiving Facilities on private property shall require the approval and consent of the owner of any proposed Facility or Receiving Facility location and compliance with any local, state or federal laws with regard to use of private property, including compliance with the requisite provisions of any homeowners association agreements or requirements. Approval pursuant to this Agreement by the Town shall not be construed to indicate approval by a private landowner or compliance with any private rights afforded thereto.

3. Term and Termination.

a. *Term.* The term of this Agreement shall be six (6) months, commencing on the Effective Date (the "Term"). Such term shall be automatically renewed for one (1) additional six (6) month term, unless either party provides ten (10) days prior written notice prior to the expiration of the initial term.

b. *Termination.* Centurylink may terminate this Agreement at any time upon 30 days' prior written notice to the Town.

4. Selection of Wireless Sites. Wireless Sites shall be selected based upon Centurylink's technical and radio frequency needs and construction costs and upon consent of any private homeowner(s).

5. Installations.

a. *Inventory.* At all times during the term of this Agreement, Centurylink shall maintain a current inventory of Wireless Sites (and including the location of all Receiving Facilities) governed by this Agreement, and within 30 days of request, Centurylink shall provide to the Town a copy of such inventory. The inventory shall include GIS coordinates, License Site ID #, and designation/type of installation for each Wireless Site.

b. *Site Supplement.* Installation of any Facilities shall require a Site Supplement in the form attached hereto as **Exhibit A**. Centurylink shall submit an application for a Site Supplement, which shall include the following information, at a minimum:

i. Plans prepared by a Colorado licensed engineer showing, as applicable, engineering design, and specifications for installation of the Facilities, including the location of radios, antenna facilities, transmitters, equipment shelters, cables, conduit, point of demarcation, backhaul solution, electrical distribution panel, electric meter, electrical conduit and cabling, and all other associated equipment, and specifications on design; and

ii. As applicable, documentation to verify that the Facility complies with the facilities permitted under OTARD.

c. *Unauthorized Installations.* If the Town identifies any unauthorized Wireless Sites, the Town shall provide written notice to Centurylink. Centurylink shall then have 30 days to submit a request for a Site Supplement for that location or, alternatively, to remove the

Facilities and restore the property at Centurylink's expense. If Centurylink fails to submit a request for a Site Supplement, or if the request is denied, Centurylink shall remove the Facilities and restore the property at its expense within 30 days of notice from the Town.

d. *Modifications.*

i. Minor. Modifications to the Facilities with like-kind or similar Facilities may be made without additional Town approval (other than any permits required by the Superior Municipal Code).

ii. Substantial. If Centurylink proposes to install a Facility which is different from the existing Facility in any substantial way, then Centurylink shall first obtain the Town's written approval for the use and installation of the new Facility, pursuant to this Agreement.

6. Attachment Fee.

a. *Calculation.* Centurylink shall pay to the Town a one-time fee equal to \$200 for the Site Supplement (the "Attachment Fee") for a Facility. The Town will not require a fee to be paid for Receiving Facilities.

b. *Payment.* The Attachment Fee is non-refundable and is payable within 60 days of the Commencement Date.

7. Centurylink's Obligations.

a. *Taxes.* Centurylink shall pay all applicable taxes levied, assessed, or imposed on Centurylink or on the Facilities or Receiving Facilities by reason of this Agreement.

b. *Compliance with Laws.* At all times during the Term, Centurylink and its Facilities and Receiving Facilities shall comply with all Laws.

c. *Maintenance and Repair.* Centurylink shall keep the Facilities and Receiving Facilities in good repair and properly maintained.

d. *Public Emergency.* In the event of an emergency or to protect the public health or safety, if the Town's employees or agents must be closer to any Facilities or Receiving Facilities than the FCC's recommended minimum distance, Centurylink shall deactivate such Facilities and Receiving Facilities immediately. In such case, the Town will contact Centurylink's main engineer, Michael Winterrowd at 318-267-7606 to request deactivation.

e. *Emergency Contact.* Centurylink shall have a designated contact person available 24/7 in the event of an emergency. Centurylink's initial contact shall be the NOC#. Centurylink shall maintain the emergency contact information current at all times with the Town Manager or designee. In an emergency, if after two attempts to contact Centurylink's emergency contact, Centurylink does not respond, the Town shall have the right to undertake any actions that the Town deems reasonably necessary to avoid property damage or personal injury, and all costs for such undertaking shall be paid by Centurylink.

8. Interference.

a. *Radio Frequency Interference.* Centurylink shall ensure that the Facilities and Receiving Facilities will not cause radio frequency interference with traffic, public safety or other communications signal equipment, consistent with the applicable FCC rules in place at such time.

b. *Remedies.* Without limiting any other rights or remedies, if interference occurs and continues for a period in excess of 24 hours following notice to Centurylink, Centurylink shall reduce power or cease operations of the interfering equipment until the interference is cured. Notice by the Town to Centurylink hereunder shall be provided to the NOC#.

9. Relocation. If Centurylink desires to relocate any Facility, Centurylink shall so advise the Town.

10. Indemnification and Waiver.

a. *Indemnification.* Centurylink agrees to indemnify and hold harmless the Town and its officers, insurers, volunteers, representative, agents, employees, heirs and assigns from and against all claims, liability, damages, losses, expenses and demands, including attorney fees, on account of injury, loss, or damage, including without limitation claims arising from bodily injury, personal injury, property loss or damage, or any other loss of any kind whatsoever, which arise out of or are in any manner connected with this Agreement if such injury, loss, or damage is caused in whole or in part by, the act, omission, error, professional error, mistake, negligence, or other fault of Centurylink, any subcontractor of Centurylink, or any officer, employee, representative, or agent of Centurylink, or which arise out of a worker's compensation claim of any employee of Centurylink or of any employee of any subcontractor of Centurylink.

b. *Waiver.* In consideration for the rights granted under this Agreement, Centurylink waives all claims, demands, causes of action, and rights it may assert against the Town and its officials, personnel, agents, and representatives because of any loss, damage, or injury to any Facilities or Receiving Facilities, or any loss or degradation of service resulting from the installation, operation, maintenance or malfunction of the Facilities or Receiving Facilities regardless of cause, except with respect to claims, demands, causes of action and rights caused by the negligence or willful misconduct the Town or its officials, personnel, agents or representatives.

11. Insurance.

a. *Coverages.* Centurylink shall procure and maintain, and shall cause each of its contractors and subcontractors to procure and maintain, the insurance coverages listed below:

i. Workers' Compensation insurance as required by law;

ii. Commercial General Liability insurance with combined single limits of \$2,000,000 per occurrence for bodily injury and property damage and \$5,000,000 general aggregate, including premises and operations, personal and advertising injury, blanket

contractual liability, and products, and completed operations. The policy shall contain a severability of interests provision, and shall include the Town and the Town's officers and employees as additional insureds as their interests may appear under this Agreement. No additional insured endorsement shall contain any exclusion for bodily injury or property damage arising from completed operations; and

iii. *Excess or Umbrella Liability insurance*, on an occurrence basis, in excess of the Commercial General Liability insurance, which has coverage as broad as such policy, with a limit of \$2,000,000.

b. *Form*. Such insurance shall be in addition to any other insurance requirements imposed by law. CenturyLink shall provide at least 30 days' advanced written notice to Town on any required coverage that is cancelled or non-renewed and not replaced. In the case of any claims-made policy, the necessary retroactive dates and extended reporting periods shall be procured to maintain such continuous coverage. Any insurance carried by the Town, its officers, its employees or its contractors shall be excess and not contributory insurance to that provided by Centurylink. Centurylink shall be solely responsible for any deductible losses under any policy.

c. *Evidence of Insurance*. Centurylink shall make available to the Town proof of insurance as evidence that the required policies are in full force and effect. Evidence of CenturyLink's insurance is also available at www.centurylink.com/moi.

d. *Increase*. The Town, upon prior notice to, review and acceptance by Centurylink, may reasonably increase the insurance required hereunder if the Town's statutory governmental immunity limits increase above \$5,000,000.

12. Assignment and Transfer.

a. *Consent Required*. Centurylink shall not assign or otherwise transfer all or any part of Centurylink's interest, rights, and duties in this Agreement or any Site Supplement, or sublet any Wireless Site or portion thereof, without the Town's prior written consent, which shall not be unreasonably withheld. Any assignment or transfer that is not in compliance with this Section shall be void.

b. *Permitted Assignments*. Notwithstanding the foregoing, Centurylink may, without the consent of the Town, assign or transfer this Agreement or any Site Supplement to an Affiliate or any entity that acquires all or substantially all of Centurylink's assets in the market defined by the FCC in which the Town is located, provided that such entity agrees to be bound by all of the terms and conditions of this Agreement. Centurylink shall provide the Town with notice of any such assignment within 30 days.

c. *Consideration*. In considering an assignment, the Town may consider the following in relation to the proposed assignee:

i. Whether it has ever been convicted or held liable for acts involving deceit, including any violation of any Laws, or is currently under an indictment, investigation or complaint charging such acts;

ii. Whether a judgment has been entered against it by any court of competent jurisdiction in an action for fraud, deceit, or misrepresentation;

iii. Whether there is pending any material legal claim, law suit, or administrative proceeding arising out of or involving a network or equipment similar to that contemplated by this Agreement, except claims, suits or proceedings relating to insurance claims, theft of service, or employment matters;

iv. Whether it is financially solvent, based on financial statements that are audited or reviewed by a certified public accountant who may also be an officer of the parent corporation; and

v. Whether it has the financial and technical capability to maintain and operate the Network, Wireless Sites, Facilities, and Receiving Facilities for the remainder of the Term.

d. *Change of Control; Security Interests; Capacity.* The following shall not constitute a transfer or assignment pursuant to this Section, and shall not require consent: (i) a change of stock ownership, partnership interest or control of Centurylink or transfer upon partnership or corporate dissolution of Centurylink; (ii) a mortgage or grant of security interest to any mortgagees or holders of security interest, including their successors or assigns; provided such holders of interests are subject to all of the terms of this Agreement; or (iii) the provision of capacity, bandwidth or grant of use in the Facilities or Receiving Facilities, or any portion thereof, to another person; provided that Centurylink shall at all times retain control over all of the Facilities or Receiving Facilities and remain fully responsible for compliance with the terms of this Agreement. The Town hereby acknowledges the ability to lease capacity under legal compulsion under applicable Laws.

13. Default.

a. *By Centurylink.* The Town shall provide Centurylink with a detailed written notice of any violation of this Agreement, and a 30-day period within which Centurylink may: demonstrate that a violation does not exist; cure the alleged violation; or if the nature of the alleged violation prevents correction thereof within 30 days, to initiate a reasonable corrective action plan to correct such violation, subject to the Town's written approval, which will not be unreasonably withheld. If Centurylink fails to disprove or correct the violation within 30 days or the timeframe set forth in the approved action plan, then the Town may declare in writing that Centurylink is in default.

b. *By the Town.* Centurylink shall provide the Town with a detailed written notice of any violation of this Agreement, and a 30-day period within which the Town may: demonstrate that a violation does not exist; cure the alleged violation; or if the nature of the alleged violation prevents correction thereof within 30 days, to initiate a reasonable corrective action plan to correct such violation, subject to Centurylink's written approval, which will not be unreasonably withheld. If the Town fails to disprove or correct the violation within 30 days or the timeframe set forth in the corrective action plan, then Centurylink may declare in writing that the Town is in default.

c. *Termination.* In the event of a default, without limiting the non-defaulting Party in the exercise of any right or remedy which the non-defaulting Party may have by reason of such default, the non-defaulting Party may terminate this Agreement. The non-defaulting Party shall have all remedies available at law and in equity; provided that specific performance shall never be an available remedy against the Town. Notwithstanding the foregoing, if Centurylink has only one default in any 12-month period, and that default is related to one or more Site Supplements and not any material provision of this Agreement, the Town may terminate the related Site Supplement(s), but will not terminate this Agreement.

d. *Bankruptcy.* The Parties expressly agree and acknowledge that it is their intent that in the event Centurylink becomes a debtor in any voluntary or involuntary bankruptcy proceeding under the United States Bankruptcy Code, 11 U.S.C. § 101, *et seq.* (the "Bankruptcy Code"), for the purposes of proceeding under the Bankruptcy Code, this Agreement shall be treated as an unexpired lease of nonresidential real property under 11 U.S.C. § 365, as amended, and accordingly, shall be subject to the provisions of 11 U.S.C. § 365(d)(3) and (d)(4). Any person or entity to which Centurylink's rights, duties and obligations under this Agreement are assigned pursuant to the provisions of the Bankruptcy Code shall be deemed without further act to have assumed all of the obligations of Centurylink under this Agreement both before and after the date of such assignment. Any such assignee shall upon demand, execute and deliver to the Town an instrument confirming such assumption. Any monies or other considerations payable or otherwise to be delivered in connection with such assignment shall be paid to the Town, shall be the exclusive property of the Town, and shall not constitute property of Centurylink or of the estate of Centurylink within the meaning of the Bankruptcy Code. Any monies or other considerations constituting the Town's property under the preceding sentence not paid or delivered to the Town shall be held in trust for the benefit of the Town and be promptly paid to the Town.

14. Miscellaneous.

a. *Governing Law and Venue.* This Agreement shall be governed by the laws of the State of Colorado, and any legal action concerning the provisions hereof shall be brought in Boulder County, Colorado or the applicable federal district court.

b. *No Waiver.* Delays in enforcement or the waiver of any one or more defaults or breaches of this Agreement by the Town shall not constitute a waiver of any of the other terms or obligation of this Agreement.

c. *Integration.* This Agreement constitutes the entire agreement between the Parties, superseding all prior oral or written communications.

d. *Third Parties.* There are no intended third-party beneficiaries to this Agreement.

e. *Notice.* Any notice under this Agreement shall be in writing, and shall be deemed sufficient when directly presented or sent prepaid, first-class United States Mail to the Party at the address set forth on the first page of this Agreement.

f. *Severability.* If any provision of this Agreement is found by a court of competent jurisdiction to be unlawful or unenforceable for any reason, the remaining provisions hereof shall remain in full force and effect.

g. *Modification.* This Agreement may only be modified upon written agreement of the Parties.

h. *Governmental Immunity.* The Town and its officers, attorneys and employees, are relying on, and do not waive or intend to waive by any provision of this Agreement, the monetary limitations or any other rights, immunities or protections provided by the Colorado Governmental Immunity Act, C.R.S. § 24-10-101, *et seq.*, as amended, or otherwise available to the Town and its officers, attorneys or employees.

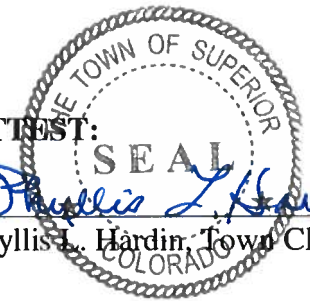
i. *Rights and Remedies.* The rights and remedies of the Town under this Agreement are in addition to any other rights and remedies provided by law. The expiration of this Agreement shall in no way limit the Town's legal or equitable remedies, or the period in which such remedies may be asserted, for work negligently or defectively performed.

j. *Subject to Annual Appropriation.* Consistent with Article X, § 20 of the Colorado Constitution, any financial obligation of the Town not performed during the current fiscal year is subject to annual appropriation, shall extend only to monies currently appropriated, and shall not constitute a mandatory charge, requirement, debt or liability beyond the current fiscal year.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the Effective Date.

TOWN OF SUPERIOR, COLORADO

Clint Folsom
Clint Folsom, Mayor

ATTEST:

Phyllis L. Hardin
Phyllis L. Hardin, Town Clerk

CENTURYLINK

STATE OF _____)
) ss.
COUNTY OF _____)

The foregoing instrument was subscribed, sworn to and acknowledged before me this _____ day of _____, 2019, by _____ as _____ of Centurylink.

My commission expires:

(S E A L)

Notary Public

EXHIBIT A

Form of Site Supplement

This Site Supplement (the "Site Supplement") is made this ____ day of _____, 20____ (the "Commencement Date") by and between the Town of Superior, a Colorado municipal corporation with an address of 124 East Coal Creek Drive, Superior, Colorado 80027 (the "Town"), and Qwest Corporation, LLC d/b/a Centurylink, Inc. ("Centurylink") (each a "Party" and collectively, the "Parties").

1. Site Supplement. This is a Site Supplement as referenced in the Over-the-Air-Reception Device Agreement between the Town and Centurylink dated _____, 2019 (the "Agreement"). All of the terms and conditions of the Agreement are incorporated herein by reference. In the event of any inconsistency between the terms of the Agreement and this Site Supplement, the terms of the Agreement shall govern. Capitalized terms used in this Site Supplement shall have the same meaning as in the Agreement.
2. Project Description and Location. Centurylink shall have the right to install its Facilities within the Town's jurisdictions, in the location described in Exhibit A-1 attached hereto (the "Facility Location"), subject to any requisite approvals from private landowners.
3. Term. The term of this Site Supplement shall commence on the Commencement Date and continue until termination of the Agreement, unless terminated earlier under the Agreement or this Site Supplement.
4. Approvals. Centurylink's ability to use the Facility Location is contingent upon its obtaining all of the certificates, permits and other approvals, including approval and consent from any private property owners (collectively, the "Approvals") that may be required by any Laws. In the event that: (i) any application for such Approvals is denied; (ii) any Approval issued to Centurylink is canceled, expired, lapsed, or is otherwise withdrawn or terminated; (iii) Centurylink determines that such Approvals may not be obtained in a timely manner; or (iv) Centurylink determines that the Facility Location is no longer technically compatible for its use, Centurylink shall have the right to terminate this Site Supplement.
5. Termination. Centurylink may terminate this Site Supplement at any time, and shall provide written notice to the Town of such termination. All fees paid prior to the date of termination shall be retained by the Town. Upon such termination, this Site Supplement shall be of no further force or effect.

IN WITNESS WHEREOF, the Parties have executed this Site Supplement as of the Effective Date.

TOWN OF SUPERIOR, COLORADO

Clint Folsom, Mayor

ATTEST:

Phyllis L. Hardin, Town Clerk

CENTURYLINK

By: _____

EXHIBIT A-1

Centurylink Plans, Facility Location, and Description of Centurylink Facilities to be Installed