




CITY OF LOVELAND
OFFICE OF THE CITY ATTORNEY

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Memorandum

TO: Teresa Andrews, City Clerk

FROM: Lana Horn 

RE: Colorado vNet Economic Incentive and Performance Agreement

DATE: March 31, 2008

Terry,

Enclosed for your records please find two fully executed originals of the referenced Agreement.

LMH
Enclosures

cc: Betsey Hale *with enclosure*

**COLORADO vNET ECONOMIC INCENTIVE
AND PERFORMANCE AGREEMENT**

This Colorado vNet Economic Incentive and Performance Agreement is made and entered into this 28th day of March, 2008, by and between THE CITY OF LOVELAND, COLORADO, a home rule municipality ("the City"); COLORADO VNET, LLC, a Colorado limited liability company ("Colorado vNet"); and WILLIAM BEIERWALTES and LYNDA BEIERWALTES (jointly "the Beierwaltes").

WHEREAS, Colorado vNet is a high-tech company offering digital audio and lighting products and solutions as well as custom, high-end building automation systems; and

WHEREAS, Colorado vNet currently has its offices and facilities in both Longmont and Loveland; and

WHEREAS, Colorado vNet wishes to consolidate its operations by locating all of its offices and facilities in a single new facility at a to-be-determined location in Loveland ("the New Facility"); and

WHEREAS, in the past year Colorado vNet has experienced significant growth in its sales and expects to add in 2008 another twenty to twenty-five (20-25) new full-time employees to its current seventy-eight (78) employees, together with expected additional job growth in future years, which could result in as many as four hundred and fifty (450) full-time total jobs at Colorado vNet by the end of 2012; and

WHEREAS, in order to so consolidate all of its operations at the New Facility, Colorado vNet will incur costs to remodel the New Facility and to relocate to the New Facility at a total estimated cost in excess of one million dollars (\$1,000,000.00); and

WHEREAS, Colorado vNet has requested from the City certain economic incentives to help defray some of Colorado vNet's costs to remodel and relocate to the New Facility in Loveland; and

WHEREAS, Colorado vNet has therefore asked the City to pay to Colorado vNet, in accordance with the terms and conditions of this Agreement, up to nine hundred thousand dollars (\$900,000.00) to be used by Colorado vNet to help pay for some of its estimated costs to remodel and to relocate to the New Facility; and

WHEREAS, on March 4, 2008, the City Council approved this Agreement in Resolution #R-23-2008 on the condition that the Beierwaltes guarantee the full performance of Colorado vNet's obligations under this Agreement; and

WHEREAS, the Beierwaltes, as the controlling principals of Colorado vNet, are willing to guarantee these obligations; and

WHEREAS, the Beierwaltes are therefore made parties to this Agreement for the sole purpose of guaranteeing Colorado vNet's obligations under this Agreement as set forth in Section 14. below; and

WHEREAS, by the adoption of Resolution #R-23-2008, the City Council has made a finding that the relocation of Colorado vNet's offices and facilities to the New Facility in Loveland and the remodeling of that New Facility will serve the public purposes of providing significant social and economic benefits to the citizens of Loveland, primarily in the form of jobs, economic development, and increased property tax revenues to the City and, therefore, the monetary incentives granted in this Agreement are in the best interests of the public and the City.

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

1. Economic Incentive Payment

The City agrees, as an economic incentive for Colorado vNet consolidating and relocating all of its operations to the New Facility, to reimburse Colorado vNet for the reasonable costs it incurs to remodel the New Facility and to relocate its operations to the New Facility in a total amount not to exceed nine hundred thousand dollars (\$900,000.00). This reimbursement obligation shall be subject to all of the following terms and conditions:

- A. To be eligible for reimbursement under this Agreement, Colorado vNet's costs shall be reasonable in amount and reasonably related to remodeling the New Facility or to relocating Colorado vNet's operations to the New Facility, which costs may include, without limitation, the following: (1) tenant improvements to the New Facility; (2) building permit fees and use taxes owed to the City by Colorado vNet or by Colorado vNet's remodeling contractor for the remodeling of the New Facility, but not to exceed the total amount of ten thousand dollars (\$10,000.00); (3) signage at the New Facility; (4) information technology infrastructure at the New Facility; (5) security system for the New Facility; (6) furnishings for the New Facility; (7) professional design services for the New Facility; and (8) moving furnishings and equipment from Colorado vNet's current facilities to the New Facility. However, the personal expenses of Colorado vNet's employees to relocate to Loveland or to the New Facility shall not be reimbursable under this Agreement.
- B. Before the City shall be obligated to reimburse Colorado vNet for its eligible costs under this Agreement, Colorado vNet must submit to the City Manager such documentation as may be required by the City Manager to determine that Colorado vNet has incurred and paid a cost eligible for reimbursement under this Agreement.

- C. Once the City Manager has received from Colorado vNet the required documentation establishing that the cost is eligible for reimbursement under this Agreement, the City shall reimburse Colorado vNet for such costs within twenty-one (21) days after receiving the documentation.
- D. In no event shall the City be obligated under this Agreement to reimburse Colorado vNet for a total cumulative amount of more than nine hundred thousand dollars (\$900,000.00).
- E. The City shall have the right to have its representatives physically inspect the New Facility both during the remodeling and after the remodeling is completed to confirm that the reimbursement amounts paid to Colorado vNet under this Agreement have in fact been used to remodel the New Facility or to relocate Colorado vNet's operations to the New Facility as contemplated under this Agreement. Colorado vNet's failure to allow such inspection or its use of any of the reimbursement funds for any purpose not authorized under this Agreement, shall each be deemed a material default under this Agreement.

2. Non-Performance Payback

The parties acknowledge that the primary goal of this Agreement is for the City to provide economic incentives to Colorado vNet so that Colorado vNet will bring new primary jobs to Loveland. Therefore, Colorado vNet agrees that if it does not accomplish this goal as contemplated in this Agreement, that it will pay to the City, in accordance with the following terms and conditions, some of the money paid to Colorado vNet under Section 1 of this Agreement, but not to exceed five hundred thousand dollars (\$500,000.00) together with any costs of collection and defaulting interest:

- A. On December 31, 2012, Colorado vNet must employ at least 250 employees at the New Facility. To be counted in this 250 minimum, each employee must satisfy the following applicable criteria:
 - (1) the employee's primary office or work location must be in the New Facility, except that up to fifteen percent (15%) of Colorado vNet's 250 employees may be field-deployed sales employees whose primary office is not in the New Facility; and
 - (2) the employee, whether considered an "employee" or an "independent contractor" for Internal Revenue Code purposes, must receive, or must have been offered and declined, Colorado vNet's full benefits package customarily offered to all of its employees.

Colorado vNet employees who satisfy both these criteria shall be hereinafter referred to collectively as "Qualified Employees" or individually as a "Qualified Employee." Notwithstanding the foregoing, the Beierwaltes shall not be counted

as Qualified Employees in calculating the number of Colorado vNet Qualified Employees under this paragraph A.

B. On December 31, 2012, the average annual "total compensation," as "total compensation" is hereafter defined, provided by Colorado vNet to its Qualified Employees must be at least sixty-five thousand dollars (\$65,000.00). As used in this Agreement and in calculating this average, "total compensation" shall be defined to include only the annual amounts paid by Colorado vNet to or for the benefit of its Qualified Employees related to gross wages or salary, the employer's share of FICA, medical insurance, life insurance, and long-term disability insurance. However, any total compensation paid by Colorado vNet to the Beierwaltes shall not be included in calculating the average annual total compensation under this paragraph B. or in paragraph C. below.

C. If Colorado vNet fails to satisfy any of the requirements in paragraphs A. or B. of this Section 2., it shall pay to the City on or before February 1, 2013, the sum of money as hereafter determined:

(1) if on December 31, 2012, Colorado vNet does not employ at least 250 Qualified Employees, but Colorado vNet's average annual total compensation for its Qualified Employees as calculated pursuant to paragraph B. of this Section is at least sixty-five thousand dollars (\$65,000.00), Colorado vNet shall pay to the City two thousand dollars (\$2,000.00) for each Qualified Employee short of the 250 minimum. By way of example, but not by way of limitation, if Colorado vNet employs only 247 Qualified Employees and the average annual total compensation of those 247 is at least sixty-five thousand dollars (\$65,000.00), Colorado vNet shall pay to the City six thousand dollars (\$6,000.00), being two thousand dollars (\$2,000.00) for each of the three Qualified Employees short of 250; or

(2) if on December 31, 2012, Colorado vNet does employ at least 250 Qualified Employees but Colorado vNet's average annual total compensation for its top 250 highest compensated Qualified Employees as calculated pursuant to paragraph B. of this Section is less than sixty-five thousand dollars (\$65,000.00), Colorado vNet shall pay to the City two thousand dollars (\$2,000.00) for each of the lowest compensated Qualified Employees of the 250 that must be eliminated from the calculation of Colorado vNet's average annual total compensation in order for that average to equal sixty-five thousand dollars (\$65,000.00) or more. By way of example, but not by way of limitation, if the three lowest compensated Qualified Employees of the 250 Qualified Employees are required to be eliminated from the calculation of the average annual total compensation in order for the average to equal sixty-five thousand dollars (\$65,000.00) or more for the remaining 247 Qualified Employees, Colorado vNet shall pay to the City six thousand dollars (\$6,000.00), being two thousand

dollars (\$2,000.00) for each of the three lowest compensated Qualified Employees eliminated from the average calculation; or

- (3) if on December 31, 2012, Colorado vNet does not employ at least 250 Qualified Employees and the average annual total compensation for the Qualified Employees that are employed on that date is less than sixty-five thousand dollars (\$65,000.00), Colorado vNet shall pay to the City two thousand dollars (\$2,000.00) for each Qualified Employee short of 250 and two thousand dollars (\$2,000.00) for each of Colorado vNet's lowest compensated Qualified Employees that must be eliminated from the calculation of Colorado vNet's average annual total compensation in order for the average to equal sixty-five thousand dollars (\$65,000.00) or more. By way of example, but not by way of limitation, if Colorado vNet employs only 247 Qualified Employees and the three lowest compensated Qualified Employees must be eliminated from the average calculation in order for the average annual total compensation to equal sixty-five thousand dollars (\$65,000.00) or more, Colorado vNet shall pay to the City twelve thousand dollars (\$12,000.00), being two thousand dollars (\$2,000.00) for each of the three Qualified Employees less than 250 and two thousand dollars (\$2,000.00) for each of the three lowest compensated Qualified Employees eliminated from the average calculation.

D. Colorado vNet shall file with the City on or before January 15, 2013, such documentation as the City Manager may require to verify the number of Colorado vNet's Qualified Employees employed on December 31, 2012, and to verify Colorado vNet's average annual total compensation on December 31, 2012, as defined in paragraph B. of this Section. However, the City shall also have the right at any time after January 15, 2013 to hire the accounting firm of Swanhorst & Company of Greenwood Village, Colorado, or such other accounting firm mutually agreed upon by the parties, to inspect and audit the books and records of Colorado vNet to confirm the number of Qualified Employees and to confirm Colorado vNet's average annual total compensation to be calculated pursuant to paragraph B. of this Section. Colorado vNet agrees to pay for the cost of any such audit. The City agrees that it will consider all the information it obtains or that its auditor obtains from Colorado vNet in any such audit to be confidential commercial and proprietary and the City agrees to keep such information confidential to the extent authorized under the Colorado Open Records Act. The City also agrees that the auditor shall not be allowed to remove any original payroll records from Colorado vNet's possession or to provide the City with copies of such records without Colorado vNet's consent, except that the auditor may provide the City with a written report of the results of its audit. Colorado vNet agrees that its failure to allow the City or the accounting firm to so inspect and audit Colorado vNet's records or to pay for the cost of the audit shall each be deemed a material default under this Agreement.

E. In addition to the foregoing, Colorado vNet agrees that its Chief Executive Officer and its Chief Financial Officer shall meet semi-annually with the City's

Business Development Manager and provide the City's Business Development Manager with up-to-date information concerning Colorado vNet's number of Qualified Employees and Colorado vNet's general overall performance, which information may be shared with the Loveland City Council.

3. Multi-Year Fiscal Obligation

The City's obligations to pay directly or reimburse Colorado vNet for the eligible reimbursement costs as provided in Section 1. above, may extend beyond December 31, 2008, such continuing obligation under this Agreement is considered a multi-year fiscal obligation under Article X, Section 20 of the Colorado Constitution and the City's Charter Section 11-6. As such, it is a multi-year fiscal obligation subject to annual appropriation by the Loveland City Council. The City shall have no obligation for the reimbursement of the expenses as provided in Section 1. above if reimbursement is being sought or to be paid on or after December 31, 2008, if the necessary appropriation has not been made by the City Council to authorize such payment. However, the City agrees that the City Manager shall include in the annual budget and appropriation ordinances for 2009 and subsequent years when needed for City Council's consideration the necessary appropriation to pay up to a total of nine hundred thousand dollars (\$900,000.00) for the reimbursement of eligible expenses as provided in Section 1. above.

4. Remedies upon Default

Default by Colorado vNet shall be deemed to have occurred under this Agreement upon the occurrence of any one of the following events:

- (a) application for appointment of a receiver for any of Colorado vNet's assets;
- (b) commencement of any proceeding under any bankruptcy or insolvency laws by or against Colorado vNet; or
- (c) the failure of Colorado vNet to timely make any payment required in Section 2. above.

Upon the occurrence of any one or more of these events of default and the failure by Colorado vNet to cure such default within thirty (30) days of receiving written notice from the City of the default, the City may pursue any and all remedies available to it under the law or in equity to collect any or all of the amounts owed to it under this Agreement including, without limitation, by judicially enforcing the Beierwaltes' personal guarantee under Section 14. of this Agreement.

5. Expenses and Costs of Collection

In the event that Colorado vNet is in default under this Agreement and, as a result, the City pursues collection efforts through suit or otherwise, Colorado vNet agrees to pay all

of the City's reasonable expenses and costs of collection incurred by the City in connection with any such collection efforts and/or suit, in addition to the other amounts owed under this Agreement, which expenses and costs of collection shall include, without limitation, the following: attorneys fees; receiver's fees and costs; expert witness fees; deposition costs; filing fees; the cost of mailing notices and other documents; the cost of serving process, notice and other documents; and copy costs.

6. Defaulting Interest

Upon Colorado vNet's default under this Agreement to timely pay any or all of the amounts owed to the City by Colorado vNet under this Agreement, which amounts shall include, without limitation, the costs and expenses of collection as described in Section 6. above, such amounts in default shall bear interest at the defaulting rate of eight percent (8%) per annum compounded annually from the date of default until paid in full.

7. Applicable Law and Venue

This Agreement shall be governed by and enforced in accordance with the laws of the State of Colorado. In addition, the hereto acknowledge that there are legal constraints imposed upon the City by the constitutions, statutes, and rules and regulations of the State of Colorado and of the United States, and imposed upon the City by its Charter and Code, and that, subject to such constraints, the parties intend to carry out the terms and conditions of this Agreement. Notwithstanding any other provisions of this Agreement to the contrary, in no event shall any of the parties hereto exercise any power or take any action which shall be prohibited by applicable law. Whenever possible, each provision of this Agreement shall be interpreted in such a manner so as to be effective and valid under applicable law. Venue for any judicial proceeding concerning this Agreement shall be in the District Court for Larimer County, Colorado.

8. Time is of the Essence

Time shall be of the essence for the performance of all obligations under this Agreement.

9. Assignment

Colorado vNet and the Beierwaltes shall not assign or transfer any or all of their interests, rights or obligations under this Agreement without the prior written consent of the City.

10. Construction

This Agreement shall be construed according to its fair meaning and as if it was prepared by all of the parties hereto and shall be deemed to be and contain the entire Agreement between the parties hereto. There shall be deemed to be no other terms, conditions, promises, understandings, statements or representations, expressed or implied, concerning this Agreement, unless set forth in writing and signed by the City and Colorado vNet.

11. Headings

Paragraph headings used in this Agreement are used for convenience of reference only and shall in no way define, control or affect the meaning or interpretation of any provision of this Agreement.

12. Notices

Any written notice given under this Agreement and all other correspondence between the parties shall be directed to the following and shall be deemed received when hand-delivered or three (3) days after being sent by certified mail, return receipt requested, to the following addresses:

If to the City: Don F. Williams
City Manager
City of Loveland
500 East Third Street, Suite 330
Loveland, CO 80537

With Copy to: John R. Duval
City Attorney
City of Loveland
500 East Third Street, Suite 330
Loveland, CO 80537

If to Colorado vNet: William Beierwaltes
255 East Sixth Street
Loveland, CO 80537

With a copy to: Rich Gabriel
Holme Roberts and Owen
1700 Lincoln, Suite 4100
Denver, CO 80203

If to the Beierwaltes: William and Lynda Beierwaltes
1907 Gail Court
Loveland, CO 80537

Any party hereto may at any time designate a different address or person receiving notice by so informing the other parties in writing.

13. Binding Effect

This Agreement shall be binding upon and, except as otherwise provided in this Agreement, shall inure to the benefit of the personal representatives, estates, heirs, successors and assigns of the respective parties hereto.

14. The Beierwaltes' Guarantee

- A. The Beierwaltes unconditionally guarantee to the City, and to the City's successors and assigns, Colorado vNet's full and punctual performance of any and all of its obligations under this Agreement. The Beierwaltes waive notice of any breach or default by Colorado vNet under this Agreement. If Colorado vNet defaults in the performance of its obligations under this Agreement, upon the City's written request, the Beierwaltes shall promptly perform all such obligations.
- B. The Beierwaltes agree that any act of the City consisting of a waiver of any of the terms and conditions of this Agreement, or the giving of any consent to any matter or thing related to this Agreement, or the granting of any indulgences or extensions of time to Colorado vNet, may be done without prior notice to the Beierwaltes and without affecting the Beierwaltes' obligations under this Section 14.
- C. The Beierwaltes agree that their obligations under this Section 14 shall not be released by any modification of this Agreement and, in case of any such modification, that their liability under this Section 14. shall be deemed modified in accordance with the terms of any such modification.
- D. The Beierwaltes agree that their liability under this Section 14 shall not be affected by: (1) the release or discharge of Colorado vNet from its obligations under this Agreement in any creditors', receivership, bankruptcy, or other proceeding, or the commencement or pendency of any such proceeding; (2) the impairment, limitation, or modification of the liability of Colorado vNet or of the estate of Colorado vNet in bankruptcy, or of any remedy for the enforcement of Colorado vNet's liability under this Agreement, resulting either from the operation of any present or future bankruptcy code or other statute or from the decision of any court; (3) the rejection or disaffirmance of this Agreement in any such proceeding; (4) the assignment or transfer of this Agreement by Colorado vNet or by operation of law; (5) any disability or other defense of Colorado vNet; or (6) the cessation from any cause whatsoever of the liability of Colorado vNet under this Agreement.
- E. Until all of Colorado vNet's obligations under this Agreement are fully performed, the Beierwaltes agree to subordinate any liability or indebtedness of Colorado vNet held by the Beierwaltes to Colorado vNet's obligations to the City under this Agreement.
- F. The Beierwaltes agree that their obligations under this Section 14. may not be discharged or terminated orally or in any manner other than by agreement in writing signed by both of the Beierwaltes and the City.

- G. The Beierwaltes agree that they are primarily, jointly, and severally liable and obligated under this Agreement and that the City may, at its option, proceed against any one or both of the Beierwaltes for collection under this Agreement without proceeding against Colorado vNet or against anyone else obligated under this Agreement.
- H. The Beierwaltes agree to pay to the City on demand all of the City's reasonable attorneys fees and costs incurred by the City in connection with its enforcement of the Beierwaltes' obligations under this Section 14. and this Agreement.
- I. The Beierwaltes agree that their obligations under this Section 14. shall apply and extend to the obligations and agreements under this Agreement of any and all successors and assigns of Colorado vNet and such obligations and agreements shall inure to the benefit of the City's successors and assigns.
- J. The Beierwaltes agree that their obligations under this Section 14. shall be binding upon the Beierwaltes and their respective personal representatives, estates and heirs.

15. Severability

If any provision of this Agreement, or the application of such provision to any person, entity or circumstance, shall be held invalid, the remainder of this Agreement, or the application of such provision to persons, entities or circumstances other than those in which it was held invalid, shall not be affected.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date and year first above written.

COLORADO VNET, LLC, a Colorado limited liability company

By: W. T. Beierwaltes
William Beierwaltes, Member

By: Lynda Beierwaltes
Lynda Beierwaltes, General Manager and Member

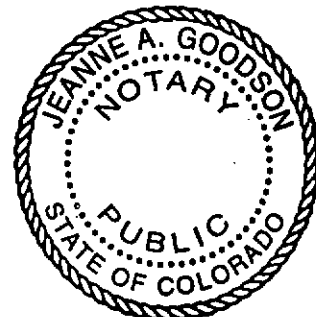
STATE OF COLORADO)
) ss.
County of Larimer)

The foregoing instrument was acknowledged before me this 28 day of March, 2008 by William Beierwaltes as Member and Lynda Beierwaltes as General Manager and Member of Colorado vNet, LLC, a Colorado limited liability company. Witness my hand and official seal. My commission expires: 8/27/2010

Jeanne A. Goodson
Notary Public

(SEAL)

W.T. Beierwaltes
William Beierwaltes, individually
Lynda Beierwaltes
Lynda Beierwaltes, individually



My Commission Expires 08/27/2008
10

STATE OF COLORADO)
) ss.
County of Larimer)

The foregoing instrument was acknowledged before me this 28 day of March, 2008 by William Beierwaltes and Lynda Beierwaltes.

Witness my hand and official seal. My commission expires: 8/27/2010



Jeanne A. Goodson
Notary Public

CITY OF LOVELAND, COLORADO

By: [Signature]
Mayor

ATTEST:

Teresa D. Andrews
City Clerk

Miss Hubert

STATE OF COLORADO)
County of Larimer) ss.

Witness my hand and official seal. My commission expires: 10/23/2010

Mary Skirworth
Notary Public

