

**MEMORANDUM**

**TO:** MAYOR AND CITY COMMISSION  
**FROM:** CITY ATTORNEY'S OFFICE  
**DATE:** July 5, 2016  
**RE:** **Agreement for Disaster Recovery Facility Hosting with Cologix, Inc.**

Attached hereto for your consideration is a proposed Agreement with Cologix, Inc. to provide Disaster Recovery Facility Hosting to enable the City to improve its ability to sustain business transactions in the event of a disaster or as a result of a significant business disruption. This Agreement with Cologix provides the City with additional capacity at a Lakeland location to house the City's backup computer server systems.

The services provided by Cologix pursuant to this Agreement will include supporting the new virtual server infrastructure for the City's failover portion of its computer server system. Additional capacity is required as the City transitions from old to new computer hardware that requires the ability to support both platforms while the City completes the implementation process.

The City's Purchasing Department, in accordance with Bid No. 6147, solicited bids for Disaster Recovery Facility Hosting services in May 2016. The following vendors responded to the City's bid:

<u>Vendor</u>	<u>Location</u>	<u>Cost</u>
Cologix, Inc	Lakeland, FL	\$418,300.00
Logista	Bessemer, AL	\$382,500.00
TerraCom Direct	Melbourne, FL	\$658,204.55
DSM Technologies	Lakeland, FL	\$973,050.00
Centurylink Comm.	Tampa, FL	\$378,277.20

After evaluation of the bids, two vendors, Cologix and DSM, are currently within our service territory and the City has existing fiber infrastructure installed to support network connectivity. Of these two vendors, Cologix was selected as the most responsive vendor that provided the best value and facility for the services requested. In addition, capacity at the Cologix Lakeland location was found to be more cost effective than the City's existing location provided by DSM Technologies. This transition from the City's existing disaster recovery site has been mapped out over the next year and will result in savings of over \$460,000.00 during the term of the contract with Cologix. Specifically, both the Cologix location and DSM Technologies location will be required until the transition is completed in May 2017, which will coincide with the expiration of the City's current agreement with DSM Technologies.

The term of this Agreement, effective July 5, 2016, upon City Commission approval shall continue for a period of five (5) years. The services pursuant to this Agreement for Data Center services will be provided to support the disaster recovery site. The total cost of this project will be \$440,000 over the five (5) year term of the contract.

It is recommended that the appropriate City officials be authorized to execute this Agreement with Cologix for Disaster Recovery Facility Hosting.

RS  
attachment



This MASTER SERVICES AGREEMENT (this "MSA") is entered into by and between Cologix US, Inc. with offices located at 2300 15th Street, Suite 300, Denver, CO 80202 ("Cologix") and the City of Lakeland, a municipality organized and existing in accordance with the laws of the State of Florida located at 228 S. Massachusetts Ave., Lakeland, Florida 33801 ("Customer") as of July 5, 2016 (the "Effective Date"), and consists of and is subject to the general terms and conditions set forth in this MSA and all Schedules and Service Orders (each as defined below) that are attached to this MSA or are subsequently entered into by the parties hereto (collectively, the "Agreement").

1. **Services.** Cologix provides the services ("Services"), in accordance with the general terms and conditions set forth in this MSA, as well as the terms and conditions set forth on the schedule(s) referencing this MSA, and attached hereto or executed hereafter (each, a "Schedule"). This Agreement shall apply to all Services provided to Customer by Cologix.
2. **Service Orders.** Cologix will perform the Services specified in any written order between Cologix and Customer that is signed by both parties or, with respect to cross-connects only, any email order that is sent by Customer and confirmed by Cologix via email (each, a "Service Order"). Each Service Order shall identify the Services to be provided by Cologix to Customer, the recurring charges and any non-recurring charges for such Services and the term during which such Services are to be provided. Service Orders under this MSA may be entered into and performed by Cologix and/or any of its Affiliates (as defined below), including an Affiliate authorized to provide Service(s) in a country or jurisdiction other than the country or jurisdiction within which this MSA has been executed. As used herein, "Affiliate" shall mean any entity controlled by, controlling or under common control with the applicable party.
3. **Representations and Warranties.**
  - a. Cologix represents and warrants to Customer that Cologix: (i) has the authority to enter into the Agreement and the Agreement constitutes a valid and binding obligation of Cologix that does not violate any other agreement between Cologix and any other person, (ii) will provide the Services in compliance with all applicable laws, rules and regulations; and (iii) Cologix will perform the Services in a workmanlike manner.
  - b. Customer represents and warrants to Cologix that Customer: (i) has the authority to enter into the Agreement and the Agreement constitutes a valid and binding obligation of Customer that does not violate any other agreement between Customer and any other person, (ii) will use the Service(s) in compliance with all applicable laws, rules and regulations; and (iii) will comply with Cologix's Policies and Procedures: Facility User Guide, as amended from time to time ("Policies and Procedures"), by publishing at [www.cologix.com](http://www.cologix.com) and posting at Cologix's facilities. In addition to the foregoing, Customer hereby represents, warrants and covenants to Cologix that if Customer is handling "protected health information" or, if Customer is a "covered entity", in each case, as such term is defined by The Health Insurance Portability and Accountability Act of 1996 (as the same may be amended, "HIPAA"), then, to the extent any data is moving through a Cologix facility, Customer will, at all times during the term of this MSA, ensure that such data is encrypted in both storage and flight as required pursuant to all applicable HIPAA regulations.
  - c. If Customer intends to resell or sublicense the Service(s), Customer further covenants that Customer (i) will not do any of the foregoing without Cologix's prior written consent, (ii) Customer will remain liable for the payment of all charges due under each Service Order and all acts or omissions of any sublicensee of Customer shall be attributable to Customer under the Agreement, and (iii) will, to the extent permitted by law, indemnify, defend and hold Cologix harmless from claims made

against Cologix by any third party that Customer resells or sublicenses the Service(s) to.

- d. EXCEPT AS EXPRESSLY SET FORTH IN THE AGREEMENT, NO WARRANTIES, EXPRESS OR IMPLIED, ARE MADE BY COLOGIX, AND COLOGIX EXPRESSLY DISCLAIMS ALL OTHER WARRANTIES, INCLUDING, WITHOUT LIMITATION, ANY IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT OR WARRANTIES ARISING FROM A COURSE OF DEALING, USAGE OR TRADE PRACTICE. CUSTOMER IS SOLELY RESPONSIBLE FOR AND COLOGIX EXPRESSLY DISCLAIMS ALL REPRESENTATIONS, WARRANTIES AND LIABILITIES OF ANY KIND RELATING TO CUSTOMER'S SOFTWARE AND HARDWARE, INCLUDING THIRD-PARTY SOFTWARE AND/OR HARDWARE LICENSED BY CUSTOMER.
- 4. Billing; Payment of Invoices; Taxes.**
- a. Cologix will inform Customer in writing, including, without limitation, email communication, that Customer's ordered Service(s) are available for use by Customer ("Service Commencement Notice"). Upon receipt of such notice, Customer shall have a period of seventy-two (72) hours to confirm that the Service(s) is properly functioning. Unless Customer delivers written notice to Cologix within such seventy-two (72) hour period that the Service(s) is not properly functioning, billing shall commence following the date of the Service Commencement Notice ("Service Commencement Date"), regardless of whether Customer is prepared to accept delivery of the ordered Service(s). In the event that Customer notifies Cologix within the time period stated above that the Service is not functioning properly, then Cologix shall correct any deficiencies in the Service(s) and deliver a new Service Commencement Notice to Customer, after which the process stated above will be repeated. Notwithstanding the foregoing, if Customer has not provided Cologix with its final power configuration with respect to the ordered Service(s) within ten (10) business days of Customer's execution of the applicable Service Order, Customer acknowledges that Cologix shall have the right to deliver the Service Commencement Notice and commence billing for the Service(s) despite the fact that the Service(s) are not available to Customer for Customer's use.
  - b. Unless otherwise specified in the applicable Service Order, any non-recurring charges will be invoiced by Cologix following the installation of the Services set forth in the applicable Service Order. Recurring charges will be billed monthly in advance, except for charges that are dependent upon usage of Services, which are billed in arrears. Billing for partial months will be prorated based on a calendar month.
  - c. All amounts payable under the Agreement shall be payable in full within forty-five (45) days of the date of invoice (the "Grace Period"), in United States dollars, unless otherwise specified in the applicable Service Order. Cologix reserves the right to charge a late fee of 1.0% per month in accordance with Florida Statute §218.74 et. seq., the Local Government Prompt Payment Act or the maximum rate permitted by law, whichever is less, calculated from the end of the Grace Period. In addition, upon expiration of the Grace Period, Cologix reserves the right to, without limitation, suspend the performance of the Service(s), restrict Customer's access to the Customer space and equipment, refuse to provide any existing Service(s) and/or new Service(s) requested by Customer, and/or exercise any termination rights it has under this MSA.
  - d. If Customer reasonably disputes an invoice, Customer must pay the undisputed amount before the expiration of the Grace Period and submit written notice of the disputed amount, within thirty (30) days of the date of the disputed invoice (with details of the nature of the dispute and the Service(s) and invoice(s) disputed). If the dispute is resolved against Customer, Customer shall pay the disputed amount plus interest from the date originally due.

- e. Cologix reserves the right to change Customer's payment terms, including requiring a deposit or another form of security, upon prior written notice to Customer when Customer's payment history under any Service Order does not conform to this Section 4 or Customer has an Insolvency Event (as defined below). As used herein, "Insolvency Event" means making a general assignment for the benefit of a party's creditors, filing a voluntary petition in bankruptcy or any petition or answer seeking, consenting to, or acquiescing in reorganization or similar relief or an involuntary petition in bankruptcy or other insolvency protection is filed against the applicable party. The acceptance and deposit by Cologix of any payment from Customer that contains reference of any type that such payment constitutes "payment in full" shall not constitute an accord and satisfaction or a waiver by Cologix of any right(s) it possesses, in law or equity, to collect payment in full from Customer for any and all Services provided to Customer under the Agreement.
- f. All charges for Service(s) are exclusive of applicable taxes and fees. Except for taxes based on Cologix's net income, Customer shall be responsible for all taxes and fees that arise in any jurisdiction, however designated, imposed on, incident to, or based upon the provision, sale or use of the Service(s) (collectively, the "Taxes"). To the extent permitted by law, Customer shall indemnify, defend and hold Cologix harmless from payment and reporting of all such Taxes, including costs, expenses, and penalties incurred by Cologix in settling, defending or appealing any claims or actions brought against Cologix related to, or arising from, Customer's non-payment of any such Taxes. If Customer is entitled to an exemption from any Taxes, Customer is required to present Cologix with a valid exemption certificate (in a form reasonably acceptable to Cologix). Cologix will give effect to any valid exemption certificate provided by Customer in accordance with the foregoing sentence to the extent it applies to any Service billed by Cologix to Customer following Cologix's receipt of such exemption certificate.

#### **5. Term, Termination; Expiration.**

- a. Unless otherwise specified in a Service Order, all Service Orders shall automatically renew for successive terms equal to twelve (12) months in length, except for Service Orders that have month to month terms which automatically renew for successive one-month terms (each a "Renewal Term"), unless either party provides written notice of non-renewal to the other party at least thirty (30) days prior to the end of the then-current term ("Non-Renewal Notice Period"). Cologix may increase any charges payable by Customer to Cologix during any Renewal Term by providing written notice of the new applicable charges at anytime prior to the end of the then-current term; provided, however, if Cologix delivers such notice during the Non-Renewal Notice Period, Customer shall have thirty (30) days from the date of Cologix's notice to give notice of non-renewal.
- b. Either party may terminate the Agreement or any Service Order, (i) if the other party fails to perform or breaches any material term or condition of the Agreement (other than as provided below) and does not cure such breach within thirty (30) days (ten (10) days for late payment of fees) following the receipt of a written notice from the non-breaching party specifying the nature of the breach in reasonable detail and stating such party's intention to terminate the Agreement and/or Service Order, as applicable; or (ii) the other party has had an Insolvency Event. Other than as expressly provided in the Agreement, neither party shall have the right to terminate the Agreement or any Service Order during a term. If Customer terminates the Agreement or any Service Order for convenience prior to the end of the applicable term thereof, then Customer shall be required to provide not less than thirty (30) days' prior written notice to Cologix of such termination, and, prior to the effective date of such termination (and prior to Customer's removal of its equipment and personal property from the applicable

Cologix facility), Customer shall pay to Cologix, as liquidated damages, a termination fee in an amount equal to one hundred percent (100%) of the monthly recurring charges due under the terminated Service Order(s) for the remainder of the term of such Service Order(s). The failure to pay amounts owed under a Service Order when due shall be considered a material breach of the Agreement. Notwithstanding the foregoing, Customer's sole remedies for Service outages, failures or defects are contained in any service level agreement(s) ("SLAs") included in any Schedule, if any.

- c. Within ten (10) business days of expiration, or the earlier termination, of the Agreement or any Service Order, Customer shall remove all of its equipment and other personal property (which shall include any hardware or software licensed by Customer from a third party) from Cologix's facility(ies). If Customer fails to remove its equipment or other personal property, Cologix may, without prior notice to Customer, disconnect, remove and dispose of Customer's equipment or other personal property at Customer's expense.
- d. In the event of any change in applicable law, regulation, decision, rule or order that materially increases the costs or other terms of delivery of the Service(s), Cologix and Customer will negotiate, in good faith, regarding how to address the change and, in the event that the parties are unable to reach agreement within thirty (30) days after Cologix's delivery of written notice requesting negotiation, then (i) Cologix may modify the Agreement upon written notice, to the extent necessary to address such change, or terminate the Agreement, and (ii) if Cologix elects to modify the Agreement, Customer may terminate the affected Service(s) by delivering written notice of termination to Cologix no later than thirty (30) days after its receipt of Cologix's notice.

**6. Limitation of Liability.** Except where a party has an indemnification obligation to the other party or where such party has acted with gross negligence or willful misconduct, in no event will either party be liable to the other party for any indirect, consequential, incidental, special or punitive damages, including, without limitation, loss of use, interruption of business, loss of data or loss of profits, arising out of or in any way connected with the Agreement or the Services, even if the relevant party has been advised of the possibility of such damages.

**7. Indemnification.** To the extent permitted by law, each party agrees to indemnify the other party, its Affiliates, and their respective officers, directors, members, shareholders, employees, agents, assigns and successors, and shall hold them harmless against any losses, liabilities, damages, costs or expenses (including reasonable attorneys' fees) resulting from a third party claim, arising out of or alleged to have arisen out of, (a) such party's breach of its obligations, representations or warranties under the Agreement or (b) bodily injury, death or property damage caused by such party. The indemnified party agrees to give prompt written notice to the indemnifying party of any such claim; provided, that any delay in furnishing such notice shall not discharge the indemnifying party from its indemnification obligation hereunder, except to the extent such delay results in actual prejudice to the indemnifying party. The indemnifying party shall undertake and conduct the defense of any claim so brought. The indemnifying party shall keep the indemnified party advised of the progress of any such claim and the indemnified party shall have the right to participate in such claim at its own expense. If the indemnifying party shall fail to take timely action to defend any such claim then the indemnified party may defend such claim at the indemnifying party's expense. The indemnifying party shall not have the right to settle, compromise or otherwise enter into any agreement regarding the disposition of any claim without the indemnified party's prior written consent, which may not be unreasonably withheld, except for a claim solely for monetary damages.

**8. Insurance.** Customer agrees to keep in full force and effect during the term of the Agreement: (a) comprehensive general liability insurance,

including contractual liability insurance, in an amount not less than One Million Dollars \$1,000,000 per occurrence, providing for the investigation, defense and satisfaction (by settlement or otherwise) of any claim under the Agreement, (b) "Special Causes of Loss" (formerly known as "All Risk") Property insurance covering all of Customer's personal property located at any of Cologix's facilities and (c) workers' compensation insurance in an amount not less than that required by applicable law and Employer's Liability with limits of at least Five Hundred Thousand Dollars (\$500,000). Customer acknowledges that (x) it retains the risk of loss for, or damage to, its equipment and other personal property located at any of Cologix's facilities and (y) Cologix's insurance policies do not provide coverage for Customer's equipment or other personal property. Customer's general liability policy shall indicate that insurer provides the primary, non-contributory insurance for any claims under the Agreement. Each of Customer's general liability policy and property insurance policy shall include a provision denying insurer subrogation rights against Cologix and the Cologix indemnitees. Customer shall cause the insurance company issuing such policies to issue a certificate to Cologix confirming that such policies are in full force and effect and provide coverage to Cologix and the Cologix indemnitees as additional insureds and confirming that before any cancellation or material modification, the insurance company will provide Cologix with thirty (30) days prior written notice. Customer shall require any contractor, customer or other third party entering a Cologix facility on Customer's behalf to procure and maintain the same types, amounts and coverage extensions as required of Customer. Customer shall have the right to satisfy the foregoing insurance coverages and requirements through a program of self-insurance and, in such event, shall deliver to Cologix, upon request, a Notice of Self-Insured Status documenting such coverage and requirements.

**9. Confidential Information.** "Confidential Information" means Cologix's reports, information, or other documents provided by Cologix to Customer with respect to Cologix's business or operations. Customer agrees that it (i) will not disclose the Confidential Information to any third party except as required by law including but not limited to Florida Statute Chapter 119, the Florida Public Records Act and (ii) Customer will take reasonable precautions to protect the confidentiality of such Confidential Information. In the event that Customer is required by law to make any disclosure of any Confidential Information, Customer must first give written notice of such requirement to Cologix, and must permit Cologix to intervene in any relevant proceedings to protect its interests in the Confidential Information. Customer acknowledges and agrees that damages at law would be an insufficient remedy to Cologix in the event that any of the covenants contained in this Section are violated. Accordingly, in addition to any other remedies or rights that may be available to Cologix, Cologix shall also be entitled, upon application to a court of competent jurisdiction, to obtain injunctive relief to enforce the provisions of this Section, and in any proceeding in which Cologix attempts to specifically enforce any or all such covenants, Customer hereby waives the defense that an adequate remedy at law exists.

**10. Publicity.** During the term of the Agreement, Customer grants Cologix the right to use Customer's logo and name on Cologix's website and promotional materials. Customer shall have the right to require Cologix to terminate any such uses at any time by written notice.

**11. Relationship of Parties.** Nothing in the Agreement will be construed to imply a joint venture, partnership or agency relationship between the parties, and Cologix will be considered an independent contractor when performing Service(s) under the Agreement.

**12. Assignment.** Neither party may assign the Agreement without the other party's prior written consent; provided, however, that either party shall have the right, without the consent of the other party but upon notice to the other party hereto, to assign the Agreement to an Affiliate of such party, or to an entity resulting from a merger, consolidation or other corporate

reorganization of such party, or to an entity that purchases all or substantially all of the assets or stock of such party.

**13. No Third Party Beneficiaries.** No provisions of the Agreement are intended to, or shall be construed to, confer upon any person, other than the parties hereto, any rights, remedies or other benefits under or by reason of the Agreement.

**14. Notices.** All notices required or permitted hereunder must be given in writing and, except for routine notices that the parties agree to send and receive electronically, shall be considered properly given if hand-delivered, mailed first class mail (postage prepaid and return receipt requested) or sent by express overnight courier at the address specified on the first page of this MSA or at such other address as a party may specify in writing pursuant to this Section. All notices shall be deemed given when received.

**15. Governing Law; Consent To Jurisdiction; Waiver of Jury Trial.** The Agreement shall be deemed to be a contract made under, and shall be construed in accordance with, the laws of the State of Florida (without reference to the conflicts of laws provisions therein and the federal laws of the United States). In addition, each party consents to the exclusive jurisdiction of any state or federal court empowered to enforce the Agreement located in Polk County, Florida, and waives any objection thereto on the basis of personal jurisdiction or venue. Each party waives their respective rights to trial by jury for any claim whatsoever in any way connected with the Agreement or the relationship between the parties.

**16. Force Majeure.** Except with respect to any payment obligations, neither party will be liable for any failure or delay in its performance under the Agreement due to causes beyond its reasonable control. In the event that Cologix is not able to deliver any Service(s) as a result of a force majeure event, Customer shall not be obligated to pay Cologix for the affected Service(s) for so long as Cologix is unable to deliver the affected Service(s).

**17. Waiver.** No waiver will be effective unless documented in a writing signed by an authorized representative of the party against which enforcement of the waiver is sought. The failure of either party to insist upon strict performance of any of the terms or provisions of the Agreement, or the exercise of any option, right or remedy contained herein, shall not be construed as a waiver of any future application of such term, provision, option, right or remedy, and such term, provision, option, right or remedy shall continue and remain in full force and effect.

**18. Survival.** Any term or provision of the Agreement of an ongoing nature and/or which, by their nature and context, should reasonably be expected to survive the expiration or earlier termination of the Agreement, shall so survive such expiration or termination thereof.

**19. Prevailing Party.** In the event of a dispute arising from or related to the Agreement, the substantially prevailing party shall be entitled to recovery of all reasonable costs incurred, including, without limitation, court costs, attorneys' fees and other related costs and expenses.

**20. Counterparts; Electronic Copies.** This MSA and any Schedule or Service Order may be executed in counterparts which, when taken together, shall constitute one and the same document. In addition, each party hereby agrees that facsimile, photographic or electronic copies of any of the foregoing shall be deemed an original thereof. Finally, each party hereby consents to the use of electronic signatures, including via Adobe e-signature or a similar product or service, and acknowledge and agree that no electronic record or signature shall be challenged or denied legal effect or enforceability because it is in electronic form.

21. **Severability.** If any term or provision of the Agreement shall be declared by a court of competent jurisdiction to be invalid, unenforceable or otherwise ineffective, that provision shall be limited or eliminated to the minimum extent necessary so that the Agreement shall otherwise remain in full force and effect and enforceable. If the surviving portions of the Agreement fail to retain the essential understanding of the parties, the Agreement shall be terminated by the mutual consent of the parties.

22. **Headings.** Heading are for ease of reference only and shall not have any effect upon the construction of the Agreement.

23. **Construction.** The parties agree that each party has reviewed and revised the Agreement and that the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of the Agreement.

24. **Entire Agreement; Modification; Order of Precedence.** The Agreement constitutes the entire agreement between the parties relating to its subject matter and the Agreement supersedes all prior agreements and understandings between the parties, oral or written, with respect to its subject matter and may not be changed unless mutually agreed upon in writing by both parties. In case of a conflict between any of the terms and conditions in this MSA and any other terms and conditions in any Schedule or Service Order, the order of precedence shall be: any Schedule, any Service Order, and this MSA. For the avoidance of doubt, any purchase order sent to Cologix by Customer (for Customer's administrative purposes or otherwise) shall not be binding.

25. **Public Records.** In accordance with Florida Statute §119.0701, the Cologix shall keep and maintain public records required by the Customer in performance of Services hereunder. Upon request from the Customer's custodian of public records, Cologix shall provide the Customer with a copy of the requested records or allow the records to be inspected or copied within a reasonable time at a cost that does not exceed the cost provided pursuant to Florida Statute Chapter 119 or as otherwise provided by law. Cologix shall ensure that public records that are exempt or confidential and exempt from public records disclosure requirements are not disclosed except as authorized by law for the duration of the Agreement term and following completion of the Agreement if Cologix does not transfer the records to the Customer. Cologix shall, upon completion of the Agreement, transfer, at no cost, to the Customer all public records in possession of the Cologix or keep and maintain public records required by the Customer to perform Services pursuant to the Agreement. If Cologix transfers all public records to the Customer upon completion of the Agreement, Cologix shall destroy any duplicate public records that are exempt or confidential and exempt from public records disclosure requirements. If Cologix keeps and maintains public records upon completion of the Agreement, Cologix shall meet all applicable requirements for retaining public records. All records stored electronically must be provided to the Customer, upon request from the Customer's custodian of public records, in a format that is compatible with the information technology systems of the Customer. **IF COLOGIX**

**HAS QUESTIONS REGARDING THE APPLICATION OF CHAPTER 119, FLORIDA STATUTES, TO COLOGIX'S DUTY TO PROVIDE PUBLIC RECORDS RELATING TO THE AGREEMENT, CONTACT THE CUSTODIAN OF PUBLIC RECORDS: KEVIN COOK - DIRECTOR OF COMMUNICATIONS AT: PHONE: 863-834-6264, E-MAIL:**

[KEVIN.COOK@LAKELANDGOV.NET](mailto:KEVIN.COOK@LAKELANDGOV.NET),  
ADDRESS: ATTN: COMMUNICATIONS  
DEPARTMENT, 228 S. MASSACHUSETTS  
AVE., LAKELAND, FLORIDA 33801.

IN WITNESS WHEREOF, the parties have executed this MSA by their duly authorized representatives.

COLOGIX:

\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Name)

\_\_\_\_\_  
(Title)

\_\_\_\_\_  
(Date)

CUSTOMER:

\_\_\_\_\_  
(Signature)

R. Howard Wiggs

\_\_\_\_\_  
(Name)

Mayor

\_\_\_\_\_  
(Title)

\_\_\_\_\_  
(Date)

Attest:

By: \_\_\_\_\_

Kelly S. Koos, City Clerk

Approved as to form and correctness:

By: \_\_\_\_\_

Timothy J. McCausland, City Attorney



This COLOCATION SERVICES SCHEDULE (this "Schedule") is made between Cologix US, Inc. with offices located at 2300 15th Street, Suite 300, Denver, CO 80202 ("Cologix") and the City of Lakeland, a municipality organized and existing in accordance with the laws of the State of Florida located at 228 S. Massachusetts Ave., Lakeland, Florida 33801 ("Customer") as of July 5, 2016 and incorporates and is governed by the terms and conditions of the Master Services Agreement (the "MSA") entered into by the parties. Any terms used herein and not defined herein shall have the meaning given to such terms in the MSA.

1. **Grant of License.** Cologix grants to Customer the right and non-exclusive license to occupy the colocation space identified in the Service Order (the "Customer Space") during the term identified in the Service Order, solely for the Permitted Uses (as defined below). Notwithstanding the foregoing, Customer acknowledges that it does not have, has not been granted and will not hold any real property interest in the Customer Space or the facility and that Customer is a licensee and not a tenant or lessee of the Customer Space. This license shall be subordinate to any lease between Cologix and its landlord.
2. **Use of Customer Space.**
  - a. Customer shall use the Customer Space solely for the purpose of (i) installing Customer's equipment in the Customer Space, (ii) maintaining the equipment, (iii) operating the equipment and (iv) removing the equipment (collectively, the "Permitted Uses"). In connection with the foregoing, Customer shall maintain the Customer Space in an orderly and safe condition, in accordance with nationally published OSHA standards, and shall return the Customer Space to Cologix in the same condition (reasonable wear and tear excepted) as when such colocation space was delivered to Customer. Customer shall perform the Permitted Uses at its sole cost and expense.
  - b. Customer will ensure that its officers, employees, technicians, agents, representatives, contractors and visitors who are involved in the installation, operation, maintenance and removal of the equipment, or who are granted access to the Customer Space, comply with the Policies and Procedures.
3. **Cologix Maintenance.** Cologix shall perform janitorial services, environmental systems maintenance, power plant maintenance, fire system maintenance and other actions as are reasonably required to maintain the Customer Space in a condition that is suitable for the placement of communications and networking equipment.
4. **Equipment Cabinets, Racks, Cages and Private Suites.** Cologix will provide equipment cabinets, racks, cages and/or private suites as specified in each Service Order.
5. **Power**
  - a. Total Customer Space size is determined in part by the deployed power density of the facility and the amount of power purchased by Customer.
  - b. Cologix shall exclusively provide any AC or DC power circuits for the Customer Space in accordance with the Service Order. It shall be Customer's responsibility to manage the power draw on each circuit and each fuse, and Cologix shall not be liable for any outage or damage to Customer's

equipment or applications should Customer exceed the circuit or fuse rating; provided, however, that Cologix shall have the right, on an ongoing basis, to monitor Customer's power draw pursuant to clauses (c) and (d) below. In connection with the foregoing, Customer acknowledges and agrees that, pursuant to applicable law, Customer's use of any power circuit is limited to eighty percent (80%) of the fuse rating thereof (the "Power Circuit Threshold"). Customer-provided power strips used for remote control or other additional functionality must be approved for use in advance by Cologix.

c. To the extent Customer orders power from Cologix on a per circuit basis (as opposed to a kW basis pursuant to clause (d) below or a metered amp per circuit basis pursuant to clause (e) below) as set forth in the applicable Service Order, Customer acknowledges and agrees that Customer shall not be permitted to draw power on any such circuit in excess of the Power Circuit Threshold, as measured by Cologix. If at any time Customer exceeds the Power Circuit Threshold, Cologix reserves the right (at any time thereafter) to send a written notice to Customer of such excessive use (each, a "Power Notice") and Customer shall have a period of ten (10) days from receipt of such Power Notice to reduce Customer's power draw below the Power Circuit Threshold. If Customer fails to cure such excessive power use within the ten (10) day period set forth above, then Cologix shall have the right, at its option, to either (i) upon not less than five (5) business days' prior written notice to Customer, terminate the applicable Service Order with Customer if the power being used by Customer in excess of the Power Circuit Threshold is not available at the applicable facility, or (ii) without any additional notice to Customer, immediately begin charging Customer for an additional power circuit at the same configuration as the circuit triggering such excessive power use for the remainder of the term of the applicable Service Order, which additional circuit charge shall be reflected on Customer's next succeeding monthly invoice and shall be payable by Customer to Cologix pursuant to the terms of the Agreement. In addition to the foregoing, if at any time during the term of the Agreement Customer receives three (3) or more Power Notices from Cologix (whether or not Customer has cured the related excessive power use), Cologix shall have the right, without additional notice, to begin charging Customer for an additional power circuit, which additional circuit charge shall be reflected on Customer's next succeeding monthly invoice and shall be payable by Customer to Cologix pursuant to the terms of the Agreement.

d. To the extent Customer orders power from Cologix on a kW basis (as opposed to a per circuit basis pursuant to clause (c) above or a metered amp per circuit basis pursuant to clause (e) below) as set forth in the applicable Service Order, Customer acknowledges and agrees that Customer shall not be permitted to exceed Customer's committed kW power usage (as reflected on the Service Order) at any time during the term of such Service Order, as measured by Cologix. If at any time a measure of Customer's power usage by Cologix reflects usage in excess of Customer's kW commitment (as reflected on the Service Order) (any such reading, a "kW Usage Spike"), the level of such kW Usage Spike shall automatically become Customer's new kW commitment for the remainder of the term of such Service Order (subject to any additional intervening kW Usage Spike which shall again set a new kW commitment for Customer). In connection with the

foregoing, commencing on the next ensuing monthly invoice, Customer shall be charged for such new kW commitment. In addition, any new kW commitment resulting from a kW Usage Spike in a month shall apply retroactively to all power charges for such month and, in furtherance of the foregoing, Cologix shall have the right to conduct a reconciliation and true-up of charges for such month, taking into account the increased kW commitment. Cologix shall send written notice to Customer of any amounts owed by Customer in connection with such reconciliation and such amounts shall be reflected on the next monthly invoice received by Customer following the date of such reconciliation by Cologix and shall be payable by Customer to Cologix pursuant to the terms of the Agreement.

e. To the extent Customer orders power from Cologix on a metered amp per circuit basis (as opposed to a per circuit basis pursuant to clause (c) above or a kW basis pursuant to clause (d) above) as set forth in the applicable Service Order, Customer acknowledges and agrees that Customer will pay to Cologix a monthly committed amp charge (the "Monthly Committed Amp Charge") based on Customer's committed amps set forth in the applicable Service Order (the "Committed Amps"). In addition to the Monthly Committed Amp Charge, if Customer's actual peak amperage during any month of the term of a Service Order exceeds the Committed Amps set forth in the Service Order (the "Excess Amperage"), as determined by Cologix, then Customer acknowledges and agrees that during such month Customer shall also be required to pay a monthly charge for such Excess Amperage equal to Customer's peak utilized amps for the applicable month, as determined by Cologix, less the Committed Amps set forth in the Service Order, multiplied by the per amp charge set forth in the applicable Service Order. Such Excess Amperage will be measured on a circuit by circuit basis and not in the aggregate across the Customer's deployment. Cologix will invoice any calculated overage relating to the Excess Amperage in the month following such measurement.

f. In the event that the rates charged to Cologix for power increase, then Cologix may proportionally increase (without mark-up) the monthly recurring charges it charges Customer in connection with Customer's power usage by delivering written notice of such increase to Customer together with reasonable evidence of the increase in rates charged to Cologix.

**6. Access and Security.**

a. Cologix will provide physical access by Customer to Cologix's facility 24 hours a day, 7 days a week, pursuant to the Policies and Procedures.

b. Unless otherwise agreed in writing by the parties, Cologix retains the right to access the Customer Space at any time and for any reason, including, without limitation, to perform maintenance and repairs, to inspect equipment, to measure power draw and to perform the contracted Service(s).

c. Cologix will provide and maintain in working condition security devices, as described in the Policies and Procedures.

**7. 24x7 Customer Support.** Cologix provides for the coordination and resolution of problems associated with the Service(s) on a 24x7 basis. Support is limited to the product features included in the Service(s) purchased.

**8. Onsite Technical-Support Services.**

a. Upon Customer request, Cologix technicians are available to perform various "Remote Hands" technical tasks on Customer's equipment. Typical activities provided by the Remote Hands services include, without limitation, rebooting or power-cycling Customer equipment, testing or swapping defective cables, visual reporting on status indicators, reseating or replacement of modular equipment and modem connections for remote access.

b. Remote Hands services may be purchased in monthly blocks of time or ad hoc.

c. Although Cologix technicians are skilled in troubleshooting and repairing a variety of equipment, prior knowledge of, or training on, a particular system utilized by Customer cannot be guaranteed. Cologix shall not be liable for any losses or damages due to any failure of the equipment or for any loss of data or damages resulting from Remote Hands service.

d. Cologix shall have no liability with respect to any shipment (a shipment may comprise of one or more boxes) from Customer (or a third party on behalf of, or for, Customer) that is received and/or stored by Cologix on Customer's behalf, regardless of the cause of any damage thereto. The receiving and handling of packages by Cologix is being done for convenience purposes only. Customers must provide their own insurance for all equipment being shipped, stored, or otherwise located at the any of the Cologix facilities.

**9. Colocation Service-Level Agreement.**

a. Cologix shall maintain 100% Service availability for redundant power Services and 99.99% Service availability for non-redundant power Services.

b. For any billing month in which Cologix fails to meet the foregoing SLA with respect to power, Customer will, subject to the "Excluded Outages" (as defined below), receive, as its sole and exclusive remedy and Cologix's sole obligation for such failure, credit to its account based on the actual duration of the interruption of such Service. Cologix's maintenance logs and trouble-ticketing systems will be used for calculating any SLA credits. The amount of credit is stated below as a percentage of the monthly recurring charges due to Cologix for such affected Service for the applicable calendar month.

<u>Services Availability</u> (measured over calendar month)	<u>Redundant Power Credit</u>	<u>Non-Redundant Power Credit</u>
Uptime of 100%	None	None
Uptime of 99.999% - 99.990%	10%	None
Uptime of 99.99% - 99.90%	25%	10%
Uptime of 99.89% - 95.00%	50%	25%
Uptime of less than 95.0%	100%	50%





COLOCATION SERVICES SCHEDULE

c. To request a credit, Customer must deliver a written request to Cologix within thirty (30) days of the end of the month for which a credit is requested.

d. If at any time Customer is in default under the Agreement, Customer will not be entitled to any credit. Customer is limited to receiving an aggregate credit of 100% of the monthly recurring charges due to Cologix for the applicable calendar month for the affected Service.

e. Notwithstanding anything to the contrary set forth herein, credit will not be issued under this SLA for any outage that, as determined by Cologix in its reasonable judgment, results from any of the following: (i) Customer-initiated changes, whether implemented by Customer or Cologix on behalf of Customer; (ii) a violation of the Policies and Procedures in existence as of the date of such circumstances giving rise to such credit; (iii) any other event or condition not wholly within the control of Cologix; (iv) viruses; (v) any Cologix scheduled maintenance announced at least forty-eight (48) hours in advance, up to an accumulated total of eight (8) hours per month; (vi) any emergency maintenance announced at least sixty (60) minutes in advance, up to an accumulated total of two (2) hours per month; (vii) any failures that cannot be corrected because Customer is inaccessible; or (viii) Customer exceeding its kW commitment as set forth in the applicable Service Order and/or Customer's power draw on any power circuit exceeding the Power Circuit Threshold therefor (clauses (i) through (viii) above, collectively, the "Excluded Outages").

10. **Anti-Long Straw.** Notwithstanding anything to the contrary set forth in the Agreement, Customers shall not be permitted to transport cross connects to locations outside the Cologix facility for the purpose of resale or transfer to another party that is not also physically present in the Cologix meet-me-room. For example, Customer cannot offer direct cross connects to networks in the Cologix meet-me-room to their customers outside the Cologix data center unless as part of an embedded and integrated network solution beyond network access. A violation of this Section 10 shall be a material breach of the Agreement.

11. **Changes.** Cologix reserves the right, on not less than thirty (30) days' prior written notice to Customer, to relocate, change or otherwise substitute replacement space for the Customer Space, at any time during the term hereof, provided that the replacement space is substantially similar in size and configuration to the original Customer Space. Any related direct out-of-pocket costs shall be at Cologix's sole expense

12. **Termination of Use.** Cologix shall have the right to terminate Customer's use of the Customer Space or the Service(s) delivered therein in the event that: (a) Cologix's rights to use the facility in which the Customer Space is located terminates or expires for any reason; (b) Customer is in default hereunder; (c) Customer makes any material alterations to the Customer Space without first obtaining the prior written consent of Cologix; or (d) Customer violates the Policies and Procedures. With respect to (b), (c), and (d) above, unless, in Cologix's sole opinion, Customer's actions interfere or have the potential to interfere with other Cologix customers or present significant operational risks, Cologix shall provide Customer with written notice and a thirty (30) day opportunity

to cure before terminating Customer's right to the Customer Space.

13. **Release of Landlord.** Customer hereby agrees to release Cologix's landlord (and its agents, subcontractors and employees) from all liability relating to Customer's access to, and use and occupancy of, the Customer Space and the facility in which it is located, except to the extent of any gross negligence or intentional misconduct of such landlord.

IN WITNESS WHEREOF, the parties have executed this Schedule by their duly authorized representatives.

COLOGIX:

\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Name)

\_\_\_\_\_  
(Title)

\_\_\_\_\_  
(Date)

CUSTOMER:

\_\_\_\_\_  
(Signature)

R. Howard Wiggs  
\_\_\_\_\_  
(Name)

Mayor  
\_\_\_\_\_  
(Title)

\_\_\_\_\_  
(Date)

Attest:

By: \_\_\_\_\_  
Kelly S. Koos, City Clerk

Approved as to form and correctness:

By: \_\_\_\_\_  
Timothy J. McCausland, City Attorney