

AMENDMENT ONE
TO
AIRPORT WIRELESS NETWORK CONCESSION AGREEMENT
BILLINGS LOGAN INTERNATIONAL AIRPORT TERMINAL BUILDING
BY AND BETWEEN
CITY OF BILLINGS
AND
BOINGO WIRELESS

W I T N E S S E T H

WHEREAS, the City of Billings (hereinafter "City") and Boingo Wireless (hereinafter "Boingo") entered into an Airport Wireless Network Concession Agreement (hereinafter the "Agreement") dated August 26, 2013 to provide Wi-Fi service in the Airport Terminal Building, and

WHEREAS, Billings Logan International Airport (hereinafter the "Airport") is currently in the design process for a major Terminal Expansion Project that will impact most of the tenants operating in the Terminal Building, and

WHEREAS, a number of the tenants operating in the Terminal Building operate under different concession agreements with the City, with terms ending prior to and/or during the construction of the Terminal Expansion Project, and

WHEREAS, until the final design and construction for the Terminal Expansion Project is completed and details for the new space are available, the City desires to work with

Terminal Building tenants on extensions of term to current agreements before seeking proposals on and entering into new agreements with new terms and conditions, and

WHEREAS, the original term of the Agreement expires on December 31, 2018, and the City, in accordance with Article II, Paragraph C, may exercise two one-year options to renew the Agreement, and

WHEREAS, both parties are in agreement that with the construction of the Airport Terminal Expansion Project, both one year renewals can be agreed to now, in effect extending the Lease an additional two years, to December 31, 2020, and

WHEREAS, during the first ninety (90) days of the extended term, both parties are willing to further negotiate and amend this Agreement with the terms to provide "free public Wi-Fi service" to the Airport's Terminal Building.

NOW THEREFORE, the Agreement is amended as follows:

1. ARTICLE II of the Agreement is amended to read as follows:

"ARTICLE II

TERM OF AGREEMENT

A. Term. The term of the Concession Agreement shall be for a period of ~~five~~ ~~(5)~~ seven (7) years commencing on January 1, 2014 and ending ~~December 31, 2018~~ December 31, 2020.

B. National Emergency. During the time of war or declared national emergency, the City shall have the right to lease the landing area or any part thereof to the United States Government for military use. If any such lease is executed, any provisions of this instrument that are inconsistent with the provisions of the lease to the Government shall be

suspended, provided that the term of this Agreement shall be automatically extended by the amount of the period of suspension.

C. Option to Renew. ~~This Agreement may be renewed for two (2) one (1) additional one-year terms term, with said option to be exercised at the sole discretion of the City.~~ This Agreement may not be renewed after December 31, 2020. ~~The optional one-year renewals~~ This renewal may require equipment upgrades should access demands, service quality, or current equipment standards require such upgrades."

2. ARTICLE III of the Agreement is partially amended to read as follows:

"ARTICLE III

CONCESSION FEES, PAYMENTS, AND REPORTING

Concessionaire shall pay to the City for the rights and privileges herein granted the percentages of the annual gross sales revenue derived from the Wi-Fi Network Concession based on a "Fully Paid Model" as follows:

	<u>FOR THE PERIOD</u>	<u>PERCENTAGE OF GROSS SALES</u>
YEAR 1	1/01/14 thru 12/31/14	<u>20%</u>
YEAR 2	1/01/15 thru 12/31/15	<u>20%</u>
YEAR 3	1/01/16 thru 12/31/16	<u>20%</u>
YEAR 4	1/01/17 thru 12/31/17	<u>20%</u>
YEAR 5	1/01/18 thru 12/31/18	<u>20%</u>
YEAR 6	1/01/19 thru 12/31/19	<u>20%</u>
YEAR 7	1/01/20 thru 12/31/20	<u>20%</u>

In the event the Option to Renew is exercised by the City, the Concession Fees and Payments due to the City, shall at a minimum, remain at the same rates as Year Five of this Agreement, or as may be negotiated and mutually agreed upon by the City and Concessionaire."

All other sections of ARTICLE III remain unchanged.

3. ARTICLE XVIII of the Agreement is retitled and revised to read as follows:

"ARTICLE XVIII

NONDISCRIMINATION

A. General. In the use and occupation of the Airport, Concessionaire shall not discriminate against any person or class of persons by reason of race, color, religion, sex, national origin or ancestry, age, or disability. Additionally, for the services provided during the use and occupation of the Airport, Concessionaire shall furnish said services on a reasonable and not unjustly discriminatory basis to all users thereof and charge reasonable and not unjustly discriminatory prices for each unit of service, provided that the Concessionaire may be allowed to make reasonable and nondiscriminatory discounts, rebates, or other similar types of price reductions to volume purchasers.

B. Civil/Human Rights Laws. In the operation and use of the Airport, Concessionaire shall not, on the grounds of race, color, religion, sex, national origin or ancestry, age, or disability, discriminate or permit discrimination against any person or group of persons in any manner prohibited by Part 21 of Title 49, Code of Federal Regulations, the Civil Rights Act of 1964, as amended, the Equal Pay Act of 1963, the Rehabilitation Act of 1973, and such other Federal, State, or Local laws as may be applicable.

Without limiting the generality of the foregoing, Concessionaire agrees to not discriminate against any employee or applicant for employment because of race, color, religion, sex, national origin or ancestry, age, or disability. Concessionaire agrees to take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, national origin or ancestry, age, or disability. Such action shall include, but not be limited to, employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; selection for training; and disciplinary actions and grievances. Concessionaire agrees to post, in conspicuous places available to employees and applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination clause.

C. Concessionaire, for itself, its heirs, personal representatives, successors in interest, and assignees, as part of the consideration of this Agreement, does hereby covenant and agree as a covenant running with the land that, in the event improvements are constructed, maintained, or otherwise operated on the Airport for a purpose for which a United States Department of Transportation program or activity is extended or for another purpose involving the provision of similar services or benefits, Concessionaire shall maintain and operate such improvements and services in compliance with all other requirements imposed pursuant to 49 CFR Part 21 (Nondiscrimination in Federally Assisted Programs of the Department of Transportation), as said regulations may be amended.

D. Concessionaire, for itself, its heirs, personal representatives, successors in interest, and assignees, as a part of the consideration of this Agreement, does hereby covenant and agree as a covenant running with the land that:

1) No person on the grounds of race, color, religion, sex, national origin or ancestry, age, or disability shall be excluded from participation in, denied the benefits of, or otherwise be subjected to discrimination in the use of said improvements.

2) No person on the grounds of race, color, religion, sex, national origin or ancestry, age, or disability shall be excluded from participation in, denied the benefits of, or otherwise be subjected to discrimination in the construction of any improvements on, over, or under such land and the furnishing of services thereon.

3) Concessionaire shall use the facilities in compliance with all other requirements imposed by, or pursuant to 49 CFR Part 21 (Nondiscrimination in Federally Assisted Programs of the Department of Transportation), as said regulations may be amended.

Concessionaire assures that it will undertake an affirmative action program as required by 14 CFR Part 152, Subpart E, to ensure that no person on the grounds of race, color, religion, sex, national origin or ancestry, age, or disability shall be excluded from participating in any employment activities covered in 14 CFR Part 152, Subpart E, or such employment activities covered in any applicable State or Local law. Concessionaire assures that no person shall be excluded on these grounds from participating in or receiving the services or benefits of any program or activity covered by this Article XVIII.

E. During the performance of this Agreement, the Concessionaire, for itself, its assignees, and successors in interest, agrees to comply with the following nondiscrimination statutes and authorities, including, but not limited to:

1) Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d *et seq.*, 78 stat. 252) (prohibits discrimination on the basis of race, color, national origin);

2) 49 CFR Part 21 (Nondiscrimination in Federally Assisted Programs of the Department of Transportation – Effectuation of Title VI of The Civil Rights Act of 1964);

3) The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. § 4601) (prohibits unfair treatment of persons displaced or whose property has been acquired because of Federal or Federal aid programs and projects);

4) Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794 *et seq.*), as amended (prohibits discrimination on the basis of disability); and 49 CFR Part 27;

5) The Age Discrimination Act of 1975, as amended (42 U.S.C. § 6101 *et seq.*) (prohibits discrimination on the basis of age);

6) Airport and Airway Improvement Act of 1982 (49 U.S.C. § 471, § 47123) as amended (prohibits discrimination based on race, creed, color, national origin, or sex);

7) The Civil Rights Restoration Act of 1987 (PL 100-209) (broadened the scope, coverage, and applicability of Title VI of the Civil Rights Act of 1964,

the Age Discrimination Act of 1975, and § 504 of the Rehabilitation Act of 1973, by expanding the definition of the terms "programs or activities" to include all of the programs or activities of the Federal aid recipients, sub-recipients, and contractors, whether such programs or activities are Federally funded or not);

8) Titles II and III of the Americans with Disabilities Act of 1990, which prohibit discrimination on the basis of disability in the operation of public entities, public and private transportation systems, places of public accommodation, and certain testing entities (42 U.S.C. §§ 12131 – 12189) as implemented by Department of Transportation regulations at 49 CFR Parts 37 and 38;

9) The Federal Aviation Administration's Nondiscrimination statute (49 U.S.C. § 47123) (prohibits discrimination on the basis of race, color, national origin, and sex);

10) Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations, which ensures discrimination against minority populations by discouraging programs, policies, and activities with disproportionately high and adverse human health or environmental effects on minority and low income populations;

11) Executive Order 13166, Improving Access to Services for Persons with Limited English Proficiency (LEP), and resulting agency guidance, national origin discrimination includes discrimination because of LEP. To ensure compliance with Title VI, you must take reasonable steps to ensure that LEP

persons have meaningful access to your programs (70 Federal Regulations at 74087 – 74100);

12) Title IX of the Education Amendments of 1972, as amended, which prohibits you from discriminating because of sex in education programs or activities (20 U.S.C. 1681 *et seq.*)."

F. That Concessionaire shall furnish its services on a fair, equal, and nondiscriminatory basis to all users thereof, and shall charge fair, reasonable, and nondiscriminatory prices for each unit or service. However, Concessionaire may be allowed to make reasonable discounts or other similar types of price adjustments to purchasers on a nondiscriminatory basis."

4. ARTICLE XIX is added to the Agreement, renumbering/deleting sections of the General Provisions to read as follows:

"ARTICLE XIX

GENERAL PROVISIONS

A. Attorney's Fees. Should either party employ an attorney or attorneys or utilize the services of in-house attorneys to enforce any of the provisions hereof or to protect its interest in any manner arising under this Agreement, the non-prevailing party in any action pursued in a court of competent jurisdiction agrees to pay to the prevailing party all reasonable costs, damages, expenses, and attorney's fees, including fees for in-house attorneys, expended or incurred in connection therewith.

B. Operation as Public Airport. City shall, during the term hereof, operate and maintain the Airport and its public facilities, as a public airport consistent with and pursuant to

sponsor's assurances given by the City to the United States Government under the Federal Airport Act.

C. Subordination of Agreement.

1) This Agreement shall be subordinate to the provisions of any existing or future agreements between the City and the United States relative to the administration, operation, or maintenance of the Airport, the execution of which has been or may be required as a condition precedent to the expenditure of Federal funds for the development of the Airport.

2) Any mortgagee or beneficiary shall have the right to cure any default on the part of Concessionaire in the payment of the percentage of gross revenues herein, and, in the event of default, to assume the Concessionaire's position under this Agreement; however, the City must receive written notice of the intent to cure. The City in no event shall be liable for the payment of the sum secured by such mortgage or trust indenture, nor for any expenses in connection with the same. Furthermore, such mortgage or trust indenture shall expressly provide that the mortgagor or beneficiary will seek no monetary judgment against the City. The mortgage or trust indenture shall also contain provisions requiring the holder of the indebtedness secured by such mortgage or trust indenture to mail to the City, by certified mail, a copy of each notice of breach of covenant, default, or foreclosure given by the holder or the trustee under such mortgage or deed of trust.

~~D. — Non-Discrimination. Concessionaire, for itself, its personal representatives, successors in interest, and assigns, as a part of the consideration hereof, does hereby covenant and agree:~~

~~1) — That no person, on the grounds of race, color, creed, political ideas, sex, age, or physical or mental handicap, shall be excluded from participation, denied the benefits of, or be otherwise subjected to discrimination in the use of Airport facilities, or the exercise of its rights and privileges under this Agreement.~~

~~2) — That, in the construction of any improvements on behalf of Concessionaire and the furnishing of services, no person shall be excluded from participation in, denied the benefits of, or otherwise be subjected to discrimination on the grounds of race, color, creed, political ideas, sex, age, or physical or mental handicap.~~

~~3) — That Concessionaire shall use the Airport facilities in compliance with all other requirements imposed by or pursuant to Title 49, Code of Federal Regulations, Department of Transportation, Subtitle A, Office of the Secretary, Part 21, Nondiscrimination in Federally Assisted Programs of the Department of Transportation, Effectuation of Title VI of the Civil Rights Act of 1964, and as said Regulations may be amended.~~

~~4) — That Concessionaire shall furnish its services on a fair, equal, and nondiscriminatory basis to all users thereof, and shall charge fair, reasonable, and nondiscriminatory prices for each unit or service. However, Concessionaire may~~

~~be allowed to make reasonable discounts or other similar types of price adjustments to purchasers on a nondiscriminatory basis.~~

D. Modification and Amendments. Changes or modifications to this Agreement will be done in the form of an amendment to be agreed upon and signed by both parties.

E. Paragraph Headings. The paragraph headings contained herein are for convenience in reference and are not intended to define or limit the scope of any provisions of this Agreement or the particular paragraphs.

F. Notices. Notices to the City provided for herein shall be sufficient if sent by certified mail, postage prepaid, addressed to:

Director of Aviation and Transit
Billings Logan International Airport
1901 Terminal Circle, Room 216
Billings, MT 59105

and notices to Concessionaire, if sent by certified mail, postage prepaid, addressed to:

Mr. Zachary Sterngold
VP Business Development
Boingo Wireless
10960 Wilshire Boulevard, Suite 800
Los Angeles, CA 90024
Phone: (310) 586-5190
FAX: (310) 586-4010
E-mail: zsterngold@boingo.com

or to such other addresses as the parties may designate to each other in writing from time to time.

G. Quiet Enjoyment. With Concessionaire's performance of the covenants and terms of the Agreement herein, Concessionaire shall have peaceful possession and quiet enjoyment of the Premises during the term hereof.

H. Relationship of Parties. Nothing contained herein shall be deemed or construed by the parties hereto, or by any third party, as creating the relationship of principal and agent, partners, joint venturers, or any other similar such relationship between the parties hereto.

I. Effect of Invalid Provision. If any term or provision of this Agreement or the application thereof to any person or circumstance shall to any extent be invalid or unenforceable, the remainder of this Agreement, or the application of such term or provisions to persons or circumstances other than those as to which it is invalid or unenforceable, shall not be affected thereby, and each term and provision of this Agreement shall be valid and be enforced to the fullest extent permitted by law.

J. Governing Law. This Agreement shall be construed and enforced in accordance with the laws of the State of Montana. Venue in any proceedings held hereunder shall be in State of Montana Thirteenth Judicial District Court, Yellowstone County, Montana.

K. Entire Agreement. This Agreement, including all exhibits and documents incorporated by reference, constitutes the entire Agreement and understanding of the parties with respect to matters referenced herein.

L. Force Majeure. Neither party hereto shall be liable to the other party for any failure, delay, or interruption in the performance of any of the terms, covenants, or conditions of this Agreement due to riot, war, hostilities between nations, threatened or actual terrorist acts of any kind or nature, weather conditions, floods, rebellion, sabotage, acts of God, fire, accident, strike, lockout, labor dispute (whether of a general or widespread nature or limited to the Concessionaire's own employees), lack of or failure to obtain sufficient electric power, or, without

limiting any of the foregoing causes, due to any other contingencies of a similar or dissimilar nature beyond the reasonable control of such party.

M. Disclaimer of Warranties. The Concessionaire, its licensors or contractors make no warranties or representations as to the accuracy, truthfulness, usefulness, effectiveness, reliability, or security of the service or content and assumes no liability or responsibility therefore. The Concessionaire will fully cooperate with law enforcement authorities and legal proceedings requiring the disclosure of the identity of users.

The City expressly agrees that use of the service is at the City's sole risk. The service and content are available strictly on an "as is" and "as available" basis without warranties of any kind, either express or implied, including, but not limited to, warranties of title, non-infringement or implied warranties of merchantability or fitness for a particular purpose or otherwise.

Neither party shall be liable for any indirect, incidental, special, consequential, or punitive damages arising out of or related to the service, or content therein including, with limitation, relating to computer viruses or use or inability to use the service or content; any errors, omissions, or defects in the service or content; losses from interruption, termination or failed operation of the service; or any breaches of security."

5. All other terms and conditions of the Agreement remain unchanged and in full force and effect.

IN WITNESS WHEREOF, the parties have hereunto set their hand this _____ day
of _____ 20____.

ATTEST:

CITY OF BILLINGS

BY _____
CITY CLERK

BY _____
MAYOR

APPROVED AS TO FORM

BOINGO WIRELESS

BY _____
CITY ATTORNEY

BY _____
ZACHARY STERNGOLD
VP BUSINESS DEVELOPMENT