To: Mayor Farrer and the Honorable Members of the City Council

Prepared by: Lisa Soghor, Assistant City Manager

Approved by: Reva Feldman, City Manager

Date prepared: January 29, 2020              Meeting date:   February 10, 2020

Subject: City Phone System

RECOMMENDED ACTION: Authorize the City Manager to execute a service agreement with Nextiva for hosted network services for the phone system at City facilities.

FISCAL IMPACT: There is no fiscal impact with the recommended action. Sufficient funding for phone services is included in the Adopted Budget for Fiscal Year 2019-2020 in Account Nos. 100-7059-5721 (Non-Departmental Services – Phones), 100-7059-7600 (Non-Departmental Services – Equipment/Furniture) and 602-7060-6120 (Information Systems – Computer Software). As part of the agreement with Nextiva, there will be no cost to the City for new phones and auxiliary equipment. The cost for installation will be $3,600. The monthly service charge will be $2,275 a month. Costs for this ongoing service will be included in future budgets.

WORK PLAN: This item was not included in the Adopted Work Plan for Fiscal Year 2019-2020. This project is part of normal staff operations.

DISCUSSION: The City’s current phone and voicemail system consists of approximately 98 telephones between all City facilities. The City’s current system was purchased in 2006. The City continues to pay a monthly service fee and an annual maintenance fee. The phone system is now out of date and the service quality is poor. There is a great deal of static on many of the phone lines, and it does not utilize current cloud-based technology. Cloud-based technology offers built-in redundancies to strengthen the system, minimize disruption, improve reliability and ensure business continuity.

On September 12, 2019, the City issued a Request for Proposals (RFP) for a firm that could provide a new, cloud managed private branch exchange (PBX) telephone system with state-of-the-art Voice over Internet Protocol (VoIP) for City Hall and other City facilities.
The City received 16 responses to the RFP. Staff conducted a technical review of each proposal and interviewed the top four firms. Based on the proposals submitted and interviews conducted, staff recommends authorizing the City Manager to execute an agreement with Nextiva for hosted network services for the City’s phone system.

As part of the agreement, Nextiva will provide the phones and auxiliary equipment to the City at no cost. The City will pay Nextiva for the taxes on the equipment and an ongoing monthly service charge. The monthly service charge is $2,275 a month. Staff believes the proposed costs are reasonable considering the additional technology, service, reliability and resiliency Nextiva offers. The new system will be much more flexible than the City’s current system and will accommodate growth that the current system cannot.

In order to get the new phone system up and running, the City will hire a firm to install the equipment. Nextiva affiliate, Green Razor Communications, located in Agoura Hills, will perform this work. The cost for installation will not exceed $3,600. Going forward, the City will now have a local firm it can call upon if service is needed.

ATTACHMENTS: Nextiva Service Agreement
This Nextiva Service Agreement (the “Agreement”) is dated, entered into, and made effective on the date of the last signature below (the “Effective Date”), by and between Nextiva, Inc. (“Nextiva”) and City of Malibu (“Customer”).

**Quote Number:**  
10940512

**Service Plan:**  
Contract Office Pro Plus (the “Nextiva Service Plan”)

**Term Length and Subscription Date:**  
The term length is thirty-eight (38) months (the “Term”) beginning from Effective Date ("Subscription Date"). Any reference to Term shall also include any subsequent renewal Terms.

**Discounted Service and/or Device(s):**  
In consideration of Customer agreeing to pay the minimum monthly recurring amounts for the Nextiva Service Plan accepted through the above referenced Quote Number (the “Quote”) for the Term, Nextiva agrees to provide Customer with discounted Service or Device(s) as described in the Quote.

**Additional Terms:**  
Customer will not be charged the Recurring Monthly Charge described in the Quote in month 2 and month 3 of the Term.

In the event Customer experiences three (3) or more Outages (as defined the Nextiva Service Level Agreement “SLA”), each lasting one (1) hour or longer in a thirty (30) day period, then Customer shall have the right to terminate the Services provided to the affected location within thirty (30) days of such outages without incurring any early termination fee described below.

Nextiva’s VOIP Service Terms and Conditions (the “VOIP Terms”) are amended and restated as follows:

Section 3 is amended and restated as follows: **“3. REVISIONS TO TERMS AND PRICING.”** From time to time, we may revise the terms and conditions of this Agreement (including, without limitation, any of the policies incorporated by reference) and the pricing (except during the term of a Minimum Commitment Contract) for the Service. Notice of revisions to the Agreement or pricing shall be posted on the NEXTIVA Website (“the Website”) and deemed given and effective on the date posted to the Website. If you do not agree to the revision(s), you must notify Nextiva of your disagreement within thirty (30) days of your receipt of notice of the revision. By rejecting the revision, you agree to adhere to and be bound by the original language in the applicable provision. If you do not timely notify Nextiva of your objection to the revision(s) and continue to use the Service after revision(s) are in effect, you hereby accept and agree to all such revisions.”

Prior to Nextiva exercising any right to suspend, terminate, or disconnect Customer’s Service per Section 8.3 (Our right to disconnect) or Section 12.5 (Discontinuation of Service for Nonpayment) of the VOIP Terms, Nextiva will provide reasonable notice to Customer of its intention to exercise such rights and Customer shall have the ability to cure the deficiency giving rise to such rights to the reasonable satisfaction of Nextiva within seven (7) days of such written notice. This clause shall not apply to Sections 8.3.5, 8.3.6, and a breach of the Acceptable Use Policy (“AUP”) as discussed partially in Section 8.3.2. This clause shall not apply to Section 8.3.8 to the extent that Nextiva must take action to prevent a material detrimental harm to its Service. Notwithstanding the foregoing, nothing herein shall be
construed as preventing Nextiva from suspending or terminating the Service if the Service is being used in an abusive manner, if Nextiva reasonably believes that the Service has been compromised, or if government, law enforcement or one of Nextiva’s carriers requires Nextiva to suspend or terminate the Service.

Section 8.3.6 is stricken and restated as follows: “8.3.6. Reserved.”

The second paragraph of Section 9.2 is amended and restated as follows: “Unless otherwise agreed upon, Client agrees that within thirty (30) days after the expiration of the Term of any Device Rental Agreement or termination of this Agreement, Client will promptly return all Rented Devices to Nextiva. Client will be responsible for (i) any damage to the Rented Devices as assessed by Nextiva upon receipt excepting normal wear and tear, (ii) the replacement cost of such Rented Devices if it is lost, misplaced, not delivered or stolen during transit, and (iii) shipping/handling costs.”

Section 10.6 is amended and restated as follows: “One-time activation fees and any other installation fees due and owing to Nextiva are set forth in the Quote.”

Section 14.3 is amended to add the following sentence: “You understand that you may download your communications logs, voicemails, faxes, e-mails, or other messages at your convenience, and that you are solely responsible for ensuring that you maintain adequate backups for compliance with the California Public Records Act.”

Section 15.2.1 is amended and restated as follows: “IN NO EVENT SHALL NEXTIVA BE LIABLE TO YOU, YOUR REPRESENTATIVES OR AUTHORIZED ASSIGNORS OR ANYONE ELSE FOR ANY INCIDENTAL, DIRECT, INDIRECT, SPECIAL, PUNITIVE, EXEMPLARY, OR CONSEQUENTIAL DAMAGES, OR FOR ANY DAMAGES FOR LOSS OF DATA, LOSS OF REVENUE OR PROFITS, RELATING TO OR ARISING OUT OF THE SERVICE, THE USE OF OR INABILITY TO USE THE SERVICE, THE ABSENCE, DELAY, FAILURE OR OUTAGE OF THE SERVICE, THE INABILITY TO DIAL 911 OR E911 TO ACCESS EMERGENCY SERVICE PERSONNEL, THE INABILITY TO DIAL SECURITY, LAW ENFORCEMENT OR FIRE PREVENTION/PROTECTION SERVICES OR SYSTEMS, THE DEVICE, THE USE OF AND/OR INABILITY TO USE THE DEVICE, THE INSTALLATION OF THE DEVICE, AND/OR THIS AGREEMENT. NOR SHALL NEXTIVA BE LIABLE FOR ANY DELAY OR FAILURE TO PROVIDE THE SERVICE, INCLUDING 911 DIALING, AT ANY TIME OR FROM TIME TO TIME, OR FOR ANY INTERRUPTION OR DEGRADATION OF VOICE QUALITY CAUSED BY ANY REASON INCLUDING BUT NOT LIMITED TO THE FOLLOWING: AN ACT OR OMISSION OF AN UNDERLYING CARRIER, SERVICE PROVIDER, VENDOR OR THIRD PARTY, EQUIPMENT, NETWORK OR FACILITY FAILURE, EQUIPMENT, NETWORK OR FACILITY UPGRADE, SERVICE, MAINTENANCE, MODIFICATION, SHORTAGE, OR RELOCATION, FORCE MAJEURE EVENTS SUCH AS BUT NOT LIMITED TO ACTS OF GOD, ADVERSE WEATHER, STRIKES, FIRE, WAR, RIOT, GOVERNMENT ACTIONS OR TERRORISM, SERVICE, DEVICE, EQUIPMENT, NETWORK OR FACILITY FAILURE CAUSED BY THE LOSS OF POWER OR INTERNET SERVICE TO NEXTIVA OR CUSTOMER, AND ANY CAUSE THAT IS BEYOND NEXTIVA’S CONTROL, INCLUDING WITHOUT LIMITATION THE FAILURE OF AN INCOMING OR OUTGOING COMMUNICATION, THE INABILITY OF COMMUNICATIONS TO BE CONNECTED OR COMPLETED, INCLUDING 911 DIALING, OR DEGRADATION OF VOICE QUALITY. NEXTIVA SHALL NOT BE LIABLE FOR UNAUTHORIZED ACCESS TO NEXTIVA’S OR CUSTOMER’S TRANSMISSION FACILITIES OR PREMISES, EQUIPMENT OR FOR UNAUTHORIZED ACCESS TO, OR ALTERATION, THEFT OR DESTRUCTION OF, CUSTOMER’S DATA FILES, PROGRAMS, PROCEDURES, OR INFORMATION THROUGH ACCIDENT, FRAUDULENT MEANS OR DEVICES OR ANY OTHER METHOD, REGARDLESS OF WHETHER SUCH DAMAGE OCCURS AS A RESULT OF NEXTIVA’S NEGLIGENCE OR OTHER ACTS OR OMISSIONS. EXCEPT WITH REGARD TO INDEMNIFICATION CLAIMS PURSUANT TO SECTION 16.1.1 OF THIS AGREEMENT, NEXTIVA’S LIABILITY FOR ANY ACT OR OMISSION SHALL IN NO EVENT EXCEED THE SERVICE CHARGES WITH RESPECT TO THE AFFECTED TIME PERIOD. THE LIMITATIONS SET FORTH
HEREIN APPLY TO ALL CLAIMS FOUNDED IN BREACH OF CONTRACT, BREACH OF WARRANTY, PRODUCT LIABILITY, TORT, AND ANY AND ALL OTHER THEORIES OF LIABILITY, AND APPLY WHETHER OR NOT NEXTIVA WAS INFORMED OF THE LIKELIHOOD OF ANY PARTICULAR TYPE OF DAMAGE. FURTHER, YOU AGREE TO REIMBURSE NEXTIVA FOR ALL COSTS AND EXPENSES RELATED TO THE DEFENSE OF ANY SUCH CLAIMS, INCLUDING ATTORNEYS’ FEES AND LITIGATION COSTS. THE PROVISIONS OF THIS SECTION SHALL BE APPLIED TO THE FULLEST EXTENT OF THE LAW, BUT IF ANY PORTION OF THIS SECTION IS DETERMINED TO BE UNLAWFUL, THEN THIS SECTION SHALL BE CONSTRUED TO LIMIT LIABILITY AGAINST NEXTIVA TO THE FULLEST EXTENT POSSIBLE UNDER THE LAW.

The following is added to the end of Section 16.1.1: “NEXTIVA shall indemnify, defend and hold harmless Client from and against any and all liability, damages, expenses, causes of action, suits, claims, costs, fees, penalties, or judgments, of any nature whatsoever, including reasonable attorneys’ fees and costs of suite, brought by or owed to third parties, to the extent caused by Nextiva’s intentional misconduct.

Section 18.1 is stricken and restated as follows: “18.1. Governing Law. This Agreement and the relationship between you and NEXTIVA shall be governed by the laws of California without regard to its conflict of law provisions. Any claim brought pursuant to this Agreement shall be brought in a court of competent jurisdiction within the State of California and venue for any such claim shall be proper in the appropriate state or federal court located in Los Angeles County, California.”

Section 19 is stricken and restated as follows: “19. Reserved.”

Section 20 is stricken and restated as follows: “20. PRIVACY. NEXTIVA Service utilizes, in whole or in part, the public Internet and third party networks to transmit voice and other communications. You acknowledge and understand that NEXTIVA cannot guarantee that voice over IP communication is completely secure. You agree that NEXTIVA may access all features of your account and the Service to determine whether the Service is being used fraudulently and/or in violation of this Agreement, and for any other purposes. YOU AGREE THAT NEXTIVA SHALL NOT BE LIABLE FOR ANY LACK OF PRIVACY UNLESS IT RESULTS FROM THE INTENTIONAL ACTS OF NEXTIVA OR ITS EMPLOYEES OR AGENTS. NEXTIVA is committed to respecting your privacy relating to personally identifiable information. Once you choose to provide personally identifiable information, it will only be used in the context of your relationship with NEXTIVA. NEXTIVA will not sell, rent, or lease your personally identifiable information to others. Upon the appropriate request of a government agency, law enforcement agency, court or as otherwise required by law, NEXTIVA may disclose personally identifiable information. Please refer to our Privacy Policy for additional information.”

Section 23 is stricken and restated as follows: “23. ASSIGNMENT. NEXTIVA may assign all or part of its rights or duties under the Agreement to a subsidiary or an affiliate without notifying you. If we do that, we have no further obligation to you. NEXTIVA may also assign all or part of its rights or duties under the Agreement to a third-party that is not a subsidiary or an affiliate by first providing notice to you. You may terminate this Agreement by providing us with written notice of your objection to that assignment within sixty (60) days of your receipt of notice of said assignment. Your sole remedy for a breach of this provision is the right to terminate this Agreement. If you do not object to the assignment, Nextiva will have no further obligation to you. You may not assign the Agreement or the Service or Device without our prior written agreement.

Section 25 is stricken and restated as follows: “25. FORCE MAJEURE (EVENTS BEYOND A PARTY’S CONTROL). Both Parties shall be excused from any delay or failure in performance hereunder caused by reason of occurrence or contingency beyond its reasonable control, including without limitation, acts
of God, earthquake, fire, flooding, riots, war, government intervention, embargoes, strikes, labor difficulties, equipment failure, late delivery by suppliers or other difficulties as may occur in spite of the party’s best efforts.”

**Early Termination Fee:**
If a Service or Device described in the Quote, a line of service or feature for the Nextiva Service Plan, is cancelled, terminated, or converts to a line of service or feature that is not the Nextiva Service Plan or in the Quote referenced herein or added within the Term, then Nextiva shall charge an early termination fee equal to the total fees owed for the remainder of the Term for any cancelled, terminated, or converted Service, Device, feature, or product. Additionally, if Customer terminates the entire Agreement with Nextiva within the Term, then Customer will pay an early termination fee equal to the total amount owed to Nextiva for the remainder of the Term under the Agreement.

Each of the undersigned represents that he or she is duly authorized to execute this Agreement on behalf of the party he or she represents. Each party has read, understands, and agrees to the early termination fee outlined in this Agreement.

This Agreement shall continue to apply to any additional Quote Numbers, additional services purchased by Customer or changes to existing services made by Customer during the Term. All Services are subject to applicable federal, state, and local taxes, surcharges and fees, and other regulatory fees outlined in the T&Cs (defined below). Such taxes, surcharges and fees are subject to change.

By signing below, the Customer agrees to the Nextiva Terms and Conditions located at [http://www.nextiva.com/terms-and-conditions.html](http://www.nextiva.com/terms-and-conditions.html), including the important e911 Information (the “T&Cs”). If there is a conflict between this Nextiva Service Agreement and the T&Cs referenced herein, the terms of this Nextiva Service Agreement will prevail. Furthermore, by signing below, the undersigned authorizes Nextiva to charge the Customer’s payment method (i.e. credit card) on file with Nextiva. If Customer receives invoices from Nextiva, then invoiced amounts shall be due immediately.
Exhibit A

Nextiva Inc. – Service Level Agreement (“SLA”)

1. **Service Description.** NEXTIVA’s Hosted Network Services (the “Network Services”) are provided on NEXTIVA’s internal network and third-party applications. Service level objectives and related warranties, as set forth in this Schedule apply only to NEXTIVA and the Network Services provided by Nextiva.

2. **Service Level Objective.** The Network Services shall perform in accordance with the Service Level Objective for network availability as measured by the MTTR (“SLO”) as set forth herein. NEXTIVA’s objective is to provide the Network Services that meet the following SLO. Except as specifically set forth in this SLA, NEXTIVA shall have no liability for its failure to achieve this objective.

   **Mean Time to Restore ("MTTR").** The MTTR objective shall be the average time required to restore the Network Services and resume availability when measured in a one-month (720 hour) period. The time is measured from the moment the outage is reported until the Network Services are available. NEXTIVA has an objective of repairing network equipment within an average of two (2) hours and restoring a network outage in an average of four (4) hours. NEXTIVA’s objective is to coordinate repair efforts on equipment or cable cuts with underlying carriers when NEXTIVA first becomes aware of the problem, or when notified by Customer.

   **Network Availability.** The SLO covers all Nextiva-controlled Services and facilities, Nextiva-controlled Hardware & Software Platforms and Systems, and Nextiva-controlled physical plant and infrastructure facilities. The SLO calculations will not include any unavailability resulting from (a) standard Nextiva network maintenance, (b) any Dedicated Access between Customer's location and Nextiva, including but not limited to the local loop, (c) Denial of Service (“DOS”) attempts and any other malicious attempts orchestrated by third parties, (d) Customer owned and/or operated cabling, infrastructure, or customer premise equipment, (e) any Customer-provided circuits or equipment, (f) Customer’s applications, (g) acts or omissions of Customer, or (h) reasons of Force Majeure.

3. **Outages.** Customer acknowledges the possibility of an unscheduled, continuous and/or interrupted period of time during which the Network Services do not conform to the SLO ("Outage"). In the event Customer experiences three (3) or more Outages, each lasting one (1) hour or longer in a thirty (30) day period, then Customer shall have the right to terminate the Services provided to the affected location within thirty (30) days of such outages without incurring the early termination fee described in the Nextiva Service Agreement.

4. **Exceptions.** An Outage does not occur if the interruption in service is, as determined by NEXTIVA in its sole discretion: (i) caused by Customer or others authorized by Customer to use the Network Services under the Agreement; (ii) due to the failure of power, facilities, equipment, systems, or connections not provided by NEXTIVA or its designees within the Network Services; (iii) the result
of network maintenance activity as set forth in Section 5 of this SLA, or (iv) due to a force majeure.

5. **Planned Network Maintenance Period ("PNMP")**. NEXTIVA shall avoid performing network maintenance between 3:00am to 9:00 pm PST, Monday through Friday, inclusive, that will have a disruptive impact on the continuity or performance level of the Network Service. However, the preceding sentence does not apply to restoration of continuity to a severed or partially severed fiber optic cable, restoration of dysfunctional power and ancillary support equipment, or correction of any potential or other emergency conditions. NEXTIVA will use commercially reasonable efforts to notify Customer prior to emergency maintenance. NEXTIVA shall make every effort to provide Customers with electronic mail, telephone, facsimile, or written notice of all non-emergency, planned network maintenance three (3) business days prior to performing maintenance (non-emergency) that, in NEXTIVA's reasonable opinion, has a substantial likelihood of affecting the Customers traffic/service. If NEXTIVA's planned activity is canceled or delayed, NEXTIVA shall promptly notify Customer and shall comply with the provisions of this Section to reschedule any delayed activity.

6. **Emergency Maintenance Period ("EMP")**. It may be necessary for NEXTIVA to issue an EMP. EMPs allow NEXTIVA to schedule mandated maintenance with a shorter Customer notification interval than PNMPs. EMPs are issued when maintenance is required immediately, e.g., to prevent further or repeated interruptions on NEXTIVA's network.

7. **Warranty**. NEXTIVA warrants that Network Services shall conform to the SLO. NEXTIVA shall use commercially reasonable efforts under the circumstances to remedy any delays, interruptions, omissions, mistakes, accidents or errors in the Network Services and restore such Network Services to comply with the terms hereof.

**THE REMEDY(IES) AS SET FORTH IN SECTION 3 SHALL BE THE SOLE AND EXCLUSIVE REMEDY(IES) OF CUSTOMER IN THE EVENT OF ANY FAILURE, INTERRUPTION OR DEGRADATION OF SERVICE INCLUDING AN OUTAGE AND/OR FOR BREACH OF THIS WARRANTY.**