

RESOLUTION NO. 25 - 2018

Moved by: _____

A Resolution authorizing the City of Harrisburg to enter into a Memorandum of Agreement with Smart City Media, LLC for the purpose of implementing a media program consisting of approximately twenty-five (25) Digital Kiosks which will be placed in designated areas in the City of Harrisburg.

WHEREAS, the City of Harrisburg recognizes the need to provide citizens and visitors with accessible, location-based information throughout the City; and

WHEREAS, Smart City Media ("SCM") aims to help make cities smarter, safer and better connected by using its CityPost smart media platform to deliver helpful Harrisburg-focused content through interactive Digital Kiosks and a mobile application; and

WHEREAS, SCM will provide, install and deploy up to twenty-five (25) kiosks units in select locations in Harrisburg at no cost to the City; and

WHEREAS, a copy of the proposed Memorandum of Agreement and project details are attached and incorporated as "Exhibit A."

NOW, THEREFORE, BE IT AND IT IS HEREBY RESOLVED, BY THE COUNCIL OF THE CITY OF HARRISBURG, that the City of Harrisburg is authorized to enter into a Memorandum of Agreement with Smart City Media, LLC for the purpose of implementing a media program throughout the City of Harrisburg.

BE IT FURTHER RESOLVED that the Mayor, City Controller and other appropriate City officials are authorized and directed to take all steps necessary to further effectuate the purpose of this Resolution.

I second this resolution: _____

Wanda R. D. Williams

Passed by City Council April 10, 2018

Wanda R. D. Williams
President of City Council

Attest [Signature]
City Clerk

- Approved
- Returned to City Council with objections

YEAS		NAYS
	MR. ALLATT	
	MS. DANIELS	
	MS. GREEN	
	MR. JOHNSON	
	MR. MADSEN	<i>Excuse</i>
	MR. MAJORS	
	MS. WILLIAMS	
Yeas	<u>6</u>	
Nays	<u>0</u>	

E x h i b i t “A”

MEMORANDUM OF AGREEMENT

This Memorandum of Agreement ("MoA") is entered into as of the effective date of the final execution below (the "Effective Date") by and between the City of Harrisburg, Pennsylvania ("Harrisburg"), and Smart City Media ("SCM"), LLC of 54 West 40th St., New York, New York 10018 ("SCM").

RECITALS

- (i) WHEREAS, SCM's mission is to help make cities smarter, safer and better connected by using its proprietary CityPost smart media platform to deliver helpful location-based information through a public-facing network powered by accessible Wi-Fi, curated "Smart" outdoor interactive screens ("Digital Kiosks"), mobile beacons and an easy-to-use mobile application; This platform is a union between the strategic resources in Harrisburg and the citizens, who act both as inputs and real users and drivers of the platform
- (ii) WHEREAS, Harrisburg wishes to implement a program of approximately twenty-five (25) Digital Kiosks and affiliated infrastructure (the "Program");
- (iii) WHEREAS, the parties acknowledge that SCM's contributions will add value to Harrisburg and wish to commemorate their mutual understanding relative to the terms and conditions on which SCM will contribute to and be compensated for its services to the collaboration agreement.
- (iv) NOW, THEREFORE, FOR GOOD AND ADEQUATE CONSIDERATION, the receipt of which is hereby acknowledged, Harrisburg and SCM agree as follows:

ARTICLE I

SCM RESPONSIBILITIES

1.1. SCM will provide, through its CityPost brand, a digital smart media channel that broadcasts "Harrisburg" focused content to Digital Kiosks, CityPost's mobile application and SCM Wi-Fi hotspots. Harrisburg hereby acknowledges and agrees that, under the scope of this MoA, it will not pursue or engage with any competing digital smart media channel provider or concept comparable to the services and products provided by SCM during the term of this MoA so long as SCM is not in default under the terms of this MoA.

1.2. SCM will develop partnerships and build ecosystems to provide the systems required to launch, manage and monetize a successful digital smart media channel. SCM will also augment citizen engagement by deploying mobile beacons throughout key strategic Harrisburg locations (both public and private, with all appropriate approvals and permissions) and will analyze data and provide Harrisburg with periodic reports of relevant information, oversee advertising sales and use its best efforts to expand the system's footprint after the Program sites are launched to increase public engagement and monetization.

1.3. SCM shall provide local curation of content and advertising to ensure content and advertising are in compliance with the following provisions:

- a) Content containing any of the following characteristics shall not be permitted:
 - Obscene or indecent;
 - Discriminatory;
 - Religious;
 - Political content promoting or opposing a political party; the election of any candidate or group of candidates for federal, state or local government offices; and initiatives, referendums and other ballot measures.

- b) Advertising that depicts or promotes the following products, services or other materials shall not be permitted:
 - Tobacco products;
 - Firearms, including advertising promoting or soliciting the sale, rental, distribution or availability of firearms or firearms-related products;
 - Adult entertainment or establishments including, but not limited to, adult book or video stores, adult internet sites, adult telephone services, and adult escort services;
 - False or misleading material that the advertiser knows or should know is false, fraudulent, misleading, deceptive, or would constitute a tort of defamation or invasion of privacy;
 - Illegal activity including any advertising that promotes any activity or product that is illegal under federal, state or local law; or any advertising that contains material that is an infringement of copyright, trademark, or is otherwise unlawful or illegal;
 - Profanity and violence, including advertising that contains any profane language or portrays images or descriptions of graphic violence, or intentional infliction of pain or violent action towards or upon a person or animal.

For purposes of this Section 1.3, the term “advertising” or “content” shall mean any printed matter, audio or electronic display including words, pictures, photographs, symbols, graphics or visual images, in connection with the promotion or solicitation of sale or use of a product or services.

The City of Harrisburg shall reserve the right to review all requests for advertisement on the kiosks and to reject any advertisement not in conformity with the policy outlined herein above.

1.4. SCM’s responsibilities with respect to hardware required for its services are as follows:

- a) To facilitate involvement of, or serve as, the funding party, which will retain title to all hardware and locations utilized in creating and maintaining the digital smart media channel.

- b) To manage third party development and delivery of hardware.

c) To deploy hardware that is community-specific and approved by Public Design and may be customized down to the neighborhood level, with designs for Harrisburg's deployment, based on location.

d) To install and deploy up to twenty-five (25) outdoor kiosk units in select locations in Harrisburg. If desired, SCM will work with Harrisburg in planning and implementing future deployment phases and to help to define expansion opportunities within Harrisburg.

e) To comply with all permitting rules, regulations and insurance requirements of Harrisburg and/or other third parties for the placement of objects in the public right-of-way.

f) To provide public Wi-Fi at all kiosk locations, and use of the network (including non-kiosk beacons) to facilitate public Wi-Fi that will be accessible by all.

g) To support IoT ("Internet of Things") sensor deployments to assist and supplement any Harrisburg Smart City initiatives.

h) To provide CityPost to Harrisburg as a platform it may use for integration with other Smart City and IoT solutions.

i) To allow, where appropriate, placement of small cell technology on SCM hardware, and to follow any guidelines appropriate for management of that program.

j) To insure all hardware units.

k) To support, fund and manage local third party maintenance company to clean and repair kiosks on a regular basis.

l) To replace any screen that has been damaged and is no longer operational.

m) To deploy mobile beacons in key strategic locations with broadcasts that meet Harrisburg's approval.

1.5. SCM's responsibilities with respect to the development and maintenance of Smart Media (software and content) are as follows:

a) To develop and manage all content on the kiosk screen, and manage a local media / content / creative design operation for this purpose (kiosks shall be interactive, and include unique content, and not just advertising).

b) To develop and manage the CityPost mobile app.

c) To co-own all data collected from Digital Kiosks and mobile applications with Harrisburg (including, but not limited to, metrics, reports and video streams), and to provide all data collected by hardware, software and mobile applications to Harrisburg at no cost and on a regular basis (collectively, such data shall be referred to as the "Collected Data"). SCM hereby certifies that it will not (and it will cause its employees, agents, sub-contractors and other third party used in connection with the Program not to), utilize or monetize any such Collected Data without the express prior written consent of Harrisburg.

d) To work with media sales teams to sell advertising inventory to corporate sponsors as well as local businesses and service providers.

e) To maintain all software associated with the digital smart media channel platform, retaining ownership of all software that has been specifically developed and designed for its broadcasts in Harrisburg.

f) To provide two-way public safety communications (e.g., 911 access, amber alerts), tools for small business, ADA-approved accessibility, and interactive multilingual content for tourists and residents in over a dozen languages.

g) As part of the master hardware listing referenced in Section 1.4 above, SCM shall identify whether each software or mobile application component is capable of collecting Personally Identifiable Information ("PII") on any user. SCM hereby certifies that it will not (and it will cause its employees, agents, sub-contractors and other third party used in connection with the Program not to), utilize or monetize any such PII without the express prior written consent of Harrisburg.

h) To immediately notify Harrisburg of any unauthorized breach or disclosure of Collected Data and/or PII by SCM, its employees, agents, sub-contractors or other third parties used in connection with the Program and to work with Harrisburg to diminish the impact of such disclosure and/or remedy the situation.

1.6. SCM may use sub-contractors and other third parties under the MoA to perform SCM's services under this MoA provided, however, that SCM shall be fully liable for any and all actions of such sub-contractors and third parties and, provided, further, that SCM shall cause its sub-contractors and third parties to comply with all the terms, conditions and obligations of SCM under this MoA. SCM shall notify Harrisburg of all sub-contractors or third parties used in providing SCM services under this MoA. Harrisburg shall, at its discretion, have the right to object to or request the removal of, any sub-contractor or third party providing SCM services under the MoA by providing notice to SCM and SCM hereby agrees to abide by Harrisburg's decision.

ARTICLE II

HARRISBURG RESPONSIBILITIES

2.1. Harrisburg's responsibilities with respect to installation and maintenance of a digital smart media channel that broadcasts Harrisburg-focused content are as follows:

- a) To commit to a minimum ten-year (10) term, with SCM's option to renew for a five-year (5) term.
- b) To assist SCM in identifying and securing all kiosk placement locations and to use its best efforts in working with SCM and Harrisburg for all required permits or licenses for the placement of objects in the public right-of way.
- c) To provide advice to SCM on obtaining power and fiber connectivity for the Program, which agreements and cost of power consumption used, electrical and network connectivity, and all other costs arising from the Program shall be solely the responsibility of SCM.
- d) To provide SCM input on acquiring network corporate sponsorships.
- e) To provide SCM access to data that is deemed to be "open data" (i.e., data that is owned by Harrisburg or data that is publicly available by third party organizations) for use in connection with the Program.
- f) To provide SCM any needed access to additional digital information Harrisburg deems of value for use with the Program that may not initially be considered "open data".
- g) To provide SCM marketing and communication advice and support for the Program.
- h) To appoint a primary contact person at Harrisburg for questions and/or issues related to the Program; provided, however, that any time and/or services provided by Harrisburg or its employees under this MoA shall be at the sole and exclusive discretion of Harrisburg.
- i) To help in coordinating efforts with other related private or public groups or interested parties (to be defined by Harrisburg).
- j) To support overall CityPost expansion plans within the Harrisburg metro area, with the understanding that any such expansion would require a new agreement or amendment to this MoA.

k) Should Harrisburg or any other governmental jurisdiction require a Digital Kiosk to be moved from the right-of-way location for construction or some unforeseen circumstance for a temporary period (defined as four (4) weeks or less), Harrisburg shall inform SCM and SCM shall have the Digital Kiosk removed within the time frame provided by Harrisburg, stored temporarily and reinstalled. Should, however, the need to modify and/or change location(s) be deemed to be longer than four (4) weeks, Harrisburg will collaborate with SCM to find a replacement location that is comparable in terms of pedestrian traffic.

l) SCM and Harrisburg hereby acknowledge and agree that Harrisburg is not required to provide any financial resources to the Program. SCM shall be liable for all costs and expense associated with the Program.

ARTICLE III ADVERTISING REVENUE

3.1. SCM will provide Harrisburg or related entities designated by Harrisburg with twenty-five percent (25%) of the net advertising revenue derived from the operation of the network throughout the term of this Agreement and any agreement hereafter executed to document the parties understandings. For purposes of this provision, the term "net advertising revenue" shall be arrived at after deducting all capital and operating costs, including hardware manufacturing/installing/maintenance, software development and maintenance, media content development and maintenance, hardware insurance, and sales commissions going to parties that sell advertising. With each payment, SCM shall provide sufficient financial documentation (income statement or similar document) which clearly details the income and expenses related to advertising revenue. Harrisburg may request such additional information as reasonable necessary to confirm the accuracy of the payment or the expenses. Payments shall be made no later than THIRTY (30) days following SCM receipt of payment from an Advertiser or Ad Sales Network.

ARTICLE IV TERM AND TERMINATION

4.1. This MoA shall commence as of the date of the final execution below, which shall be considered the Effective Date, and, unless terminated pursuant to the terms of this MoA, shall continue on for ten (10) years (the "Initial Term"). Unless otherwise terminated pursuant to the terms of this MoA, SCM may elect to renew this MoA for five (5) additional one (1) year terms (each a "Renewal Term", and together with the Initial Term, each a "Term" and collectively the "Term") by delivering to the Executive Director of Harrisburg a written notice of such election at least ninety (90) days prior to the end of the then applicable Term.

4.2. After the Effective Date and subject to Section 4.4, this MoA may be terminated (i) by written notice of either party (the "Non-Breaching Party"), but only if the other party breaches any provision of this MoA and fails to cure such breach within sixty (60) days following delivery of written notice from the Non-Breaching Party specifying the breach in sufficient detail to permit the Breaching Party to cure such breach, (ii) by written notice to SCM by Harrisburg if the License is not executed by Harrisburg, (iii) by written notice to SCM if the License Agreement is terminated; or (iv) unless otherwise agreed to by SCM and Harrisburg, by written notice to SCM if the Program is not fully operational within six (6) months from the date of the License Agreement. For purposes for this Section 4.2, SCM shall not be considered to be in breach of this Agreement in the event of a Force Majeure (as defined in Section 4.4).

4.3. Upon termination of this MoA for any reason: (i) SCM shall be required to remove all hardware and equipment within thirty days of such termination (ii) SCM shall provide Harrisburg a final accounting of all advertising sales and expenses up to the date of termination; (iii) SCM shall pay Harrisburg any amounts due for advertising revenue under Section 3.1 up to the date of termination; (iv) SCM shall provide Harrisburg any and all copies of Collected Data up through the date of termination; (v) within 30 days from the date of termination, SCM shall provide Harrisburg with financial statements for the Project (as of the termination date), (vi) the license set forth in Section 2.1(k) shall terminate as of the date of termination of this MoA; and (vii) the provisions set forth with respect to the use of PII and Collected Data shall survive and remain in full force and effect after the termination of this MoA.

4.4. In no event shall SCM be responsible or liable for any failure or delay in the performance of its obligations under this MoA arising out of or caused by, directly or indirectly, forces beyond its control, including, without limitation, strikes, work stoppages, accidents, acts of war or terrorism, civil or military disturbances, nuclear or natural catastrophes or acts of God, global economic conditions or governmental involvement or regulations that prevent SCM from fully deploying an operation system within six (6) month from the date of this MoA (each, a "Force Majeure"); it being understood that SCM shall use reasonable efforts which are consistent with accepted practices in its industry to resume performance as soon as practicable under the circumstances.

ARTICLE V ANNUAL AND PERIODIC REVIEWS

5.1. On or before March 1 of each calendar year, SCM shall provide to Harrisburg audited financial reports for the immediate prior calendar year, as well as metric reports monitoring the usage and efficacy of the Program. SCM shall make human and other resources available to Harrisburg for reporting to the Harrisburg Board of Directors regarding the Program's finances and performance for the immediate prior calendar year.

ARTICLE VI GOVERNANCE

6.1. In connection with the direct performance of this MoA, SCM shall ensure that personnel actions with reference to such matters as recruiting, hiring, compensation, benefits, transfers, promotions,

layoffs, recall from layoffs, training, education, and social and recreation programs for all SCM employees and sub-contractors shall be administered without regard to race, sex, sexual orientation and gender identity, marital status, religion, age 40 and over, color, national origin, because the person is a qualified individual with a disability, or because the individual is a smoker or nonsmoker. In this regard, SCM shall comply with all applicable laws prohibiting discrimination based on race, sex, sexual orientation and gender identity, marital status, religion, age 40 and over, color, race, national origin, disability or because the individual is a smoker or nonsmoker.

ARTICLE VII REPRESENTATION OF PARTIES

Each party hereby represents and warrants to the other party that:

7.1. The execution, delivery and performance by such party of this MoA does not and will not breach or violate any of the provisions of, and will not result in default by such party under, any agreement, instrument or document to which such party is a party or by which it is bound;

7.2. The execution, delivery and performance by such party of this MoA:

a) has been duly authorized by all requisite corporate actions (if applicable),

b) does not and will not violate or conflict with the articles of incorporation, by-laws (as applicable) or other organizational documents (if applicable) of such party, or any judgement, degree, order, law or other governmental requirement binding on such party, and

c) does not and will not breach or violate any of the provisions of, and will not result in default by such party under, any other agreement, instrument or document to which it is a party or by which it is bound;

7.3. No notice to consent or approval of any governmental body or authority or other third-party of any kind whatsoever is required in connection with the execution, delivery or performance by such party of this MoA, with the exception of any approvals required by Harrisburg;

7.4. This MoA is a legal, valid and binding obligations of such party, enforceable against such party in accordance with the terms hereof and thereof, except as enforceability may be limited by bankruptcy or other similar laws affecting the rights of creditors generally or by general principles of equity;

7.5. There is no pending or threatened action or proceeding against or affecting such party before any

court, governmental agency, or arbiter which may, in any case or in the aggregate, materially and adversely affect the ability of such party to perform its obligations under this MoA; and

7.6. That SCM is an independent Contractor and is not to be considered an employee or affiliate of Harrisburg, or assume any right, privilege or duties of an employee or affiliated entity.

ARTICLE VIII GENERAL TERMS AND CONDITIONS

8.1. The parties agree that if any clause or provision of this MoA is declared to be invalid or unenforceable by a final decision of any court of competent jurisdiction, it is the intent of the parties that the remainder of the MoA shall not be affected thereby. The parties shall amend this MoA to replace such invalid or unenforceable clause or provision with a legal, valid and enforceable provision to effect the purposes of this MoA.

8.2. SCM shall indemnify, hold harmless, and defend Harrisburg Government, its elected and appointed officials, officers, directors, managers, employees, agents, affiliates, successors and permittee assigns in interest from all claims, damages, losses and expenses including attorney's fees, arising out of or resulting, directly or indirectly, from SMC's (or SCM's sub-contractors or other third parties used to provide SCM services under this MoA) performance or breach of the contract provided that such claim, damage, loss, or expense is: (1) attributable to personal injury, body injury, sickness, death, or to injury to or destruction of property, including the loss of use resulting therefrom, or breach of contract, and (2) not caused by the negligent act or omission or willful misconduct of Harrisburg or its elected and appointed officials and employees acting within the scope of their employment. This Hold Harmless and Indemnification Clause shall in no way be limited by any financial responsibility or insurance requirements and shall survive the termination of this MoA.

8.3. Notwithstanding anything to the contrary contained in this MoA, no director, officer or employee of Harrisburg shall have any personal obligation or liability hereunder, and SCM shall not seek to assert any claim, or enforce any of its rights hereunder, against any Harrisburg director, officer or employee.

8.4. This MoA supersedes all prior understandings and agreements of the parties and contains the entire agreement of the parties. This MoA may not be amended except by a written amendment signed by both parties, nor may rights be waived except by an instrument in writing signed by the party charged with such waiver.

8.5. This MoA does not and shall not be deemed or construed to confer upon or grant to any third party or parties the right to claim damages or bring any suit, action or other proceeding against either Harrisburg or SCM because of any breach in this MoA or because of any of the terms, covenants, agreements and conditions contained in this MoA.

8.6. Each party covenants and agrees that it will not assign or transfer its rights, nor delegate any duties under this MoA, either in whole or in part, without first obtaining the written consent of the other party.

Any attempt by either party to assign or transfer its rights or delegate its duties without such prior written consent shall not be binding on the other party and shall, at the option of the other party, immediately and automatically terminate this MoA and all rights of the other party hereunder.

8.7. SCM shall maintain throughout the Term, and produce evidence upon execution of this MoA and on an annual basis, of insurance coverage not less than the following:

- a) Workers' Compensation at the statutory requirement set by the State of Pennsylvania;
- b) Disability Coverage at the statutory requirement set by the State of Pennsylvania;
- c) General Liability/Property Damage at \$2,000,000.00 per occurrence and \$2,000,000.00 aggregate bodily and property damage;
- d) Hired and non-owned Automobile liability at \$2,000,000.00 combined single-limit policy;
- e) Cyber Liability Insurance at \$1,000,000.00 for any one claim and in the aggregate, to include:
 - Security & Privacy Liability
 - Multimedia & Intellectual Property Liability
 - Technology Services
 - Miscellaneous Professional Services
 - Network Interruption and Recovery
 - Event Support Expenses
 - Privacy Regulation Defense & Penalties
 - Network Extortion
 - Electronic Theft, Computer Fraud & Telecommunications Fraud
 - Social Engineering Fraud
 - Reputational Damage
 - Notification Expense
 - PCI Fines; and

(f) Insurance on SCM's hardware and assets, as set forth in Section 1.4(j). Each such policy shall name Harrisburg, and each of their respective elected and appointed officials, officers, directors, managers, employees, agents, affiliates, successors and permitted assigns (collectively, the "Indemnified Party") as additional insured parties for general liability, property damage, automobile liability and cyber liability, and shall state that all such coverage shall be primary to any other insurance coverage held by the Indemnified Party. SCM will provide Harrisburg a Certificate of Insurance ("COI") naming each Indemnified Party separately within thirty (30) days of execution of this MoA and SCM will provide for Harrisburg to receive sixty (60) days' notice in the event of termination, cancellation, or non-renewal of such policies.

8.8. All notices given under this MoA to Harrisburg shall be delivered to Harrisburg and its legal counsel by first class mail, at:

Wayne S. Martin (or someone else?)
City Engineer
City of Harrisburg, PA
123 Walnut Street
Harrisburg, PA 17101-1618

All notices given under this MoA to SCM shall be delivered to SCM and its legal counsel by first class mail, postage prepaid, or by courier, at:

Smart City Media, LLC
54 West 40th Street
New York, NY 10018
Attn: Mike Mainthow

Either party may designate, in writing, a different address or different person to whom notices must be sent.

8.9. This MoA shall be governed by and construed in accordance with the laws of the State of Pennsylvania. All claims, actions, proceedings, and lawsuits brought in connection with, arising out of, related to, or seeking enforcement of this MoA shall be brought in before a court of local jurisdiction in Harrisburg, Pennsylvania.

8.10. This MoA shall be binding on and inure to the benefit of the respective parties hereto and their successors and permitted assigns.

8.11. All acknowledgements, representations and warranties shall survive the execution of this MoA.

8.12. The captions and headings of the various sections of this MoA are for convenience only and are not to be construed as confirming or limiting in any way the scope or intent of the provisions hereof. Whenever the context requires or permits, the singular shall include the plural, the plural shall include the singular and the masculine, feminine and neuter shall be freely interchangeable.

8.13. This MoA may be executed in one or more counterparts, and all such counterparts shall constitute one single agreement, binding on the parties hereto. Facsimile or Email copies of this MoA and the signatures hereto may be used with the same force and effect of the original. Electronic PDF file copies of this MoA shall be enforceable as originals.

[Signature Page Follows]

Signatures as follows:

City of Harrisburg, Pennsylvania

By: _____

Date: _____

Title: _____

Smart City Media, LLC

By: _____

Date: _____

Title: _____

INTER

OFFICE

MEMO

To: HARRISBURG CITY COUNCIL
From: Kirk Petroski, City Clerk
LEGISLATIVE APPROVAL FORM

Date:

LEGISLATIVE APPROVAL FORM/CERTIFICATE OF ACCEPTANCE

BILL NO. -2018 RESOLUTION NO. ²⁵-2018

THE ABOVE LISTED ITEM WAS WRITTEN AND PREPARED FOR FINAL INTRODUCTION AT THE HARRISBURG CITY SOLICITOR'S OFFICE ON:

R. James E. Faldoch
Acting Sr. Deputy City Solicitor

2-23-2018
Date

Requested by Department/Bureau: Engineering

Department/Bureau Contact Person: Wayne Martin

For Action on or before:

The attached was received in the Office of the City Clerk for introduction on

Received by: *KP*

Date: 2-23-18