

**Interstate Passenger Air Service Agreement
between the City of Gallup, NM and Advanced Air LLC**

THIS INTERSTATE PASSENGER AIR SERVICE AGREEMENT (“Agreement”) is made and entered into as of _____, 2022 by and between Advanced Air LLC (“Advanced”), a California limited liability company registered to conduct business in New Mexico; and the City of Gallup, New Mexico (“City”), a New Mexico municipal corporation.

WITNESSETH

WHEREAS, City has been awarded a grant by the New Mexico Department of Transportation Aviation Division pursuant to the Rural Air Service Enhancement (RASE) program for the purpose of supporting new scheduled air routes; and

WHEREAS, the City conducted a competitive proposal process to select an air carrier to provide scheduled air service in compliance with the Rural Air Service Enhancement Act and determined the proposal submitted by Advanced to be the most advantageous to the City, taking into consideration the evaluation factors set forth in the request for proposals; and

WHEREAS, Advanced is a regional commuter air carrier, charter operator and owner, which operates aircraft in the United States and has commuter authority from the U.S. Department of Transportation; and

WHEREAS Advanced is willing and capable of providing commuter air service for the following routes: Gallup, NM (GUP) to/from Phoenix, AZ (PHX), on the terms and conditions set forth herein.

NOW, THEREFORE, in consideration of the above recitals and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto, intending to be legally bound, hereby agree as follows:

1. Scheduled Commuter Air Service and Fares. Advanced shall provide commuter air service pursuant to the **RASE** grant program on the routes and schedules and during the service period specified in **Exhibit A**, attached hereto and incorporated herein by reference, and as may be amended from time to time by written agreement of the parties, each flight with GUP as its origin or destination on a single day (the “Commuter Flights.”) The primary aircraft serving GUP will be a King Air 350, with the option to recover no more than 30% of the annual flights in a Pilatus PC-12. All flights under this Agreement shall be operated by Advanced which shall have exclusive control and authority over initiating, conducting, or terminating flights.

Flight schedules to/from GUP, as described in Exhibit A, have been mutually agreed upon between Advanced and the City based upon aircraft, staff, crew, gate availability, weather and other operational factors. Advanced does not guarantee and shall not be held in breach of this Agreement for failure to actually operate the number of flights described in Exhibit A so long as Advanced shall use good faith effort business practices to operate a safe, reliable, on-time operation.

Fares for the GUP-PHX service will average \$75.00 + tax for each one-way segment, increasing to \$80 + tax in year two. Advanced shall provide the City with monthly passenger and flight operation/completion reports by the 10th of each month for the previous month once operations commence. Advanced shall make reasonable attempts to participate in discussions/conference calls as reasonably requested by the City and/or its consultants, in the sole exercise of discretion of the City and/or its consultants.

2. Payment. Payment to Advanced shall be made in arrears on a per-flight-completed basis. Advanced will submit an invoice at the beginning of each month for the prior month requesting a payment amount based on the number of flights that were actually completed in conformance with this agreement at the rate of \$2,644.23 per completed flight (A “flight” is a single trip from GUP to PHX or from PHX to GUP) up to an annual maximum of \$1,925,000 for 728 completed flights. Submitted invoices will detail the service actually completed (specifically the number of flights completed), dates of service,

aircraft type, routing, passenger count, and any actual variations from the service contemplated by this Agreement.

If Advanced is forced by operational exigencies to make ad hoc adjustments to its service, such as aircraft type or routing, these deviations will be reported on the invoice with the appropriate adjustments. In the event such deviations exceed the 30% allowance described above in Section 1, the subsidy rate shall be reduced, and the City shall be charged for each such flight based upon the seating capacity for the replacement aircraft in proportion to the seating capacity of a King Air 350. Flights that did not conform to the terms and stipulations of this agreement will not be compensable unless approved in advance by the City. Only completed flights are considered eligible for payment unless otherwise excused under the terms of this agreement. For example, weather conditions or mechanical issues may require the aircraft to return to its airport of origin before reaching its scheduled destination. In such event, Advanced will be compensated for the actual minutes of flight time, which rate shall be determined by dividing the per-flight subsidy amount by the average flight time for all similar flights in the preceding 10 days. Flights that never take-off because of weather, mechanical problems, air traffic control issues, crew shortages/flight and duty time issues, etc. are not compensable. All flights that can be safely operated must be completed to be compensable; flights that overfly points for lack of traffic will not be compensated.

3. Bateman Act. The terms of this Agreement are contingent upon sufficient appropriations being made by the New Mexico Legislature and the Gallup City Council for the performance of this Agreement. If sufficient appropriations are not made by the Legislature or the Gallup City Council, this Agreement shall terminate no less than sixty days after written notice is provided to Advanced by the City of the failure to provide sufficient appropriations.
4. Records Retention. Advanced shall maintain all records and documents relative to the provision of the services described in Section 1 of this Agreement and the invoices submitted to the City pursuant to Section 2 of this Agreement for a period of three years after final payment is made to Advanced under this Agreement. Advanced shall furnish such records, upon request by the City or an external auditor upon determination by the City or an external auditor that such records are material to the performance of an audit.
5. Operational Responsibility. City hereby disclaims any and all liability to passengers or other third parties associated with the Commuter Flights. Advanced bears sole responsibility for the operation of the Commuter Flights, including the decision whether or not to operate a Commuter Flight, and any liability resulting therefrom.
6. Term. This Agreement shall become effective on the date first listed above and continue in effect until such time as the final payment is made to Advanced for the provision of services within the two year "Period of Service" defined in Exhibit A. At the option of the City, this Agreement may be renewed for an additional two-year Period of Service upon satisfactory performance and adequate funding to sustain the service beyond the initial two-year Period of Service, provided the City and Advanced mutually agree to the appropriate rate of compensation per completed flight for the renewal term. The City agrees to provide Advanced ninety (90) days' written notice of its intent to renew this Agreement.
7. Non-Disclosure. The parties agree to preserve as confidential the terms of this Agreement except for such disclosures that are required in connection with the party's performance of this Agreement or by law, specifically to include the provisions of the New Mexico Inspection of Public Records Act.
8. Promotional Activities, Reservations System, Call to Action and Reporting. The parties agree that they will mutually agree on a generally integrated marketing plan from Advanced and the City, use their best reasonable efforts, collectively, in addition, to promote the Commuter Flights in such a way as to maximize the public awareness of the availability of the Commuter Flights. Advanced will maintain and manage a reservation system for bookings and call to action will be Advanced website. Advanced will provide weekly raw booking data to the City or designated party.

9. Insurance. At all times during the term of this Agreement, Advanced shall carry and maintain, at its sole cost and expense, aircraft liability insurance in an amount of not less than \$50,000,000 USD per occurrence for personal injury and death and property damage. Such coverage shall include a waiver of subrogation as against (in favor of) the City and shall name the City of Gallup, its officers, directors, employees and agents, as additional insureds. Advanced shall provide the City with thirty (30) days advance written notice of cancellation, termination or material modification of the insurance coverage required herein, in which event the City shall have the right in the sole exercise of its discretion to terminate this agreement. Additionally Advanced will provide evidence of General Liability Insurance in the amount of not less than \$2,000,000 per occurrence, Property Damage Insurance of at least \$100,000 per occurrence, and Workers' Compensation pursuant to the requirements of New Mexico Workers Compensation Act.
10. Indemnification. Advanced and its agents, directors, officers, owners, employees and representatives, without limitation (hereafter collectively the "Advanced Air Affiliates"), and the successors and assigns of Advanced and the Advanced Air Affiliates, shall indemnify, defend and hold the City, and its agents, officers, and employees, without limitation, financially free and harmless from any liability, claims, damages, cross-complaints, subsequent lawsuits, judgements, sanctions, orders, attorney fees or costs of any kind, without limitation, arising in any manner, directly or indirectly, from the performance of this Agreement by Advanced and any and all actions of Advanced incident thereto.
11. Confidential Information. The parties mutually acknowledge that during the performance of this Agreement information may be received by one party from the other which is confidential and/or a trade secret ("Confidential Information"). Confidential Information shall be defined as that information that a party designates as "Confidential" prior to delivering the same to the other party. The parties agree not to disclose any such Confidential Information to a third party without the written consent of the party from which the Confidential Information originated. The City understands and agrees that passenger information is required to be disclosed by Advanced to regulatory authorities, its agents, employees and others by Advanced in the normal course of business and that City employees may already be customers of Advanced and its affiliates or may become customers through Advanced's marketing channels. Advanced understands and agrees that information it submits to the City may, by such submission, become a public record, as that term is defined by the New Mexico Inspection of Public Records Act, and subject to mandatory disclosure if a valid Request for Public Records is filed with the Gallup City Clerk.
12. Termination for Cause. Either party may terminate this Agreement if a party materially breaches its obligations under this Agreement, and such breach is not cured within fourteen days after delivery of the non-breaching party's notice or such longer time as the non-breaching party may specify in the notice ("cure period"). The notice must describe the factual basis of the breach and the specific terms of this Agreement that were breached. During the cure period, the parties shall negotiate, in good faith, to attempt to resolve any dispute regarding the alleged breach. If the parties are unable to resolve any dispute regarding the breach and the breach is not cured within the cure period specified in the notice, or within a reasonable period of time for a breach not capable of being cured within the specified cure period, the party alleging the breach may immediately suspend its performance under this Agreement and deliver notice to the party alleged to be in breach of its intent to terminate the Agreement.
13. Arbitration. All controversies, claims or disputes that arise out of or relate to the Agreement or the interpretation, performance, termination, enforceability or validity of the Agreement that cannot be resolved after the parties have engaged in good faith negotiations, shall be resolved by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction and in compliance with Section 15.3 of this Agreement.

Claims or controversies shall be heard by a single arbitrator. The place of arbitration shall be Gallup, New Mexico, unless the parties agree upon a different location. The arbitration shall be governed by the laws of the State of New Mexico, except as New Mexico law may preempted by the United States

Arbitration Act (9 U.S.C. §1 *et seq.*). Time is of the essence for any arbitration under this Agreement and arbitration hearings shall take place within 90 days of filing and awards rendered within 120 days. The Arbitrator shall agree to these limits prior to accepting appointment.

The Arbitrator will have no authority to award punitive or other damages not measured by the prevailing party's actual damages, except as may be required by statute. The prevailing party shall be entitled to an award of reasonable attorney fees. The parties agree that failure or refusal of a party to pay its required share of the deposits for arbitrator compensation or administrative charges shall constitute a waiver by that party to present evidence or cross-examine witnesses. In such event, the other party shall be required to present evidence and legal argument as the arbitrator may require for the making of an award.

14. General Provisions.

- 14.1 Assignment. This Agreement and the rights and obligations created hereunder shall not be assigned by either party without the prior written consent of the other party.
- 14.2 Compliance with the Law. This Agreement shall at all times be subject to federal, state, and local laws and to all applicable rules and regulations of any governmental agencies or other entity with oversight authority. Each party hereto agrees to comply with all applicable rules, regulations and laws of any governmental body relating to the performance of its obligations under this Agreement, including but not limited to all applicable rules, regulations and laws of any federal, state, local agency or authority. Neither party shall be liable to the other party if it is prevented from fulfilling its obligation under this Agreement by reason of any such law, rule or regulation.
- 14.3 Governing Law and Jurisdiction. This Agreement shall be governed by the laws of the State of New Mexico. Any action at law or in equity regarding the legality, interpretation, or enforcement of the arbitration provisions contained in Section 13 of this Agreement, or to enforce an arbitration award, or any other action at law or in equity that is not precluded by the arbitration provisions contained in Section 13 of this Agreement must be brought in the McKinley County District Court in Gallup, New Mexico
- 14.4 Waiver of Jury Trial. Each party waives any and all right to trial by jury in any action arising out of, or relating to, this Agreement or the transactions contemplated by this Agreement.
- 14.5 Attorneys' Fees. In any action at law or in equity arising out of, or relating to this Agreement, or the transactions contemplated by this Agreement, the prevailing party shall be entitled to an award of attorneys' fees and costs reasonably incurred.
- 14.6 Entire Agreement. This Agreement constitutes the entire agreement of the parties hereto with respect to the subject matter hereof. This Agreement may be modified or amended only by a writing signed by the party against which enforcement of the modification or amendment is sought, and this Agreement supersedes any prior written, oral or implied agreements, understandings or representations. However, the parties acknowledge that the Agreement is also subject at all times to Advanced's then existing Contract of Carriage.
- 14.7 Force Majeure. Except as otherwise expressly provided in this Agreement, neither party shall be liable for performance hereunder to the extent such performance is prevented or delayed as a result of acts of God, severe weather, natural disaster, earthquake, fire, war, military action, terrorist action, labor disputes, or any court order or action of any governmental, administrative or judicial entity epidemics, pandemics or Acts of God or by any other reason or circumstance, similar or dissimilar, beyond the reasonable control of such party; provided, however, such party shall (a) provide the other party with prompt written notice thereof, (b) use its best reasonable efforts to avoid or remove such causes of non-performance, and (c) continue performance to the extent such causes are removed or avoided.

- 14.8 Joint Preparation. This Agreement shall be deemed to be jointly prepared by all parties hereto and with the assistance of independent legal counsel. In connection therewith, the provisions of California Civil Code section 1654 or any comparable statute or common law rule shall not be deemed to be applicable in the event of any interpretation of this Agreement.
- 14.9 Modification. This Agreement cannot be altered, modified, changed, extended, waived, or terminated, except by a writing signed by both parties.
- 14.10 Binding Nature of Agreement. This Agreement shall bind the parties hereto and their legal representatives, as well as their successors and assigns.
- 14.11 Advice of Counsel. The parties acknowledge and represent that, in effecting and executing this Agreement, they have received full legal advice from legal counsel as to their legal rights; and that they have read all of this Agreement and fully understand its content and effect.
- 14.12 Voluntariness. The parties have entered into this Agreement voluntarily, and free from duress, fraud, undue influence, coercion or misrepresentation of any kind.
- 14.13 Partial Invalidity. In the event any provision of this Agreement shall be found to be illegal or unenforceable as a matter of law by a court of competent jurisdiction, the remaining provisions shall remain in full force and effect unless such finding shall materially frustrate the purpose and intent of this Agreement.
- 14.14 Authority. The undersigned represent and warrant that they have been duly authorized to execute this Agreement on behalf of the respective parties.
- 14.15 Communications. Neither party shall make any disparaging or negative statements nor any public or private criticism of or concerning the other or its employees, agents, subsidiaries or affiliates. Advanced understands and agrees that public employees have free speech rights under the First Amendment to the U.S. Constitution and Article II, Section 17 of the New Mexico Constitution and that the City may not restrict the statements made by its officers or employees that are within the protections of those constitutional provisions. Advanced shall have the right to list the City as a customer.
- 14.16 Notices. Any notice or other communication that this Agreement requires to be in writing, may be delivered by certified mail (with return receipt) addressed to the person and address specified below; or by email sent to the person and email address specified below, but only if the email requires an affirmative confirmation of receipt by the recipient. The same shall be deemed to have been given on the date when received, if sent by certified mail or on the date the recipient affirmatively acknowledges receipt, if sent by email.

The notice addresses of the parties are as follows:

For the City:

City of Gallup
City Attorney's Office
110 W. Aztec Ave.
Gallup, NM 87301
Email: attorney@gallupnm.gov

For Advanced:

Advanced Air, LLC
Attn: Levi Stockton
12101 Crenshaw Blvd. Suite 100
Hawthorne, CA 90250
Email: lstockton@flyadvancedair.com

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, the parties hereto have caused their undersigned, duly authorized representatives to execute this Agreement as of the dates herein below.

CITY OF GALLUP, NEW MEXICO

Maryann Ustick, City Manager

Date

ADVANCED AIR, LLC

Levi Stockton, CEO

Date

EXHIBIT A

Interstate Passenger Air Service Agreement between the City of Gallup, NM and Advanced Air LLC

Scheduled Service between:

Gallup, NM (GUP) – Phoenix, AZ (PHX)

Service period – Two Years:

Service Period: August 1, 2022 through July 31, 2024.

Frequency

Seven (7) Round Trips per week – schedule to be coordinated between parties and may be adjusted seasonally.