TOWN OF JACKSON
TOWN COUNCIL
AGENDA DOCUMENTATION

PREPARATION DATE: November 9, 2016
MEETING DATE: November 14, 2016

SUBMITTING DEPARTMENT: Legal
DEPARTMENT DIRECTOR: Audrey Cohen-Davis
PRESENTER: Lea Colasuonno

SUBJECT: Lease for Space on Telecommunications Tower at Snow King Mountain Resort, LLC

STATEMENT/PURPOSE
The purpose of this item is to discuss the Town leasing space on the Snow King Mountain Resort, LLC telecommunications tower for Public Works and START.

BACKGROUND/ALTERNATIVES
The Town has had two-year contracts for space on the Snow King Mountain Resort, LLC telecommunications tower for at least ten years. This lease enables radio communications for START and wireless communications for the sewer and water services for Public Works.

At the October 17, 2016 Regular Town Council meeting, Council requested Staff look into discussing the rate of the lease with Snow King Mountain Resort, LLC. Town Staff followed up with the lessor and the rate of $8,880.00 per annum is still the lessor's requested per annum cost.

ALIGNMENT WITH COUNCIL'S STRATEGIC INTENT
This item aligns with the Town's goal of providing efficient and effective service delivery to the public by ensuring modern, reliable communications for the START system and Public Works' water and sewer systems.

ATTACHMENTS
2016 Draft Lease between Snow King Mountain Resort, LLC and the Town of Jackson.

FISCAL IMPACT
The fiscal impact of negotiating this lease included the Assistant Town Attorney working with Snow King Mountain Resort, LLC management, approval by the Town Attorney, and coordination with START and Public Works to obtain exhibits for the lease. The lease is currently at a rate of $8,880.00 per annum.

STAFF IMPACT
The impact of developing this lease agreement consisted of coordination between Town departments, coordination between the Assistant Town Attorney and the lessor, and the Town Manager working directly with the lessor.

LEGAL REVIEW
Complete.

RECOMMENDATION

Staff recommends entering the lease agreement.

SUGGESTED MOTION

I move to approve the lease agreement with Snow King Mountain Resort, LLC and authorize the Mayor to execute it.

LEASE AGREEMENT

This Lease Agreement ("Lease Agreement") was made and commenced on the 1st day of July, 2015 ("Commencement Date"), by and between SNOW KING MOUNTAIN RESORT, L.L.C., a Wyoming Limited Liability Company, P.O. Box 1846, Jackson, Wyoming 83001, herein called "Lessor", and the Town of Jackson, a Wyoming municipal corporation P.O. Box 1687, Jackson WY 83001, herein called "Lessee."

RECITALS

1. Lessor wishes to lease space to Lessee to be used for telecommunications on the property located at Snow King Mountain, in Jackson, Wyoming as outlined below; and,
2. Lessee desires to lease from Lessor space at the Snow King Mountain site for use by its Public Works Department and the Southern Teton Area Rapid Transit ("START") public transportation system.

AGREEMENT

IN CONSIDERATION OF MUTUAL COVENANTS CONTAINED HEREIN AND FOR OTHER GOOD AND VALUABLE CONSIDERATION, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

1. Premises.

Lessor is the permit holder of a parcel of land (the "Land") and the owner of a telecommunications tower (the "Tower") and building (the "Building") on Snow King West Mountain, Jackson, Wyoming, as further described in **Exhibit A** attached hereto and incorporated by reference herein. The Land, Tower and Building are sometimes hereinafter collectively referred to as the "Property." That portion of the Property leased to Lessee is referred to herein as the "leased premises" or "premises" which is further described and depicted on **Exhibit B** attached hereto and incorporated by reference herein.

2. Use.

The Premises shall be used by Lessee for the operation of lawful mobile communications services, including the transmission and reception of radio communication signals on various frequencies and for the construction, maintenance and operations of Lessee's antenna facilities and related equipment as described in **Exhibits B and C**.

3. <u>Restrictions on Use of the Premises.</u>

(a) The Leased Premises will be used and occupied by Lessee to construct, maintain and operate a communications facility. Lessee shall comply with all laws, ordinances, rules and regulations of all appropriate governmental authorities affecting the occupancy and use of the Leased Premises and shall not use the Leased Premises for any other purposes.

(b) Lessee shall not act in any way as to jeopardize Lessor's permit with United States Forest Service ("USFS").

(c) Lessee shall modify its installation as directed by USFS at Lessee's expense.

(d) This Agreement shall terminate simultaneously with Lessor's permit expiration with USFS.

(e) Lessee shall not sublet the Premises nor any part thereof.

(f) Lessee shall not make or cause to be made any waste of the Building, Tower or other improvements or the surrounding ground.

(g) Lessee shall not use or allow any use of the Building or Tower that interferes with Lessor's or other tenant's operations or causes interference with said radio signals, the reception by or radio signal transmission from Lessor's or any other tenant's equipment.

(h) Lessee shall not allow any lien to exist with respect to any work done on or materials supplied to the Property and shall take all steps necessary to promptly remove any lien.

(i) Lessee shall obtain and maintain in good standing all necessary licenses and permits to allow and authorize its use of the Property, including such licenses as are required by the Federal Communications Commission ("FCC").

(j) Lessee shall not store, discharge, or permit accumulation of hazardous substances on the Property. Hazardous substances shall include, without limitation, dangerous, toxic or hazardous pollutants, contaminants, chemicals, wastes, materials or substances as defined in or governed by the provisions of any federal, state or local law, rule or regulation, requirement, ordinance, or statute relating thereto, and include by way of illustration and not limitation the following: asbestos, asbestos containing materials, petroleum products, urea-formaldehyde, dioxins, polychlorinates, byphenyls and human waste.

(k) No smoking is allowed in the Building.

(l) Lessee shall keep the Leased Premises and any other part of the Property it uses in its activities clean and neat. Lessee shall remove and lawfully dispose of Lessee's garbage and trash from the Property.

4. <u>Term.</u>

The term of this Agreement (the "Initial Term") is two (2) years, commencing on July 1, 2015 and ending on July 1, 2017.

5. **Consideration.**

(a) Lessee shall pay Lessor as Rent Eight Thousand Eight Hundred and Eighty Dollars ($8,880.00) per annum as determined by the calculations in **Exhibit D** of this Agreement. Should Lessor consent in writing to a change in Lessee's equipment installation, the Rent paid by Lessee to Lessor will be adjusted accordingly. Rent includes tower attachments, space inside Lessor's Building, AC power, use of Lessor's back-up generator, USFS fees, and access to the Property.

(b) Rent shall change annually in proportion to any related increase in USFS fees. Lessor shall notify Lessee of any fee change immediately upon notification from the USFS. If a USFS fee increase occurs between July 1 and June 30 of any year within the Term of this Agreement, Rent shall be prorated for the remainder of the applicable year as of the date of the fee increase.

(c) Fees charged for power reflect past usage and associated costs. If usage or costs depart from these norms, Lessor may recalculate the fee based on actual usage/costs at the anniversary date of the Agreement and shall provide Lessee documentation to support the proposed recalculated power usage costs.

(d) Rent shall be payable annually on the anniversary of the start date of the lease in advance to Lessor at Snow King Mountain, Attention: Accounts Receivable P.O. Box 1846, Jackson, Wyoming, 83001.

6. **Installation, Operations, Utilities, Address.**

(a) Lessee has the right to install, maintain and operate on the Leased Premise radio communications facilities as described in **Exhibit B**. All of Lessee's construction and installation work shall be performed at Lessee's sole cost and expense and in a good and workmanlike manner. All wiring installed by Lessee's shall be in compliance with the National Electric Code requirements. All employees, agents or subcontractors entering the Premises, climbing on any structures, and all other work procedures shall adhere to OSHA requirements. Title to the Lessee's equipment shall be held by Lessee. All of Lessee's equipment shall remain personal property of Lessee and are not fixtures. Lessee has the right to remove all of Lessee's equipment at its sole expense on or before the expiration or earlier termination of this Agreement, provided Lessee repairs any damages to the premises caused by such removal.

(b) Lessee's employees, agents and subcontractors are permitted to access the Premises twenty-four (24) hours a day, seven (7) days a week. Lessee shall utilize the lock(s) installed by Lessor; Lessee shall not install its own locks at any location on the Property.

7. **Interference.**

(a) Lessee shall operate the Leased Premise in a manner that will not cause interference to Lessor or any other tenants on the Property, whose site use predates Lessee's

occupancy and use under this Agreement. All operations by Lessee shall be lawful and in compliance with all FCC requirements. In addition, no transmitters shall deliver more than one hundred (100) watts per frequency at the combiner output.

(b) Subsequent to the installation of the Lessee's facilities, Lessor shall not knowingly permit itself, or other tenants to install new equipment on the Property if such equipment is likely to cause interference with Lessee's operations.

(c) If interference occurs, Lessee shall work with Lessor and other tenants to identify the interference.

(d) Upon ascertaining the party causing the interference, Lessor shall take reasonable action to correct and eliminate such interference, including, enforcing provisions in any license or other agreements between Lessor and the persons or entities causing such interference. If Lessor cannot correct such interference within thirty (30) calendar days, Lessee shall have the right to terminate this Agreement at no penalty to Lessee.

(e) If Lessee is deemed to have caused the interference, Lessee shall cease operations, or modify Lessee's equipment and/or antennae within five (5) days of the notification. If the interference is not resolved by the sixth (6th) day, Lessor shall have the right to disconnect and remove Lessee's equipment from the Premises.

8. <u>Equipment.</u>

(a) Lessee shall provide and install at its sole cost and expense all transmitters and receivers and all related electronic equipment and antennas ("Site Equipment"), except common antenna system equipment, required for the installation and operation of Lessee's system. The Site Equipment is and shall remain the sole property of the Lessee and may be removed from the Premises by Lessee at any time. Lessee, upon termination of the Agreement, shall, within fifteen (15) calendar days, unless sooner required by the USFS, remove its Site Equipment and restore the Property to its original condition, reasonable wear and tear excepted.

(b) Within thirty (30) days prior to every anniversary of the Commencement Date, Lessee shall provide to Lessor an inventory list of all Lessee's equipment located on the tower, on the Leased Premises, and on Lessor's Property.

9. <u>Waiver of Owner's Lien.</u>

So long as Lessee is current in the payment of its rent and any other Lessee fees, Lessor waives any lien rights it may have on the Lessee's personal property; and Lessee has the right to remove the same at any time without Lessor's consent.

10. <u>Environmental Law Compliances.</u>

Lessee shall conduct its activities on the Property in compliance with all applicable federal, state and local environmental laws, rules and regulations and shall indemnify, defend and hold Lessor harmless from and against any and all claims, suits, demands and liability,

such as, but not limited to, damages, costs, expenses, assessments, penalties, fines, losses, judgments and attorney fees that Lessor may suffer due to environmental damage or contamination arising or resulting from Lessee's activities on the Property. This indemnification shall survive the termination or expiration of this Agreement.

11. <u>Default/Termination.</u>

(a) The following are events of default:

i. Lessee fails to pay Rent when due and such failure to pay is not remedied by the eleventh (11th) day of the month for which the Rent is due;

ii. A party breaches any material duty under this Lease Agreement and fails to remedy such breach within thirty (30) calendar days of service of written notice of such breach by the non-breaching party; provided, however, the thirty (30) calendar-day period may be extended by the non-defaulting party if good faith efforts to remedy the default have commenced. Delays in remedying a default that are due to causes beyond the control of the breaching party shall not be counted against the thirty (30) calendar-day period.

(b) Notwithstanding the foregoing, any monetary default which occurs three (3) or more times in any twelve (12) month period shall not be curable without Lessor's written consent.

(c) In the event of default by a party hereunder, the non-defaulting party may terminate the lease agreement without further liability by serving written notice to the defaulting party of its intent to terminate the lease agreement, pursuant to the provisions of Paragraph 26 "Notices."

(d) In the event Lessor's Special Use Permit expires or is terminated or withdrawn for any reason, Lessor may immediately terminate this Agreement and shall have no further obligations under this Agreement except as to indemnification.

12. <u>Termination in the Event of Casualty.</u>

(a) In the event of any damage to or destruction of the Premises or any part thereof which renders the Premises unusable or inoperable, such that the Premises are no longer adequate for Lessee to continue its operations or such that any repairs to the Premises have not been completed or cannot reasonably be completed within sixty (60) calendar days from the date of the damage by Lessor, Lessee shall have the right, but not the obligation, to terminate this Agreement and all of its duties and obligations thereunder by giving written notice to Lessor within fifteen (15) calendar days after such damage or destruction, if by virtue of such casualty the Premises are no longer adequate for Lessee to continue its operations or any repairs to the Premises have not been completed or cannot reasonably be completed within sixty (60) calendar days from the date of the damage.

(b) If Lessee does not terminate this Agreement, (i) the Rent payable hereunder shall be reduced or abated in proportion to the actual reduction or abatement of use of the Premises; and (ii) within sixty (60) days from the date of such damage or destruction, Lessor shall make any necessary repairs to the Premises caused by any such damage or destruction.

13. <u>Insurance.</u>

During the Initial and Renewal Terms, Lessee shall maintain commercial general liability insurance insuring against liability for bodily injury, death or damage to personal property with combined single limits of Three Million and No/100 Dollars ($3,000,000). In addition, Lessee shall maintain worker's compensation in statutory amounts, employer's liability insurance with combined single limits of Three Million and No/100 Dollars ($3,000,000); automobile liability insurance insuring against claims for bodily injury or property damage with combined single limits of Three Million and No/100 Dollars ($3,000,000); and all risk property insurance covering all personal property of Lessee for full replacement value. Lessee shall provide Lessor with evidence of such insurance in the form of a certificate of insurance prior to obtaining occupancy of the Premises and throughout the term of this Lease or any Renewal Term. The limits of liability required to be maintained hereunder may be increased or decreased by mutual consent of the parties, which consent shall not be unreasonably withheld by either party in the event of any factors or occurrences including substantial increases in the level of jury verdicts or judgments or the passage of state or federal or other governmental regulations which would materially increase or decrease either parties' exposure to risk.

14. <u>Waiver of Subrogation.</u>

Lessor and Lessee release each other, and their respective principals, employees, representatives and agent, from any claims for damage to any person or to the Premises, or to Lessee's Site Equipment thereon that are caused by, or result from, risks insured against under any insurance policies carried by the parties and in effect at the time of any such damage. Each party shall cause each insurance policy obtained by it to provide that the insurance company waives all right of recovery by way of subrogation against the other party in connection with any damage covered by any policy.

15. <u>Assignment.</u>

Neither Lessor nor Lessee may assign, or otherwise transfer all or any part of its interest in this Lease Agreement without the prior written consent of the other party, such consent not to be unreasonably withheld; provided, however, that Lessor or Lessee may assign its interest to its parent company, any subsidiary or affiliate or to any successor in interest or entity acquiring fifty-one (51%) or more of its assets, subject to the assignee assuming all of the assignor's obligations herein. Notwithstanding anything to the contrary contained

in this Lease Agreement, either party may assign, mortgage, pledge, hypothecate or otherwise transfer without consent its interest in this Lease Agreement to any financing entity, or agent on behalf of any financing entity to whom such party: (i) has obligations for borrowed money or in respect of guaranties thereof; (ii) has obligations evidenced by bonds, debentures, notes or similar instruments; or (iii) has obligations under or with respect to letters of credit, bankers acceptances and similar facilities or in respect of guaranties thereof.

16. <u>Maintenance and Repairs.</u>

Lessee shall maintain the Leased Premises and operate its facilities thereon in such lawful manner as will best enable it to fulfill its service requirements, and in accordance with the specifications herein mentioned. Lessor shall maintain the Property, other than Lessee's improvements and Leased Premises, in good and tenantable condition and repair. Lessee shall not be required to make any repairs to the Leased Premises or Property unless such repairs shall be necessitated by reason of the willful and negligent act of the Lessee, its agents, servants and employees as specified hereunder.

17. <u>Warranty of Title and Quiet Enjoyment.</u>

Lessor warrants that: (a) Lessor is the permit holder of the Land and owner of the Building, and has the rights of access hereto; (b) Lessor has the full right to make this Agreement, and (c) Lessor covenants and agrees with Lessee that upon Lessee paying the Rent and observing and performing all the terms, covenants and conditions on Lessee's part to observed and performed, Lessee may peacefully and quietly enjoy the Premises, subject nevertheless to the terms and conditions of this Agreement.

18. <u>Surrender Upon Termination of Lease.</u>

At the expiration of the lease term, Lessee shall surrender the Leased Premises in as good condition as it was at the beginning of the term, reasonable use and ordinary wear and tear excepted. Lessee may, at any time prior to or upon termination of the lease, remove from the Leased Premise all materials, equipment and property or every other sort installed by Lessee provided that such removal can be done without injury to the Leased Property. Lessee shall be required to continue to pay Rent until such time when the Site Equipment is removed pursuant to this Agreement.

19. <u>Time of the Essence, Attorney's Fees.</u>

Time is of the essence in the fulfillment of each party's duties under this Lease Agreement. Lessor and Lessee agree that should a party default in any of the covenants and agreements contained herein, the defaulting party shall pay all reasonable costs and expenses, including attorney's fees, which may arise or accrue from enforcing this agreement or in obtaining possession of the Premises covered hereby or in pursuing any remedy provided hereunder

or by the statutes of the State of Wyoming whether such remedy is pursued by filing a suit or otherwise.

20. <u>Indemnification.</u>

Lessee shall defend, indemnify and hold Lessor, the permit holder and site owner, harmless from and against any claim, loss, expense or damage to any person or property in or upon the demised Premises or any area allocated to or used by Lessee or its agents, employees or invitees, arising out of Lessee's use or occupancy of such Premises, or any act or neglect of Lessee or its servants, employees or agents, or any change, altercation or improvement made by Lessee on the Leased Premises except to the extent that any claim, loss, expense or damage is due to the negligence or intentional acts of Lessor, its agents, employees or independent contractors.

21. <u>Entire Agreement/Modification.</u>

This Lease Agreement represents the entire understanding of the parties, supersedes and voids any prior agreement and may be changed only in writing, signed by each party. Any change in rates, charges or regulations by legally constituted authorities having jurisdiction over the Leased Premises or activities conducted hereon will act as a modification of the lease to the extent applicable.

22. <u>Binding Effect.</u>

This Lease Agreement is binding upon and will run to the benefit of the heirs, executors, administrators, successors and assigns of the Lessor and Lessee.

23. <u>Governing Law, Jurisdiction & Venue</u>.

This Agreement shall be governed by and construed according to the laws of the State of Wyoming without giving effect to any choice of law or conflict of law provision or rule that would cause the application of the laws of any jurisdiction other than the State of Wyoming, with jurisdiction and venue in the applicable court of Teton County.

24. <u>Miscellaneous.</u>

(a) Each party agrees to furnish to the other, within fifteen (15) calendar days after request, such truthful estoppel information as the other reasonably requests.

(b) If any term of this Lease is found to be void or invalid, such invalidity shall not affect the remaining terms of this Lease, which shall continue in full force and effect. Accordingly, if any provisions are deemed unenforceable, the parties agree to negotiate necessary modification(s) and that such modification(s) is enforceable only upon consent by both parties to the modification(s) in writing.

(c) The persons who have executed this Lease Agreement represent and warrant that they are duly authorized to execute this Lease in their individual or representative capacity as indicated.

(d) This Lease Agreement may be executed in any number of counterpart copies, each of which shall be deemed an original, but all of which together shall constitute a single instrument.

25. <u>Governmental Immunity</u>.

Lessee does not waive its sovereign or governmental immunity by entering into this Agreement with Snow King, and fully retains all immunities and defenses provided by law with respect to any action based on or arising out of this Agreement.

26. <u>Notices.</u>

Any notice which may be or is required pursuant to the provision of this Lease Agreement will be faxed, hand-delivered or sent first class mail, postage prepaid, and addressed as follows:

Lessor: Snow King Mountain Resort, LLC
Attn: General Manager
P.O. Box 1846
Jackson, Wyoming, 83001

Lessee: Town of Jackson Public Works
Attn: Public Works Director
P.O. Box 1687, Jackson WY 83001

Town of Jackson START
Attn: START Director
P.O. Box 1687, Jackson WY 83001

SIGNATURE PAGE

In WITNESS WHEREOF, THE PARTIES HAVE EXECUTED THIS AGREEMENT as of the date first written.

ATTEST/WITNESS:

_____

LESSOR:
Snow King Mountain Resort, LLC
By: _____
Ryan Stanley

ATTEST/WITNESS:

_____

LESSEE:
Town of Jackson, Wyoming, a municipal corporation

By: _____
Name

STATE OF _____
COUNTY OF _____

I, the undersigned, a notary public in and for the State and County aforesaid, do hereby certify that _____ and _____, known to me to be the same persons whose names are subscribed to the foregoing Ground Lease, appeared before me this day in person and severally acknowledged that each signed said Lease as each's free and voluntary act for the uses and purposes therein stated.

Given under my hand and seal this _____ day of _____, 2016.

_____

Notary Public

My commission expires_____