

ORDINANCE NO.172, 2018
OF THE COUNCIL OF THE CITY OF FORT COLLINS
APPROVING A FRANCHISE AND LICENSE AGREEMENT
BETWEEN THE CITY OF FORT COLLINS AND PLATTE RIVER
POWER AUTHORITY FOR A FIBER OPTIC NETWORK

WHEREAS, the City of Fort Collins (hereinafter referred to as "the City") currently owns and operates an electric utility that acquires and distributes electricity to utility customers (hereinafter referred to as "the Electric Utility"); and

WHEREAS, Platte River Power Authority (hereinafter referred to as "Platte River") is a separate governmental entity created under State law by intergovernmental agreement between the City, the cities of Longmont and Loveland, and the Town of Estes Park (hereinafter referred to collectively as "the Four Municipalities"), pursuant to Colorado Revised Statutes (C.R.S.) Section 29-1-204; and

WHEREAS, Platte River was created by the Four Municipalities for the purposes of generation and transmission of electricity to be sold to the Four Municipalities on a wholesale basis; and

WHEREAS, in order to upgrade its operations in the generation and transmission of electricity, in 1998, Platte River embarked on a project to link its electric substations in the City with its substations in the cities of Loveland and Longmont by a fiber-optic communication system (the "Fiber Optic Network"); and

WHEREAS, in constructing its Fiber Optic Network, Platte River installed underground and aboveground a fiber-optic cable (hereinafter referred to as the "Cable") that has been located, in part, within the City's boundaries since 1999; and

WHEREAS, the Cable contains approximately 144 fiber-optic strands, which includes one buffer tube of 12 fiber-optic strands used in its operations related to the generation and transmission of wholesale electricity (the "Platte River Fiber") and the remaining strands in 11 buffer tubes that are dedicated to use by the Four Municipalities (the "Excess Fiber"); and

WHEREAS, the Fiber Optic Network, including the Platte River Fiber and the Excess Fiber, includes fiber configured and serving Platte River facilities within the City (a "Local Loop"), and fiber configured and connecting the Four Municipalities (the "Long-Haul Fiber"); and

WHEREAS, to have the right to maintain and operate the Fiber Optic Network and any extensions within (1) the City streets and rights-of-way under Section I, Article XI of the City's Charter; and (2) certain City utility facilities ("Electric Utility Facilities"), Platte River needed a franchise and license from the City; and

WHEREAS, on December 15, 1998, the Council of the City of Fort Collins adopted Ordinance No. 229, 1998 pursuant to which the City Council approved a Fiber Franchise Agreement and License Agreement dated December 29, 1998 (the "1998 Fiber Franchise

Agreement”), granting to Platte River, on the terms and conditions set forth therein, a franchise to use the City’s streets and a license to use Electric Utility facilities in return for Platte River’s delivery of certain lease revenues from the Excess Fiber owned by Platte River ; and

WHEREAS, the 1998 Fiber Franchise Agreement is expiring, according to its terms, on December 31, 2018; and

WHEREAS, Platte River and the Four Municipalities have determined to transfer the Excess Fiber in the Local Loops to the respective cities where the Local Loops reside, with Platte River to retain ownership of the Platte River Fiber and Long-Haul Fiber; and

WHEREAS, on September 27, 2018, Platte River’s Board of Directors adopted Resolution 15-18 authorizing the General Manager to transfer to the City its Local Loop on execution of an Intergovernmental Agreement for Fiber Management; and

WHEREAS, contemporaneous with this Ordinance, the Fort Collins City Council adopted Resolution 2018-116 pursuant to which the City Council approves an Intergovernmental Agreement for Fiber Management (“Fiber Management IGA”) between Platte River and the Four Municipalities; and

WHEREAS, the City’s grant to Platte River of the rights to use City property set forth in a new twenty (20) year Franchise and License Agreement without the payment of cash franchise fees serves a bona fide public purpose because:

- (1) it promotes the health, safety and general welfare and benefits a significant segment of the citizens of Fort Collins by allowing the delivery electricity from Platte River to the City to supply its electric utility enterprise;
- (2) it supports the City Councils goals and adopted policies, specifically Economic Health Objective 3.5 of the City 2018 Strategic Plan by maintaining utility systems, services, infrastructure and predictable rates;
- (3) the financial support afforded to Platte River as a result of eliminating payment of a cash franchise fees eliminates an increased cost of wholesale electricity that would otherwise be borne by City electric utility customers;
- (4) it does not result in any direct financial benefit to Platte River or any other private person or entity and any such benefit is only an incidental consequence and is not substantial relative to the public purpose of obtaining wholesale electricity at a reasonable cost for delivery to electric utility customers (who would otherwise bear such costs); and
- (5) it will not interfere with current City projects or work programs, hinder workload schedules or divert resources needed for primary City functions or responsibilities; and

WHEREAS, the collocation and cooperative management of the Platte River Fiber and

Long-Haul Fiber with the City's Local Loop under the proposed Franchise and License Agreement conserves available City rights-of-way, reduces the wholesale cost of electricity required by the City's Electric Utility and sold to its customers, and reduces the financial burden of providing the management and coordination services with respect to the Fiber Optic Network to be provided by Platte River for the benefit of the City and the City's Electric Utility provide an in-kind benefit to the City in lieu of cash franchise fees; and

WHEREAS, in consideration of the foregoing benefits accruing to the City and its Electric Utility customers, the City Council desires to grant to Platte River the rights set forth in the new Franchise and License Agreement attached hereto as Exhibit "A" (the "2018 Franchise and License Agreement"); and

WHEREAS, Charter Article XI, Section 1 requires notice of the Council's public hearing on the grant of franchise be published by the franchise applicant in a local newspaper of general circulation once a week for three successive weeks immediately before the date of the hearing; and

WHEREAS, Platte River has satisfied this notice requirement by having the notice of public hearing attached as Exhibit "B" and incorporated by reference published in the *Fort Collins Coloradoan* each day beginning on November 14, 2018, and ending on November 21, 2018; and

WHEREAS, the City Council hereby finds that the 2018 Franchise and License Agreement is necessary for the public's health, safety and welfare and is in the best interests of the City and its residents.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF FORT COLLINS, COLORADO, as follows:

Section 1. That the City Council hereby makes and adopts the determinations and findings contained in the recitals set forth above.

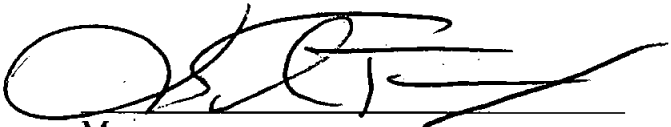
Section 2. That the City Council hereby approves the 2018 Franchise and License Agreement and the non-exclusive franchise and license granted in it.

Section 3. That the Mayor is hereby authorized to enter into the 2018 Franchise and License Agreement, in substantially the form attached hereto as Exhibit "A", together with such modifications in form or substance as the City Manager, in consultation with the City Attorney, determines to be necessary and appropriate to protect the interests of the City or to effectuate the purposes of this Ordinance.

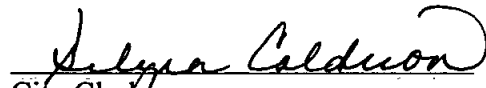
Section 4. That if any portion of this Ordinance is held to be unconstitutional or invalid for any reason, such decision shall not affect the constitutionality or validity of the remaining portions of this Ordinance. The City Council hereby declares that it would have passed this Ordinance and each part hereof irrespective of the fact that any one part may be declared unconstitutional or invalid.

Introduced, considered favorably on first reading, and ordered published this 4th day of

December, A.D. 2018, and to be presented for final passage on the 18th day of December, A.D. 2018.


Mayor

ATTEST:

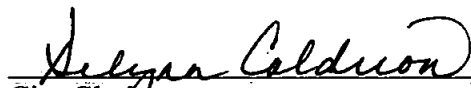

City Clerk



Passed and adopted on final reading on this 18th day of December, A.D. 2018.


Mayor

ATTEST:


City Clerk



FRANCHISE AND LICENSE AGREEMENT

THIS AGREEMENT is made and entered into as of December 29, 2018 between **THE CITY OF FORT COLLINS, COLORADO**, a municipal corporation (hereinafter referred to as “the City”), and the **PLATTE RIVER POWER AUTHORITY**, a public corporation and political subdivision of the State of Colorado (hereinafter referred to as “Platte River”).

WHEREAS, the City is a home rule municipality organized and existing under the laws of the State of Colorado; and

WHEREAS, the City currently owns and operates an electric utility that acquires and distributes electricity to retail customers (hereinafter referred to as the “Electric Utility”); and

WHEREAS, Platte River is a separate governmental entity created under State law by intergovernmental agreement between the City, the cities of Longmont and Loveland, and the Town of Estes Park (hereinafter referred to individually as a “Municipality” and collectively as “the Owner Municipalities” or “Municipalities”); and

WHEREAS, Platte River was created by the Owner Municipalities for the purposes of generation and transmission of electricity to be sold to the Owner Municipalities on a wholesale basis; and

WHEREAS, to ensure high quality, reliable communications critical to the real-time operation of its electric system, Platte River completed a project of linking its electrical substations in the City together with its substations in the cities of Loveland, Longmont and Estes Park by a fiber-optic system (the “Fiber Optic Network”); and

WHEREAS, the Fiber Optic Network constructed by Platte River includes underground and aboveground a fiber-optic cable (hereinafter referred to as “the Cable Bundle”) located, in part, within the City’s boundaries; and

WHEREAS, the Cable Bundle generally contains twelve (12) fiber-optic strands in 1 buffer tube, which strands contain a bandwidth capacity sufficient for Platte River’s needs to support its operations related to the generation and transmission of electricity at wholesale (the “Platte River Fiber”); and

WHEREAS, the Fiber Optic Network includes more fiber than the Platte River Fiber required for Platte River’s purposes (“Excess Fiber”); and

WHEREAS, the Fiber Optic Network, including the Platte River Fiber and the Excess Fiber, includes fiber configured and serving Platte River facilities within each of the Municipalities (a “Local Loop”), and fiber configured and connecting the Municipalities (the “Long-Haul Fiber”); and

WHEREAS, to (1) have the right to maintain and operate the Platte River Fiber and any Extensions (as hereinafter defined) within the City streets and rights-of-way under Section I, Article XI of the City's Charter; (2) locate and maintain the Platte River Fiber, and any Extensions, in the Electric Utility facilities; and (3) use certain electric City utility facilities ("Electric Utility Facilities"), Platte River needed a franchise and license from the City; and

WHEREAS, on December 15, 1998, the Council of the City of Fort Collins adopted Ordinance No. 229, 1998 pursuant to which the City Council approved a Fiber Franchise Agreement dated December 29, 1998 (the "1998 Fiber Franchise Agreement"), granting to Platte River, on the terms and conditions set forth therein, a franchise to use the City's streets and a license to use Electric Utility facilities; and

WHEREAS, on October 22, 1998, Platte River's Board of Directors adopted Resolution 17-98 pursuant to which the Board authorized Platte River to enter into the 1998 Franchise Agreement; and; and

WHEREAS, the 1998 Franchise Agreement is expiring, according to its terms, on December 28, 2018; and

WHEREAS, Platte River and the Owner Municipalities have determined to transfer the Local Loops to the respective Owner Municipalities, retaining ownership of the Platte River Fiber and the Long-Haul Fiber; and

WHEREAS, on September 27, 2018, Platte River's Board of Directors adopted Resolution 15-18 authorizing the General Manager to transfer to the City its Local Loop on execution of an Intergovernmental Agreement for Fiber Management; and

WHEREAS, on _____, ____, the Fort Collins City Council adopted Resolution 2018-____ pursuant to which the City Council approved an Intergovernmental Agreement for Fiber Management ("Fiber Management IGA"); and

WHEREAS, The City's grant to Platte River of the rights to use City property set forth in this Franchise Agreement without the payment of cash franchise fees serves a bona fide public purpose because (1) it promotes the health, safety and general welfare and benefits a significant segment of the citizens of Fort Collins by allowing the delivery of electricity from Platte River to the City to supply its electric utility enterprise; (2) it supports the City Councils goals and adopted policies, specifically Economic Health Objective 3.5 of the City 2018 Strategic Plan regarding maintenance of utility systems, services, infrastructure and predictable rates; (3) the financial support afforded to Platte River as a result of eliminating payment of cash franchise fees eliminates the increased cost of electricity that would otherwise be borne by City electric utility customers; (4) it does not result in any direct financial benefit to Platte River or any other private person or entity and any such benefit is only an incidental consequence and is not substantial relative to the public purpose of obtaining wholesale electricity at a reasonable cost for delivery to electric utility customers (who would otherwise bear such costs); and (5) it will not interfere with current City projects or work programs, hinder workload schedules or divert resources needed for primary City functions or responsibilities; and

WHEREAS, the collocation and cooperative management of the Platte River Fiber and Long-Haul Fiber with the City's Local Loop under the Fiber Management IGA conserves available City rights of way, reduces the wholesale cost of electricity required by the City's Electric Utility and sold to its customers, and reduces the financial burden of providing the management and coordination services with respect to the Fiber Optic Network to be provided by Platte River for the benefit of the City and the City's Electric Utility provide an in-kind benefit to the City in lieu of cash franchise fees; and

WHEREAS, in consideration of the foregoing benefits accruing to the City and its Electric Utility customers, the City Council desires to grant to Platte River the rights set forth in this Franchise Agreement.

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, and other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged by the parties, the parties hereby agree as follows:

I. Definitions. Unless the context requires another meaning, the following terms, phrases, words and acronyms when used in this Agreement shall have the meanings ascribed to them below:

- A. *Electric Utility* facilities shall mean all of the Electric Utility's existing and hereinafter constructed and acquired aboveground and underground facilities and infrastructure directly used for the distribution of electricity at retail and that are located in the service area, including, without limitation, all of the Electric Utility's poles, conduits and vaults.
- B. *Extensions* shall mean any extension of the Platte River Fiber and Long-Haul Fiber that is necessary and used to expand the delivery of wholesale electricity by Platte River to the City's Electric Utility.
- C. *FCC* shall mean the Federal Communications Commission or any successor governmental entity.
- D. *Fiber or fiber optics* shall mean thin, transparent fibers of glass or plastic that are enclosed by material of a lower index of refraction that use light to send data, high quality video and sound throughout their length by internal reflections.
- E. *Person* shall mean an individual, partnership, association, joint stock company, trust, corporation, limited liability company, governmental entity or any other entity.
- F. *Service area* shall mean the present municipal boundaries of the City and shall include any future additions thereto by annexation or other legal means.
- G. *Street* shall mean the surface of and the space above and below any public way, street, road, highway, freeway, lane, path, alley, court, sidewalk, boulevard, parkway, drive, right of way or any easement now or hereafter owned by the City, whether the City acquired it by conveyance, dedication, adverse possession or eminent domain. However, the definition of

street shall not include any City-owned easement which by the terms of its grant does not permit the use of the easement by Platte River.

II. Grant of Franchise. The City hereby grants to Platte River, as of the effective date of this Agreement and subject to the terms and conditions of this Agreement, a non-exclusive franchise which authorizes Platte River to locate and maintain the Platte River and Long-Haul Fiber, and any Extensions, or replacements in, among, upon, across, above, over, under or in any manner connected with any street within the City electric service area and for that purpose to erect, install, construct, repair, replace, reconstruct, maintain, retain in, over, under, upon, across or along any street and all extensions thereof or additions thereto, such wires, cables, conductors, ducts, conduits, vaults, manholes, pedestals, amplifiers, appliances, attachments and other related property or equipment as deemed necessary or pertinent to Platte River's use of the Platte River and Long-Haul Fiber and any Extensions, including poles if poles are otherwise permitted by this Agreement. This franchise is, however, subject to the Fort Collins City Charter and Code and to all other local ordinances, rules and regulations now in effect or that become law in the future, provided that Platte River's rights and obligations hereunder are neither altered nor abrogated by such future laws in any material respect, subject only to the provisions of Section IX below.

III. Grant of License. The City hereby grants to Platte River, as of the effective date of this Agreement and subject to the terms and conditions of this Agreement, a nonexclusive license which authorizes Platte River to locate, maintain and use the Platte River and Long-Haul Fiber and Extensions or replacements in and on Electric Utility facilities. This license is, however, subject to the Fort Collins City Charter and Code and all other local ordinances, rules and regulations now in effect or that become law in the future, provided that Platte River's rights and obligations hereunder are neither altered nor abrogated by such future laws in any material respect, subject only to the provisions of Section IX below. In addition, nothing in this Agreement shall be construed to require or obligate the City to construct any new Electric Utility facilities for Platte River's use unless the City and Platte River agree under separate written agreement to such construction.

IV. Right of the City to Issue Franchise and License. Platte River acknowledges and accepts the legal right of the City to grant and issue the franchise and license as herein provided, and Platte River agrees that it shall not now or at any time hereafter challenge this lawful right in any way, in any City, State or Federal court or governmental agency.

V. Franchise and License Nonexclusive. This Agreement shall not be construed as any limitation upon the right of the City to grant to any other person the rights, privileges or authorities similar to the rights, privileges and authorities herein set forth, in the same or other streets, alleys or other public ways or public places and in the Electric Utility facilities. The City specifically reserves the right to grant at any time during the term of this Agreement or renewal thereof, if any, such additional franchises and licenses as it deems appropriate upon such terms and conditions as it deems appropriate.

VI. Effective Date of Agreement. The effective date of this Agreement shall be December 29, 2018.

VII. Term of Agreement. The term of this Agreement, and of the grants of the franchise and license hereunder, shall be for a period of approximately twenty (20) years commencing on the effective date of this Agreement and expiring on December 31, 2038, unless sooner terminated as provided in this Agreement.

VIII. Familiarity with Agreement. The City and Platte River hereby acknowledge that they have participated equally in the negotiation and drafting of this Agreement and, accordingly, that no Court construing this Agreement shall construe it more stringently against one party than against the other.

IX. Police Power. In accepting the franchise and license granted under this Agreement, Platte River acknowledges that its rights under this Agreement are subject to the police powers of the City to adopt and enforce general ordinances necessary for the health, safety and welfare of the public and it agrees to comply with all applicable general laws and ordinances enacted by the City pursuant to such power.

X. Franchise and License Fees. In lieu of cash franchise and license fees, the following in-kind benefits accruing to the City and the City's Electric Utility as a result of the co-location and cooperative management of the Platte River Fiber and Long-Haul Fiber with the City's Local Loop under the Fiber Management IGA shall constitute the franchise and license fees due under this Agreement:

- A. Conservation of available City rights of way, for City utilities and other City purposes;
- B. Reduction of the wholesale cost of electricity required by the City's Electric Utility and sold to its customers, which would otherwise include the cost to Platte River of cash franchise and license fees;
- C. Reduction of the financial burden of providing management and coordination services with respect to the Fiber Optic Network to be provided by Platte River under the Fiber Management IGA for the benefit of the City and the City's Electric Utility; and
- D. Avoidance of the cost to physically separate the Platte River Fiber, Extensions and Long-Haul Fiber from the Local Loop now owned by the City.

XI. Adequacy of Franchise and License Fees. The City and Platte River acknowledge and agree that the benefits set forth in Article X above in lieu of cash franchise and license fees constitute appropriate compensation to the City by Platte River for the fair value of Platte River's right to use City streets and Electric Utility facilities as provided in this Agreement and for the estimated future costs of the City to administer this Agreement. In the event that the benefits in lieu of a cash franchise fee or the license fee to be paid by Platte River hereunder is prohibited by any law or regulation, Platte River shall pay to the City an equivalent amount of what would have been paid pursuant to this Agreement in the form of another legally permissible payment whether it is characterized as rent, payment for the fair market value of the City's streets and/or the Electric Utility facilities, or characterized in some other manner.

XII. Use of Additional Electric Utility Facilities. Prior to Platte River locating any Extension of the Platte River or Long-Haul Fiber in or on Electric Utility facilities other than those in existence as of the effective date of this Agreement ("Additional Electric Utility Facilities"), Platte River shall make written request to the City's Executive Director of Utility Services (hereinafter referred to as "the Utilities Executive Director") describing what Additional Electric Utility Facilities Platte River desires to use to operate its wholesale electric distribution system. The Utilities Executive Director shall review Platte River's written request and advise Platte River within twenty (20) working days of receiving the written request whether such Additional Electric Utility Facilities can be so used by Platte River. Platte River shall only be entitled to locate, maintain and use the any Extension of the Platte River or Long-Haul Fiber in and on those Additional Electric Utility Facilities if all of the following criteria are satisfied as determined in the sole discretion of the Utilities Executive Director:

- A. There is space available in and/or on the Additional Electric Utility Facilities;
- B. The Additional Electric Utility Facilities are not needed by the Electric Utility for its own current or future operations, including telecommunications facilities and services;
- C. There are no safety or engineering reasons why Platte River cannot use the Additional Electric Utility Facilities;
- D. Platte River's use of the Additional Electric Utility Facilities will not detrimentally interfere with the Electric Utility's current or future operations, including telecommunication facilities and services;
- E. Any Platte River Fiber or Extensions shall be located on Additional Electric Utility Facilities in manner that does not require Platte River access to secure areas of such Facilities; and
- F. Platte River's use of any Additional Electric Utility Facilities is necessary to operate its wholesale electric distribution system.

XIII. Construction in City Streets. When using City streets to construct and install any Extensions and any related facilities or to operate, maintain, repair or replace the existing Platte River and Long-Haul Fiber (all of which are referred to jointly as "the Improvements"), Platte River shall comply, where applicable, with all of the following provisions:

- A. The Improvements shall be installed underground in the streets, unless the Utilities Executive Director authorizes, in writing and upon such reasonable terms and conditions as the Utilities Executive Director, after consultation with the City Engineer and the City Manager, may impose in his or her sole discretion, Platte River to install the Improvements aboveground on the streets.
- B. All construction and installation of the Improvements shall meet or exceed all technical standards of the FCC and other applicable Federal, State and local laws and regulations as

they now exist or may hereafter be amended. In addition, such construction and installation shall be performed in an orderly and workmanlike manner and must comply with the National Electric Safety Code and good and accepted industry standards, as the foregoing apply to the providing of telecommunications services. If there is any conflict between any of these laws and standards, the stricter laws and standards shall be controlling.

- C. No installation of any part of the Improvements shall be performed or conducted within any of the paved or improved streets of the City unless plans thereof shall have been first submitted to the City Engineer and a construction permit issued therefore and all permit fees paid in advance, if such submittal and permit are required under the City Code with respect to the paved or improved street in question.
- D. Platte River, at its own cost and expense and in the manner approved by the City, shall replace and restore all paving, sidewalks, driveways and improved surfaces of any street disturbed by any construction and installation work of Platte River to as good a condition as before the work was commenced. Failure of Platte River to so replace or restore such paving, sidewalk, driveway or street surface within forty-eight (48) hours, weather permitting, after notification by the City shall entitle the City to cause the restoration to be made at Platte River's expense. Platte River shall fully reimburse the City for all its costs incurred in performing such restoration work. Such amounts shall be paid to the City by Platte River within thirty (30) days after Platte River receives an itemized invoice from the City.
- E. The City shall have the right to inspect all construction and installation work performed by Platte River pursuant to this Agreement as it deems necessary to ensure compliance by Platte River with all the requirements of this Agreement.
- F. Whenever Platte River shall cause, or any person acting on its behalf shall cause, any injury or damage to any private property by or because of the installation, maintenance, repair or operation of the Improvements, such injury or damage shall be compensated for and remedied by Platte River at its expense as required by law.
- G. Upon receiving prior written notice from the City, at least fifteen (15) days prior notice to protect, support, or temporarily disconnect the Cable Bundle or at least sixty (60) days prior notice to relocate in the street or remove from the street the Cable Bundle, Platte River shall, at its own expense, protect, support, temporarily disconnect or relocate in or remove from the street implement the Improvements when required to do so by the City for reasons of: traffic conditions; public safety; street, right-of-way or easement vacation; freeway or street construction; change or establishment of streets grade; installation of sewers, drains or water pipes; construction of any other type of City structure or improvement; or for any reason related to the exercise of the City's police power. The cost of relocating Improvements for reasons other than the foregoing shall be governed by the Fiber Management IGA. If public funds are available to any person using vacated City streets,

rights-of-way or easements, for the purposes of bringing the cost of any of the foregoing, such funds shall also be made available to Platte River, to the extent permitted by law.

- H. Platte River shall, at the request of any person holding a building moving permit issued by the City, temporarily raise or lower any of the Improvements located above ground to permit the moving of such building, provided: (1) the expense of such temporary raising or lowering of the Improvements is paid by said person, including, if required by Platte River, by making such payment in advance; and (2) Platte River is given at least fifteen (15) days prior notice to arrange for such temporary changes to any of the Improvements.

XIV. Installation, Maintenance and Repair of the Platte River Fiber and Extensions.

- A. Whenever Platte River is authorized by Section XII. to install in any of the Additional Electric Utility Facilities Platte River or Long-Haul Fiber or any Extensions, such installation may be performed by Platte River or its contractor in conformance with the Fiber Management IGA. If the City performs the installation, Platte River shall fully reimburse the City for all its costs incurred in performing the installation according to the Fiber Management IGA. Such amount shall be paid to the City by Platte River within thirty (30) days after Platte River receives an itemized invoice from the City.
- B. Whenever it is reasonably necessary to perform maintenance and/or repair work on the Platte River or Long-Haul Fiber or on any Extensions that are located in Electric Utility facilities, maintenance and/or repair work may be performed by Platte River or its contractor in conformance with the Fiber Management IGA. If the City performs the maintenance and/or repair work, Platte River shall fully reimburse the City for all its costs incurred in performing the maintenance and/or repair work according to the Fiber Management IGA. Such amount shall be paid to the City by Platte River within thirty (30) days after Platte River receives an itemized invoice from the City.

XV. Insurance. Platte River shall furnish to the City and at all times during the term of this Agreement maintain in full force and effect at Platte River's own cost and expense, a comprehensive commercial general liability insurance policy in the amount of two million dollars (\$2,000,000.00) with a company licensed to do business in Colorado, with a Best rating of "A-" or better and in a form satisfactory to the City Attorney, indemnifying and defending the City, City Council and all officers, boards, commissions, agents and employees thereof, from and against any and all claims, demands, actions, suits and proceedings by any person whatsoever for loss or damage, or personal injury, death or property damage, occasioned by the operations of Platte River under this Agreement or alleged to so have been caused or occurred, with minimum liability limits of two million dollars (\$2,000,000.00) to any one person, any occurrence, and two million dollars (\$2,000,000.00) to two or more persons in any one occurrence; and two million dollars

(\$2,000,000.00) for damage to property resulting from any one occurrence. Platte River may satisfy the foregoing insurance requirement by through a combination of self-insurance in an amount not to exceed one million dollars (\$1,000,000) and an excess liability insurance policy issued by a company meeting the requirements set forth above, all of which shall provide the scope of coverage described above. The City shall be named as an additional insured with respect to this policy. Platte River shall also provide and maintain workers' compensation insurance for its employees as required by Colorado law. All insurance coverage required by this Section XV. shall provide for at least thirty (30) days prior written notice to the City Clerk in the event of material alterations or cancellations of any coverage afforded in the policies, before such alteration or cancellation becomes effective. Platte River's maintenance of the insurance policies required shall not be construed to excuse unfaithful performance by Platte River or to limit the liability of Platte River to the coverage provided in the insurance policies, or otherwise to limit the City's recourse to any other remedy available at law or in equity.

XVI. Indemnification.

- A. In connection with the City's performance of its obligations under this Agreement, the City agrees to the extent permitted by law to indemnify and hold harmless Platte River, and its officers and employees, against all liabilities, claims and demands which arise from any negligent act or omission of the City, or of its officers or employees, provided that such act or omission by the City's officers or employees occurred during the performance of their duties and within the scope of their employment. In addition, to the extent permitted by law the City agrees to indemnify Platte River, and its officers and employees, from all costs and expenses related to defending such liabilities, claims and demands, including but not limited to, litigation costs and reasonable attorney's fees, whether or not any such liabilities, claims and demands are groundless, frivolous, false or fraudulent. However, the City and Platte River acknowledge and agree that all such liabilities, claims and demands shall be subject to any notice requirements, defenses, immunities and limitations to liability that the City and its officers and employees may have under the Colorado Governmental Immunity Act (C.R.S. §24-10-101, et seq.) and under any other law.
- B. In connection with Platte River's performance of its obligations under this Agreement, Platte River agrees to the extent permitted by law to indemnify and hold harmless the City, and its officers and employees, against all liabilities, claims and demands which arise from any negligent act or omission of Platte River or of its officers or employees, provided that such act or omission by Platte River's officers or employees occurred during the performance of their of duties and within the scope of their employment. In addition, to the extent permitted by law Platte River agrees to indemnify the City, and its officers and employees, from all costs related to defending such liabilities, claims and demands, including but not limited to, litigation costs, and reasonable attorney's fees, whether or not such liabilities, claims and demands are groundless, frivolous, false or fraudulent. However, Platte River and the City acknowledge and agree that all such liabilities, claims and demands shall be subject to any notice requirements, defenses, immunities and limitations to liability that Platte River and its officers and employees may have under the

Colorado Governmental Immunity Act (C.R.S. §24-10-101, et seq.) and under any other law.

XVII. Default and Termination. The City Council shall have the right to revoke and terminate the franchise and/or the license granted under this Agreement to Platte River and all of Platte River's rights and privileges under the franchise and/or the license in the event of Platte River's default in any of the material terms and conditions of this Agreement. However, prior to such revocation and termination, the City shall give Platte River written notice of the default. If the default by Platte River continues for a period of forty-five (45) days following the receipt of such written notice without written proof from Platte River that corrective action has been taken or is being actively and expeditiously pursued in good faith by Platte River, the City Council may consider revoking and terminating this Agreement. Written notice of such proposed revocation and termination by the City Council shall be given to Platte River at least fifteen (15) days in advance and Platte River must be given an opportunity to appear before the City Council to present at a public hearing its arguments why this Agreement should not be so revoked and terminated. Should the City Council determine, following the public hearing, that Platte River is in material breach of this Agreement, City Council may declare by written resolution that this Agreement is hereby terminated and therefore that the franchise and license granted hereunder are hereby revoked. The City Council shall provide a reasonable additional opportunity for Platte River to remedy the default and come into compliance with this Agreement so as to avoid revocation and termination of this Agreement; provided that in no event shall Council be required to provide such an additional opportunity of more than ninety (90) days, or where Platte River is required to construct a new route for the fiber necessary to operation and delivery of electricity at wholesale, not more than twelve (12) months.

XVIII. Removal of Platte River Fiber from Streets and Electric Utility Facilities. When the term of this Agreement expires as provided in Section VII. above or if this Agreement is terminated as provided in Section XVII. above, the City shall have the right, but not the obligation, to remove: (a) any portion of the Fiber Optic System then owned by Platte River that is located on or in Electric Utility Facilities; and (b) any portion of the Fiber Optic System then owned by Platte River that is located in City streets. The City's reasonable costs in so removing portions of the Fiber Optic System then owned by Platte River shall be fully reimbursed to the City by Platte River. Such reimbursement shall be paid to the City by Platte River within thirty (30) days after Platte River receives an itemized invoice from the City.

XIX. Option to Purchase.

A. When the term of this Agreement expires as provided in Section VII. above or if this Agreement is terminated as provided in Section XVII. above, the City shall have the option to purchase from Platte River all of the Platte River Fiber, Extensions and related property, facilities and equipment then owned and used by Platte River or leased to third parties by Platte River that are located in the City's service area and which have not been previously transferred to the City. In addition, the City shall have the option to purchase from Platte River all of Platte River's leases and/or licenses to third parties of fiber in the Local Loop and Extensions located in the City's service area (hereinafter referred to as "the Leases").

B. In order to avail itself of this option to purchase, the City shall give written notice to Platte River of its desire to exercise its option, which notice shall be valid if given on or before the date this Agreement shall so expire or terminate. On the exercise of this option by the City, Platte River shall, as expeditiously as possible, transfer to the City possession and title to such Platte River Fiber, Extensions, and the Leases. Such property shall be free from all liens and incumbrances not agreed to be assumed by the City, unless the City has agreed to a reduction of the purchase price to offset any incumbrances the City may agree to accept.

C. Platte River shall execute such bills of sale, warranty deeds, lease assignments and other instruments of conveyance as shall be necessary for the transfer of the Platte River Fiber, Extensions and the Leases.

D. The purchase price that the City shall pay Platte River shall be as follows: (1) for the Platte River Fiber and Extensions, the City shall pay Platte River an amount determined by negotiation; (2) for the Leases, the City shall pay Platte River one dollar (\$1.00); and (3) for any other property, facilities and equipment used by Platte River or leased by it to third parties related to the operation of the Fiber-Optic Network (hereinafter referred to as "the Platte River Property"), the City shall pay Platte River an amount determined by negotiation. In the event, however, that the City and Platte River fail to agree on the purchase price to be paid for either or both the Platte River Fiber and Extensions and the Platte River Property, the parties shall refer the issue of the value to a board of qualified appraisers composed of one disinterested appraiser appointed by the City and one disinterested appraiser appointed by Platte River. For purposes of this section, the date of valuation of the Platte River Fiber and Extensions and the Platte River Property shall be the date when Platte River transfers to the City possession and title to such assets and the Leases. If within sixty (60) days after the appointment of the two appraisers, they cannot agree upon such value, they shall appoint a third disinterested qualified appraiser, and the decision of any two of these appraisers shall be binding. If, however, the two appraisers appointed by the City and Platte River cannot agree to the appointment of a third appraiser, then the Chief Judge of the Eighth Judicial District of Colorado shall be asked to appoint a third disinterested qualified appraiser. Absent any misrepresentation or fraud, the decision of any two of these three appraisers shall then be binding. If, however, no two of the appraisers can agree upon an appraised value, then the average of the two closest appraisals of the three appraisers shall be the purchase price of the Fiber-Optic System and the Leases. The expenses relating to the appraisal shall be borne equally by the City and Platte River. In no event, however, shall the purchase price of the Platte River Fiber and Extensions and the Platte River Property include any value for the franchise and license granted hereunder.

E. Failure of the City and Platte River to agree to a negotiated purchase price to be paid for the Platte River Fiber and Extensions and/or the Platte River Property shall not delay the performance required herein by Platte River, that is the requirement to expeditiously transfer such assets and the Leases to the City promptly following the exercise of the City's option to purchase.

F. In addition to the foregoing, if the City exercises its option to purchase hereunder, the City agrees to consider, but is not obligated to, lease back to Platte River, upon such reasonable terms and conditions as shall be negotiated by the City and Platte River, the Platte River Fiber and Extensions.

XX. Assignment. This Agreement, and the franchise and license granted hereunder, shall not be assigned by Platte River without the City Council's prior approval by resolution of such assignment.

XXI. Waiver. No waiver by either of the parties hereto of any term and condition of this Agreement shall be deemed to be or shall be construed as a waiver of any other term or condition, nor shall a waiver of any breach of this Agreement be deemed to constitute a waiver of any subsequent breach of the same provision of this Agreement.

XXII. Cumulative Provisions. The rights and remedies reserved to the City by this Agreement are cumulative and shall be in addition to and not in derogation of any other rights or remedies which the City may have with respect to the subject matter of this Agreement, and a waiver thereof at any time shall have no effect on the enforcement of such rights or remedies at a future time.

XVIII. Notices. Other than billing invoices which may be sent by first class mail, whenever written notice is required or permitted to be given under this Agreement by one party to the other, it shall be given effect by hand delivery or by mailing the same by certified mail, return receipt requested, to the party to whom given. Notices shall be addressed as follows:

If to the City to:

City Manager
300 West LaPorte Avenue
PO Box 580
Fort Collins, CO 80522

With a copy to:

Utilities Executive Director
222 West LaPorte Avenue
PO Box 580
Fort Collins, CO 80522

If to Platte River to:

General Manager
Platte River Power Authority
2000 East Horsetooth Road
Fort Collins, CO 80525

Either party hereto may at any time designate a different person or address for the purpose of receiving notice by so informing the other party in writing. Notice by certified mail shall be

deemed effective upon actual receipt thereof or three (3) days after being deposited in the United States mail, whichever first occurs.

XXIV. Books and Records. Platte River agrees that the City may review such of its books and records during normal business hours and on a nondisruptive basis, as is reasonably necessary to monitor Platte River's compliance with the terms hereof.

XXV. Force Majeure. Notwithstanding anything contained herein to the contrary, it is agreed that in the event and to the extent that fire, flood, earthquake, natural catastrophe, explosion, accident, war, illegality, act of God, or any other cause beyond the control of either of the parties hereto, or strikes or labor troubles (whether or not in the power of the party affected to settle the same) prevents or delays performance by either party to this Agreement, such party shall be relieved of the consequences thereof without liability, so long as and to the extent that the performance is prevented by such cause; provided, however, that such party shall exercise due diligence in its efforts to resume performance within a reasonable period of time.

XXVI. Governing Law and Enforceability. This Agreement shall be construed in accordance with the laws of the State of Colorado. In addition, the parties hereto recognize that there are legal constraints imposed upon the City and Platte River by constitutions, statutes, rules and regulations of the State of Colorado and of the United States and imposed upon them by the City Charter and City Code, and that, subject to such constraints, the parties intend to carry out the terms and conditions of this Agreement. Notwithstanding any other provision of this Agreement to the contrary, in no event shall either of the parties hereto exercise any power or take any action which shall be prohibited by applicable law. Whenever possible, each provision of this Agreement shall be interpreted in such a manner so as to be effective and valid under applicable law.

XXVII. Headings. Section headings in this Agreement are for the convenience of reference only and shall in no way define, limit or prescribe the scope or intent of any provision of this Agreement.

XXVIII. No Third-Party Beneficiaries. This Agreement is made for the sole and exclusive benefit of the City and Platte River and is not made for the benefit of any third party.

XXIX. Construction of Agreement. Words of the masculine gender shall include the feminine and neuter gender; when the sentence so indicates, words of the neuter shall refer to any gender. Words in the singular shall include the plural and vice versa. This Agreement shall be construed according to its fair meaning as if prepared by both parties hereto and shall be deemed to be and contain the entire understanding and Agreement between the parties hereto. There shall be deemed to be no other terms, conditions, promises, understandings, statements or representations, express or implied, concerning this Agreement unless set forth in writing and signed by both of the parties hereto.

XXX. Time is of the Essence. Whenever this Agreement sets forth any time for any act to be performed by either of the parties, such time shall be deemed to be of the essence under this Agreement.

XXXI. No Joint Venture. Nothing contained herein shall be deemed or construed by the parties hereto nor by any third party as creating a relationship of principle and agent or a partnership or joint venture between the parties hereto, it being agreed that none of the provisions set forth herein or any of the acts of the parties herein shall be deemed to create a relationship between the parties hereto other than the relationships of franchisor and franchisee, and licensor and licensee.

XXXII. Severability. If any section, sentence, paragraph, term or provision of this Agreement is determined to be illegal, invalid or unconstitutional, by any court of competent jurisdiction or by any State or Federal regulatory authority having jurisdiction thereof, such determination shall have no effect on the validity of any other section, sentence, paragraph, term or provision, all of which shall remain in full force and effect for the term of this Agreement.

XXXIII. Attorney's Fees. In the event either of the parties hereto shall default in any of their covenants or obligations contained herein so as to require the other party in this Agreement not in default to commence legal or equitable action against the defaulting party, the defaulting party expressly agrees to pay all of the non-defaulting party's reasonable expenses in said litigation, including a reasonable sum for attorney's fees.

XXXIV. Binding Effect. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

XXXV. Appropriation. Both the City and Platte River are governmental entities; therefore, all direct and indirect financial obligations under this Agreement shall be subject to annual appropriations pursuant to Article X, Section 20 of the Colorado Constitution and the parties' respective charters and ordinances, and applicable law. This Agreement and the obligations of the parties hereunder do not constitute a multi-year fiscal obligation and all financial obligations hereunder are expressly contingent upon the parties' respective governing bodies budgeting and appropriating the funds necessary to fulfill their respective obligations.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement to be effective as of the day and year first above written.

PLATTE RIVER POWER AUTHORITY,
a public corporation and political subdivision of
the state

ATTEST:

By: _____
General Manager/CEO

By: _____
Secretary

APPROVED AS TO FORM:

By: _____
Deputy General Counsel

CITY OF FORT COLLINS, COLORADO,
a Colorado home rule municipal corporation

ATTEST:

By: _____
Wade Troxell, Mayor

By: _____
City Clerk

APPROVED AS TO FORM:

By: _____
Senior Assistant City Attorney