

Municipal Indefeasible Right to Use Contract

THIS AGREEMENT (the "Agreement") is made and entered into as of _____, 20____, (the "Effective Date") by and between the City of _____, Washington, a municipal corporation (hereinafter "City") and _____, Inc., a Washington corporation (hereinafter "Customer"). City and Customer are referred to herein individually as a "Party" and collectively as the "Parties."

RECITALS

WHEREAS, City has constructed and is the owner of a continuous conduit system in _____, Washington as more particularly described on Exhibit A attached hereto (the "City System"); and

WHEREAS, Customer desires to pull an optical fiber cable thru a two-inch (2") Conduit in the City System, and the City desires to grant Customer an Indefeasible Right to Use of Conduit and Associated Property in the City System, all upon the terms and conditions set forth below.

NOW THEREFORE, in consideration of the mutual promises set forth below, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

1. DEFINITIONS

Unless expressly defined herein, words having well known technical or trade meanings shall be so construed. Unless expressly otherwise defined herein, the following capitalized terms when used in this Agreement will have the following meaning:

- 1.1 "Associated Property" shall mean the tangible and intangible property needed for the use of conduit and optical fibers, including, but not limited to, connecting points, support structures and the City rights in all Underlying Rights, but expressly excluding any rights in any electronic or optronic equipment.
- 1.2 "City System" means any combination of Conduits, Innerducts, Manholes, Vaults, Handholds, Junction Boxes and pedestals joined to form an integrated whole, which is owned, in whole or in part, by the City.
- 1.3 "City Facilities" means all facilities, including but not limited to fiber optic cables, conduit, equipment and all associated hardware, owned, controlled, and/or utilized by the City.

- 1.4 “Conduit” shall mean a structure for supporting fiber optic cables or other cables, usually underground, which may contain, among other things, one or more Innerducts.
- 1.5 “Customer Facilities” means all facilities, including but not limited to fiber optic cables, equipment and all associated hardware, owned and/or utilized by Customer that occupy and use the identified portion of the City System.
- 1.6 “Handhold” means a buried box with a lid that is even with the surface of the ground used to store, terminate, splice or transfer fiber optic cable.
- 1.7 “High Risk” shall mean, a planned activity with potential risk to the Customer.
- 1.8 “Innerduct” means a single enclosed raceway/channel within a single Conduit in which the fiber optic cable will be placed.
- 1.9 “Impositions” shall mean all taxes, fees, levies, imposts, duties, charges or withholdings or any nature (including, without limitation, sales, use, transfer, personal property and real property taxes, gross receipts taxes, gross income taxes, net receipts or net income taxes received by or accrued to such Party, franchise, access, license and permit fees), together with any penalties, fines or interest thereon (except for penalties or interest imposed as a direct result of acts or failures to act on the part of a Party) arising out of the transactions contemplated by this Agreement and/or imposed upon the City System by an federal, state or local government or other local public taxing authority with the lawful capacity to charge, levy or impost.
- 1.10 “Indefeasible Right of Use” or “IRU” shall mean (i) an exclusive indefeasible right of use for the purposes described herein, in the Customer Conduit, as granted in Article 2, and (ii) as associated nonexclusive indefeasible right of use for the purposes described herein, in the Associated Property; provided that the IRU’s granted hereunder do not provide Customer with any ownership interest in or other rights to physical access to, or control of, modifications of, encumbrance in any manner, or the use of the City System and Associated Property except as expressly set forth herein.
- 1.11 “IRU Fee” shall mean the fee calculated on the basis of the actual aggregate mileage of the City System for which an IRU has been granted to Customer as set forth in Articles 2 and 5, hereafter, and shall not include applicable charges for the Maintenance Fees, Costs or Impositions incurred or accrued by reason of the IRU.
- 1.12 “Junction Box” means a box where cable splices and connections are made and accessed.
- 1.13 “Manhole” means a subsurface enclosure, which qualified personnel may enter and use for the purpose of installing, operating and maintaining facilities.
- 1.14 “Pedestal” means an above ground structure used to store, terminate, splice, or transfer fiber optic cable.

- 1.15 “Reasonable Efforts” shall mean efforts commercially and reasonably designed to achieve the desired results, but shall not obligate a Party to make unreimbursed expenditures that are substantial in amount, in light of the circumstances to which the requirement to use reasonable efforts applies.
- 1.16 “Service Affecting Condition” shall mean a condition on the City System that materially adversely affects Customer’s ability to utilize its Fiber within the Customer Conduit.
- 1.17 “Underlying Rights” shall mean all deeds, leases, easements, rights of way, licenses, franchises, permits and other rights, titles or interests as are necessary for the construction, installation, operation, maintenance, or repair of the City System.
- 1.18 “Underlying Rights Requirements” shall mean the terms, conditions, requirements, restrictions, and/or limitations upon Customer’s right to use the Customer Conduit and Associated Property as provided and permitted under this Agreement, and associated safety, operational and other rules and regulations imposed in connection with the Underlying Rights.
- 1.19 “Vault” means an underground structure used to store, terminate, splice, and/or transfer copper wiring, including electrical conductor, and/or fiber optic cable.

2. GRANT OF RIGHTS IN THE CITY SYSTEM

- A. As of the Effective Date, the City grants to Customer, and Customer hereby purchases from the City, an exclusive Indefeasible Right of Use for the identified Conduit located within the City System, all as more specifically described in the maps included in Exhibit A hereto, and a non-exclusive Indefeasible Right of Use in the Associated Property, all subject to the terms, conditions, representations, warranties, and covenants more specifically set forth herein. The City shall retain legal title to the entire City System, the Conduit and all Associated Property, subject only to the IRU granted hereunder.

3. PERMITS; UNDERLYING RIGHTS

- A. The City shall obtain on or before the Effective Date, any and all Underlying Rights relating to the grant of rights and interests in and/or access to the real property underlying the City System, and such other rights, licenses, permits, authorizations, consents and approvals (including, without limitation, any necessary local, state, federal or tribal authorizations and environmental permits) that are necessary in order to (i) grant the IRU’s, and otherwise perform its obligations hereunder, and (ii) permit Customer to use, operate, access, and maintain the identified Conduit and Associated Property. Notwithstanding anything in this Agreement to the contrary, it is expressly understood that Customer shall be solely responsible for compliance with all legal and regulatory requirements associated with its business or operation of identified Conduit, Associated Property or use of the IRU including maintaining all required franchises, permits,

authorizations, licenses, approvals or other consents (other than the Underlying Rights), and the City shall have no responsibility or liability whatsoever in connection therewith.

- B. The City shall use its Reasonable Efforts to either require that the stated term of any Underlying Right applicable to the City System shall be for a period that does not expire in accordance with its ordinary terms prior to the last day of the Initial Term of the IRU (as defined in Article 6 herein), or if the stated term of any such Underlying Rights expires, in accordance with its ordinary terms, on a date earlier than the last day of the Initial Term of the IRU, the City shall, at its cost, exercise any renewal rights thereunder, or otherwise use its Reasonable Efforts to acquire such extensions, additions and/or replacements as may be necessary in order to cause the stated term thereof to be continued until a date that is not earlier than the last day of the Initial Term of the IRU; provided, however, that the City shall not be required to expend, as consideration for any such renewals or extensions, more than the fair market rate payable at such time for similar rights and terms unless Customer agrees, at its option, to pay directly any amounts required to be paid in excess of such fair market rate to renew or extend such Underlying Rights. If after use of Reasonable Efforts, the City does not obtain such extensions, additions and/or replacements, nothing in this Agreement shall prevent Customer from seeking to obtain or obtaining any renewal or extension of any such Underlying Rights from the grantor of such Underlying Rights, but at the Customers sole cost and expense.
- C. Notwithstanding anything to the contrary contained in this Article 3, upon the expiration and termination of any Underlying Right that is necessary in order to grant, continue or maintain an IRU granted hereunder in accordance with the terms and conditions hereof, and so long as the City shall have fully observed, and performed its obligations in accordance with this Article 3 with respect thereto, the term either the Initial Term or any Renewal Term granted hereunder, of the IRU granted with respect to the Customer Facilities or any portion of the City System affected thereby shall automatically expire upon such expiration or termination of the Underlying Rights.
- D. The City shall use its Reasonable Efforts to cause the terms of each such Underlying Rights to provide Customer with a guarantee of non-disturbance during the term of such Underlying Rights and any renewal thereof, and shall further endeavor to include the right of Customer to obtain notice of any default on the part of the City and to permit Customer to cure, on behalf of the City, any such default by the City and, thereafter, to continue to use of such Underlying Rights in accordance with the City's rights and interest thereunder; provided that the City's failure to obtain such notice and a right to cure shall not be considered a breach of this Agreement by the City. If Customer at any time cures such default by the City, the City shall reimburse Customer for any and all amounts reasonably paid by Customer promptly upon demand.
- E. The City further covenants and agrees with respect to such Underlying Rights to observe and perform its duties, obligations and responsibilities under such Underlying Rights or under this Agreement, if the failure to observe and perform any such obligation or obligations would permit the grantor of such Underlying Rights to terminate such Underlying Rights prior to its stated expiration date, or would otherwise materially

adversely impair or affect Customer's ability to use the Customer Facilities and Associated Property, or exercise Customer's right with respect to the IRU, as provided and permitted hereunder.

- F. Throughout the term of each such Underlying Rights, the City shall at its reasonable cost and expense defend and protect the City's rights in and interests under the Underlying Rights and Customer's right to use the identified Conduit and Associated Property as provided and permitted hereunder against interfering or infringing rights, interests or claims of third Parties.
- G. The Parties agree that this Agreement shall not be construed as limiting or interfering with the City's right to manage, control, construct, locate, maintain and/or use: the City's System; City Facilities; the public right of way, and/or; any public or private property in which the City System or the City's Facilities are located.
- H. The Parties intend that nothing contained in this Agreement should act as a limitation, restriction, or prohibition against the City with respect to any agreement with the City has heretofore entered into, or may in the future enter into with others regarding the City System, including the identified portion of the City System covered by this Agreement.
- I. In the event of an emergency, as soon as practicable thereafter and not later than forty eight (48) hours after having taken such action, the City will advise Customer in writing of the emergency work performed or the action taken with respect to any emergency modification or alternation of Customer Facilities. The City shall use reasonable efforts to limit the scope of such emergency modification or alteration of the Customer Facilities.
- J. Customer hereby acknowledges and accepts the existing Underlying Rights and the Underlying Rights Requirements associated therewith. With respect to any Underlying Rights obtained after the date hereof by the City (or any Underlying Rights existing under any document, agreement or instrument first delivered to Customer after the date hereof) the City covenants that it will use its Reasonable Efforts to assure that the terms and conditions thereof, and rules and regulations imposed in connection therewith, shall not impose materially more burdensome limitations and restrictions on the rights of Customer to use the identified Conduit and Associated Property than the existing Underlying Rights Requirements.
- K. Customer Facilities placed in or connected to the City System must meet all of the following physical design specifications;
 - (i) Construction splices in Customer's cables shall be located in Manholes, Vaults, Handhold, Junction Boxes or Pedestals.
 - (ii) Customer shall install ownership identification tags on all Customer Facilities where fiber installed by the Customer is present in any Manhole, Vault, Handhold, Junction Box or Pedestal.

- (iii) The City shall determine the maximum permissible diameter of any fiber to be installed by the Customer and the number of fiber cables which the Customer may place in the City's System.
 - (iv) Where Customer constructs Conduit, which is to be connected to any of the City's Manholes, Vaults or Junction Boxes, such Conduit shall be sealed against the entry of gases or liquids at the opening to the Manhole, Vaults or Junction Boxes, and where such Conduit enters any building it shall also be sealed where it enters the building.
- L. Prior to the performance of any work in any public right of way, and in addition to any other permits required by law, Customer shall apply for and obtain a right of way use permit from the City's Transportation Department, which application and permit shall comply with Chapter 14.30 of the Bellevue City Code and any other applicable City ordinances, regulations or standards. Pursuant to Bellevue city Code 14.30.150, if the City reasonable determines that there is a potential for injury, damage or expense to the City as a result Customer's use of the right of way the City may require Customer to provide an assurance devise, in a form acceptable to the City, for activities described in the subject permit.

4. REMOVAL, REPLACEMENT CONDUIT OR RELOCATIONS

- A. If, after the Effective Date, the City is required by an entity with legal authority to so require to relocate any portion of the City System, including any of the facilities used or required in providing the IRU in the Customer Facilities including any condemnation or taking under the power of eminent domain of all or any portion of the City System, the City shall immediately notify Customer and provide written notification of pending relocation, and shall have the right, in good faith, to reasonably determine the extent of, the timing of, and methods to be used for such relocation; provided that: (i) Customer shall be kept fully informed of all material determinations made by the City in connection with such relocation, (ii) Customer Facilities affected by the relocation shall be constructed and tested in accordance with the specifications and drawings set forth in Exhibit A, (iii) shall not result in an adverse change to the operations, performance or connection points with the network of Customer, or the end points in the City System, and (iv) shall not unreasonably interrupt service on the City System.
- B. Customer shall reimburse the City for Customer's proportionate share of all Costs associated with the relocation of the Customer Facilities, including connecting points or other facilities in the affected portion of the City System as so relocated, including the City's cost of providing new connections for, and obtaining new rights-of-way. The City shall refund, to Customer, Customer's proportionate share of any recovery of fees or other costs or reimbursement received by the City related to the relocation or the route from which the Customer Facilities were relocated.

- C. Customer shall have the right to review and audit all costs incurred in connection with such relocation. The City shall deliver to Customer updated As-built drawings with respect to the relocated portions of the City System within (90) days following the completion of such relocation.

5. IRU FEE

- A. Upon execution of this Agreement, Customer shall pay to the City a Total IRU Fee in the amount of _____dollars, which shall include both (i) the 10-year IRU fee and (ii) all maintenance costs for the Initial Term of this IRU associated with the use and occupancy of the Conduit identified in Exhibit A.
- B. The IRU Fee, as provided above, is specific to this Agreement and this fee shall not be construed as establishing a standard or uniform fee structure for the City. The City reserves the right to establish and charge fees, if any, for other uses or occupancy of the City's System, including any other use and occupancy by Customer, on a case-by-case basis. Such fees, if any, may be established by the City, in its sole discretion, taking into consideration all factors that City considers to be pertinent and relevant to establishing such fees, if any, for the use and occupancy of the City System.
- C. Wherever this Agreement provides for Customer to pay for work done by the City, the charge for such work shall include all reasonable material, labor, engineering, and administrative costs and applicable overheads, and the City's standard billing rates for having personnel on site shall apply.

6. TERM AND RENEWAL

- A. The grant of the IRU for the Customer Conduit and Associated Property shall commence on the Effective Date and shall expire on the earlier of the tenth (10th) anniversary date of the Effective Date, or at the end of the economically useful life of the identified Conduit as determined by the Customer (the "Initial Term"). At the expiration or other termination of this Agreement, the IRU shall immediately terminate, and all rights of Customer to use the Associated Property, or any part thereof, shall cease.
- B. Subject to the conditions set forth below, and subject to the extension of the Underlying Rights, City will use Reasonable Efforts to provide Customer with two (2) additional terms of five (5) years each, or, if shorter, for the useful life of the Customer Facilities ("Renewal Term"). In the event Customer desires to extend the Initial Term or any Renewal Term herein, Customer shall provide City with not less than three (3) months written notice prior to the expiration of the then current term of the IRU. The renewal IRU payment shall be \$ _____. All terms and conditions of this Agreement shall be applicable to any Renewal term.
- C. If at any time Customer determines that the Customer Facilities have reached the end of their economic useful life, Customer shall have the right to terminate the IRU by written notice to City. In the event Customer abandons the Customer Facilities during or after

the last year of the current term of this Agreement, Customer shall provide written notice to City and shall peacefully and quietly surrender occupation of the Customer Facilities and Associated Property to City. Upon any such notice of termination or abandonment, the current term of this Agreement shall expire and all rights to use the City System and the Associated Property shall revert to City without reimbursement of any fees or other payments previously made with respect thereto (excluding pre-paid Maintenance Fees, in any), and from and after such time, Customer shall have no further rights or obligations hereunder with respect the City System.

7. NETWORK ACCESS; CONDUIT FACILITIES

- A. City will provide Customer with 24 x 7 access to the identified Conduit , as identified on Exhibit A, in order for Customer to connect its electronic telecommunications equipment and pull and otherwise access Customer Facilities (“Connecting Point”).
- B. Customer may determine and utilize any type of fiber, electronics, or technologies in association with its use of the Customer Conduit, and Customer may install and operate its fiber, and upgrade, rearrange, maintain, repair, replace or otherwise deal with Customer’s electronics and fiber at its sole discretion, subject to mutually agreeable safety procedures.
- C. Customer acknowledges that it has been informed that some or all of the City System that will be occupied by Customer is used to support the City traffic signal system. Customer acknowledges that it has been informed that live electrical conductor may be present within portions of the City System, including certain Vaults, Manholes, Junction Boxes and/or other accessory structures. Customer agrees that any work performed by Customer, including any work performed by contractors of Customer, on Customer Facilities occupying the City System must be performed by qualified professionals certified and licensed to work around live electrical power conductor. All work completed will be in accordance with IEEE Safety Rules for Underground Lines. City represents and warrants that the City System and all electrical conductors will be in compliance with all IEEE Safety Rules for Underground Lines.

If any of Customer Facilities are found occupying any portion of any of the City System other than as identified and set forth in Exhibit A and not otherwise authorized to occupy any portion of the City System, the City may, without prejudice to its other rights or remedies under this Agreement, require Customer to remove the unauthorized occupancy within ten (10) days of receipt of notice from the City regarding Customer’s unauthorized use.

- D. If at the end of such ten (10) day period, unless Customer has disputed, in writing, the City’s findings, Customer has not removed the unauthorized occupancy, the City may, at its sole option, remove Customer Facilities at Customer’s expense in accordance with Article 5D, and the City shall be indemnified by Customer for such work in accordance

with Article 9 of this Agreement. Nothing herein in any way limit or serve to prohibit City from asserting a claim for appropriate fees for the amount and period of the Customer's unauthorized use and occupation.

8. MAINTENANCE AND REPAIR

- A. From and after the Effective Date, the maintenance of the City System shall be provided either by City or by an independent contractor to be selected by City in accordance with the maintenance requirements and procedures set forth in Exhibit C.
- (i) Customer shall pay City a Maintenance Fee for routine scheduled maintenance, including patrol of the route, a "Call-Before-You-Dig" program and maintenance technicians along the route, that is subject to adjustment as established in Exhibit B, which shall be included in the IRU fees, and
 - (ii)
 - (iii) If Customer Facilities, or any part thereof are not maintained in accordance with terms and conditions provided by this Agreement and Customer has not corrected the violation within thirty (30) days from receipt of written notice thereof from the City, the City may at its own option correct said conditions, or cause such conditions to be corrected, at Customer's expense. The City will notify Customer in writing at least five (5) business days prior to performing such work. When the City reasonably believes, however, that such conditions pose an immediate threat to the safety of the City's employees or the public, interfere with the performance of the City's service obligations, or pose an immediate threat to the physical integrity of the City Facilities, the City may perform such work, cause such work to be performed, and/or take such action at Customer's expense that it deems necessary without first giving written notice to Customer and the City shall be indemnified by Customer for such work in accordance with Article 9 of this Agreement. As soon as practicable thereafter and not later than seventy-two (72) hours after having taken such action, the City will advise Customer in writing of the work performed or the action taken and make all reasonable efforts to arrange for re-accommodation of Customer Facilities so affected.
- B. From and after the Effective Date, in the event that all or any part of the City System is damaged or destroyed such that a Service Affecting Condition exists on the identified Conduit, City shall promptly resolve such Service Affecting Condition utilizing the Service Restoration procedures described in Exhibit C to restore the affected portion of the City System to full utilization. Notwithstanding anything contained herein to the contrary, except where a Service Affecting Condition was caused primarily by the gross negligence or willful misconduct of City, its employees or agents, City shall not incur any liability to Customer by reason of a Service Affecting Condition except its obligation to resolve such Service Affecting Condition as set forth in this Section 8., and Customer shall not be entitled to any credits for IRU Fees or any other payment paid or to be paid

by the Customer pursuant to this Agreement by reason of such Service Affecting Conditions.

9. INDEMNIFICATIONS AND LIMITATION OF LIABILITY

- A. Each Party will defend, indemnify, and hold the other Party, its principals, officers, directors, agents and employees, harmless from and against any loss, cost, damage, liability, claim or expense, including but not limited to any reasonable attorneys' fees and court costs, brought by a third party, ("Third Party Claims"), to the extent arising from (i) the indemnifying party's or any of the indemnifying party's subcontractors' or agents' negligent acts or omission or willful misconduct in connection with this Agreement, or (ii) the indemnifying party's violation of applicable federal, state, or local statutes, regulations, ordinances or orders. Further City will defend, indemnify, and hold Customer, its principals, officers, directors, agents and employees, harmless from and against any Third Party Claims to the extent arising from City's breach of any representation or warranty herein. To the extent any Third Party Claims are caused partly by the negligent acts or omission or willful misconduct of Customer and partly by the negligent acts or omissions or willful misconduct of City, then Customer and City will be responsible for such Third Party Claims in proportion to their relative fault.

NEITHER PARTY SHALL BE LIABLE TO THE OTHER (INCLUDING WITH RESPECT TO THIRD PARTY CLAIMS) FOR ANY INDIRECT, INCIDENTAL, SPECIAL OR CONSEQUENTIAL DAMAGES OF ANY KIND (COLLECTIVELY "EXCLUDED DAMAGES") (INCLUDING, BUT NOT LIMITED TO, LOSS OF REVENUE, LOSS OF GOODWILL, LOSS OF BUSINESS OPPORTUNITY, LOSS OF DATA, AND/OR LOSS OF PROFITS TO THE EXTENT THE PRECEDING ITEMS ARE DEEMED TO BE EXCLUDED DAMAGES UNDER APPLICABLE LAW) ARISING IN ANY MANNER FROM THIS AGREEMENT OR THE PERFORMANCE OR NONPERFORMANCE OF OBLIGATIONS HEREUNDER REGARDLESS OF THE FORESEEABILITY THEREOF. THE FOREGOING LIMITATION SHALL NOT APPLY TO THE FOLLOWING: EACH PARTY'S OBLIGATIONS TO INDEMNIFY THE OTHER PARTY AS SET FORTH IN THIS AGREEMENT; WILLFUL MISCONDUCT OF A PARTY; AND ANY CLAIMS ARISING PURSUANT TO THE NONDISCLOSURE AGREEMENT BETWEEN THE PARTIES.

10 INSURANCE

- A. Each Party shall procure and maintain in force at its sole cost and expense the following insurance coverage's from companies that are lawfully approved to do business in all states in which the Customer Fibers are located, in the amounts and with limits as set forth below:

- (1) not less than \$5,000,000 combined single-limit liability insurance, on an occurrence basis, for personal injury and property damage, including, without limitation, injury or damage arising from the operation of vehicles or equipment and liability for completed operations;
 - (2) workers' compensation insurance in amounts required by applicable law and employers' liability insurance, with a limit of at least \$1,000,000. Policy shall be endorsed to include a waiver of subrogation in favor of the City.
 - (3) automobile liability insurance covering death or injury to any person or persons, or damage to property arising from the operation of vehicles, with limits of not less than \$2,000,000 per occurrence.
- B. City shall require each subcontractor who is engaged by its connection with the construction or maintenance of the City System to maintain insurance in the types and amounts set forth herein.
- C. Each Party shall be listed as an additional insured but only with respect to the operation and liability of the named insured on all policies set forth above held for the benefit of the other Party, except workers' compensation. All such policies of insurance shall provide that the additional insured shall be notified in writing at least thirty (30) days prior to any cancellation of, or any material change or new exclusions in the policy. Each Party shall provide the other Party with certifications of insurance evidencing such insurance coverage.
- D. Each Party shall each obtain from the insurance companies providing the coverage's required by this Agreement the permission of such insurers to allow such Party to waive all rights of subrogation and such Party does hereby waive all rights of said insurance companies to subrogation against the other Party, its parent corporation, affiliates, subsidiaries, assignees, officers, directors, and employees or any other Party entitled to indemnity under this Agreement.

11. TAXES, FEES AND IMPOSITONS

- A. City and Customer acknowledge and agree that it is their mutual objective and intent to (i) minimize, to the extent feasible, the aggregation Impositions payable with respect to the City System, (ii) to the extent Impositions of property taxes or taxes and fees required or permitted under law to be passed through to Customer may not feasibly be separately assessed or imposed upon or against the respective interest of City and Customer in the City System, to share such Impositions according to their Proportionate Share in the City System, and (iii) to cooperate with each other and coordinate their mutual efforts to achieve such objectives in accordance with the provisions hereof.
- B. City shall timely pay any and all Impositions imposed upon or with respect to the City System to the extent such Impositions may not feasibly be separately assessed or imposed upon or against each party's proportionate share of the City System; provided that, upon

receipt of a notice of an Imposition resulting from Customer's operation and/or use of the City System or Conduit following the Effective Date that Customer is liable to pay a proportionate share under this Article 11, City shall promptly notify Customer of such Imposition including the basis for the Imposition and the calculation used to determine the Customer's proportionate share and following payment by City, Customer shall promptly reimburse City for Customer's proportionate share of such Impositions, unless the Customer objects in writing to the basis for or the calculation or amount of the Customer's proportionate share. Customer's proportionate share of such Imposition shall be determined to the extent possible, based upon the manner and methodology used by the particular person or authority imposing such Impositions (e.g., on the cost of the relative property interests, historic or projected revenue derived there from, or any combination thereof).

- C. Notwithstanding any provision herein to the contrary, City shall have the right to contest any Imposition it is ultimately obligated to pay, provided that such contest does not materially adversely affect Customer's ability to utilize any IRU granted hereunder and the associated Conduit. Where the Imposition relates to a tax, fee or assessment, a portion of which Customer is ultimately obligated to pay, City shall promptly notify Customer and afford Customer the right to participate in the contest of such Imposition. Any refunds or credits resulting from a contest brought, in which event all such expenses shall be divided between City and Customer in the same proportion as the Impositions were borne by City and Customer. Further, where City does not contest such Imposition, Customer shall have the right, after notice to City, to contest such Imposition as long as such contest does not materially, adversely affect the title, property or rights of City. The out-of-pocket costs and expenses (including reasonable attorneys' fees) incurred by Customer and any refund or credit Imposition in any such contest shall not be shared by City.
- D. City and Customer agree to cooperate fully in the preparation of any returns or reports relating to the Impositions.
- E. City shall keep and maintain for at least four (4) years after the end of each calendar year such books, records, vouchers and accounts of all costs, maintenance fees, Impositions and other amounts payable by Customer hereunder. City shall at all reasonable times and upon written request make such books available for inspection and copy by Customer.

12. CONFIDENTIALITY

- A. City and Customer hereby agree that if either Party provides (or, prior to the execution hereof, has provided) confidential or proprietary information to the other Party ("Proprietary Information"), such Proprietary Information shall be held in confidence, and the receiving Party shall afford such Proprietary Information the same care and protection as it affords generally to its own confidential and proprietary information (which in any case shall be not less than reasonable care) in order to avoid disclosure to or unauthorized use by any third Party. The Parties acknowledge and agree that this Agreement, including all of the terms, conditions and provisions hereof, and all drafts

hereof, constitutes Proprietary Information. In addition, all information disclosed by either Party to the other in connection with or pursuant to this Agreement, including prior to the date hereof should be deemed to be Proprietary Information. All Proprietary Information, unless otherwise specified in writing, shall remain the property of the disclosing Party, shall be used by the receiving Party only for the intended purpose, and such written Proprietary Information, including all copies thereof, shall be returned to the disclosing Party or destroyed after the receiving Party's need for it has expired or upon the request of the disclosing Party. Proprietary Information shall not be reproduced except to the extent necessary to accomplish the purpose and intent of this Agreement, or as otherwise may be permitted in writing by the disclosing Party.

- B. The foregoing provisions of Section 12A shall not apply to any Proprietary Information which (i) becomes publicly available other than through the recipient; (ii) is required to be disclosed by a governmental or judicial law, order, rule or regulation; (iii) is independently developed by the disclosing Party or in the possession of the disclosing Party prior to disclosure; (iv) becomes available to the disclosing Party without restriction from a third Party; or (v) becomes relevant to the settlement of any dispute or enforcement of either Party's right under this Agreement in accordance with the provisions of this Agreement, in which case appropriate protective measures shall be taken to preserve the confidentiality of such Proprietary Information as fully as possible within the confines of such settlement or enforcement process. If any Proprietary Information is required to be disclosed pursuant to the foregoing clause (ii), the Party required to make such disclosure, and, if requested, shall give the other Party an opportunity as such other Party's expense, to oppose or otherwise limit such disclosure.
- C. Any news release, public announcement, advertising or any form of publicity pertaining to this Agreement, provision of services pursuant to it, or association of the Parties with respect to the subject of this Agreement shall be subject to prior written approval of both Parties which approval shall not be unreasonably withheld or delayed.
- D. The provisions of this Article shall survive expiration or termination of this Agreement.

13 DEFAULT

- A. With respect to any material obligation either Party hereunder, unless a shorter time period for cure is expressly provided elsewhere in this Agreement, in the event such Party shall fail to perform such an obligation as set forth in this Agreement and such failure shall continue for a period of thirty (30) days after written notice of such failure to the defaulting Party, such Party shall be in material default hereunder; provided, however, that where such failure cannot reasonably be cured within such 30-day period, if the defaulting Party shall proceed promptly to cure the same within the aforesaid period and continues to prosecute such cure with due diligence, the time for curing such failure shall be extended for such period of time as may reasonably be necessary to complete such cure, and provided further that if such Party certified in good faith to the other Party in writing that a failure has been cured, such failure shall be deemed to be cured unless the

non-defaulting Party otherwise notifies the defaulting Party in writing within fifteen (15) days of receipt of such notice.

- B. Either Party shall be in material default hereunder (i) immediately upon the making by such Party of a general assignment for the benefit of its creditors, the filing by the Party of a voluntary petition in bankruptcy or the filing by the Party of any petition or answer seeking, consenting to, or acquiescing in reorganization, arrangement, adjustment, composition, liquidation, dissolution, or similar relief; or (ii) one hundred twenty (120) days after the filing of an involuntary petition in bankruptcy or other insolvency protection against the Party which is not dismissed within such one hundred twenty (120) days.
- C. Upon failure to cure any material default by a Party, after written notice thereof from the non-defaulting Party, the non-defaulting Party may (i) in accordance with the terms herein, take such action as it determines, in its sole discretion, to be necessary to correct the default and recover from the defaulting Party's reasonable costs incurred in correcting such default.

14. FORCE MAJEURE

- A. Neither Party shall be in default under this Agreement if, and to the extent that, any failure or delay in such Party's performance of one or more of its obligations hereunder is caused by any of the following conditions, each of which shall constitute a force majeure, and the affected Party shall be released from liability and shall suffer no prejudice for the failure of performance of its obligation or obligations, including without limitation, any change of circumstances not reasonably foreseen at the time this Agreement was executed which is beyond the reasonable control of the affected Party, and which materially affects the ability of the affected Party to perform its obligations hereunder; any act of God; Fire: Flood: Lack of or delay in transportation; the adoption or amendment of Government codes, Ordinances, Laws, Rules, Regulations or Restrictions that materially impair the affected Party's performance hereunder; war or civil disorder; strikes, lock-outs or other labor disputes; failure of a third Party to grant or recognize an Underlying Right (provided City has made timely and reasonable commercial efforts to obtain the same).
- B. The Party claiming relief under this Article shall notify the other in writing of the existence of the event relied on and the cessation or termination of said event.

15. ASSIGNMENT AND TRANSFER RESTRICTIONS

- A. Customer shall not assign, encumber or otherwise transfer this Agreement or all or any portion of its rights or obligations hereunder to any other person or entity without the prior written consent of City, which consent will not be unreasonably withheld or delayed. Customer shall have the right, without City's consent, to assign or otherwise transfer this Agreement in whole or in part to any parent, wholly owned subsidiary or affiliate of Customer; or (iii) to any partnership, joint venture or other business entity of

which Customer or any partnership, joint venture or other business entity of which Customer or any wholly owned subsidiary of Customer owns more than fifty percent (50%) of the equity interests thereof and which is controlled by Customer (or wholly owned subsidiary or affiliate of Customer), or (iv) any other entity into which Customer may be merged or consolidated or which purchases all or substantially all of the stock or assets of Customer; provided that the assignee or transferee in any such circumstance shall assume and continue to be subject to all of the provisions of this Agreement, including without limitation this Section 15. A Customer shall give City written notice identifying any permitted assignee.

- B. City may assign or transfer this Agreement including its rights and obligations hereunder without Customer's consent, provided that such assignment or transfer shall not release or discharge City from its duties, obligations, or liabilities hereunder.

16. REPRESENTATIONS, WARRANTIES AND ACKNOWLEDGEMENTS

- A. Each Party represents and warrants to the other that: (i) it has the full right and authority to enter into, execute, deliver and perform its obligations under this Agreement; (ii) all corporate actions necessary to enter into this Agreement and to perform all of the transactions contemplated hereby have been taken; (iii) this Agreement constitutes a legal, valid and binding obligation enforceable against such Party in accordance with its terms, subject to bankruptcy, insolvency, creditors' rights and general equitable principles; (iv) its execution of and performance under this Agreement shall not violate any applicable existing regulations, rules, statutes or court orders of any local, state or federal government agency, court or body; and (v) no consents of any third Party or governmental body are required for the execution or performance of this Agreement.

17. MISCELLANEOUS

- A. No Waiver. The failure of either Party hereto to give notice of default or breach of any provision of this Agreement or to enforce any of the provisions of this Agreement, shall not be construed as a waiver or relinquishment of any such default or breach or its right to enforce any such provision at the alter date, but the same shall nevertheless be and remain in full force and effect.
- B. Governing Law. This Agreement shall be governed by and construed in accordance with the domestic laws of the State of Washington, without reference to its choice of law principles. Any litigation based hereon, or arising out of or in connection with a default by either Party in the performance of its obligations hereunder, shall be brought and maintained exclusively in the courts of the State of Washington, and each Party hereby irrevocable submits to the jurisdiction of such courts for the purpose of any such litigation and irrevocably agrees to be bound by any judgment rendered thereby in connection with such litigation.
- C. Notices. Unless otherwise provided herein, all notices and communications concerning this Agreement shall be in writing, addressed to the other Party as follows:

If to City:

City of _____
_____, Washington 98XXX
Attention: City Clerk

With a copy to:

City of _____
_____, Washington 98XXX
Attention: IT Director

If to Customer:

With a copy to:

nor at such other address as either Party may designate from time to time in writing to the other Party. Notices shall be hand delivered, sent by registered or certified U.S. mail, postage prepaid, or by commercial overnight delivery service, and shall be deemed served or delivered to the addressee or its office when actually received at the address for notice specified above when hand delivered, on the day after being sent when sent by overnight delivery service, or three (3) days after deposit in the mail when sent by U.S. mail.

- D. Entire Agreement. The fact that this Agreement may have been either fully negotiated between or jointly drafted by the Parties, shall not affect the interpretation of any provision of this Agreement in a manner adverse to such Party or otherwise prejudice or impair the rights of such Party. This Agreement constitutes the entire and final agreement and understanding between the Parties with respect to the subject matter hereof, which are of no further force or effect. The Exhibits referred to herein are integral parts hereof and are hereby made a part of this Agreement. To the extent that any of the provisions of any Exhibit hereto are inconsistent with the express terms of this Agreement, the terms of this Agreement shall prevail. This Agreement may only be modified or supplemented by an instrument in writing executed by a duly authorized representative of each Party and delivered to the Party relying on the writing.
- E. Relationship of the Parties. The relationship between Customer and City shall not be that of partners, agents, or joint ventures for one another, and nothing contained in this Agreement shall be deemed to constitute a partnership or agency agreement between them for any purposes, including, but not limited to federal income tax purposes. Customer and City, in performing any of their obligations hereunder, shall be independent contractors or independent Parties and shall discharge their contractual obligations at their own risk subject, however, to the terms and conditions hereof.

- F. Severability. If any term, covenant or condition contained herein shall, to any extent, be invalid or unenforceable in any respect under the laws governing this Agreement, so long as such invalidity does not materially impair the benefit of this Agreement to either Party, the remainder of this Agreement shall not be affected thereby, and each term, covenant or condition of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

- G. Counterparts. This Agreement may be executed in one or more counterparts, all of which taken together shall constitute one and the same instrument.

- H. Survival. Any provision of this Agreement, which by its nature extends beyond the term hereof or which is required to ensure that the Parties to fully exercise their rights and perform their obligations hereunder shall survive the expiration or termination of this Agreement for any cause whatsoever.

- I. No Personal Liability. Each action or claim against any Party arising under or relating to this Agreement shall be made only against such Party as a corporation, and any liability relating to hereto shall be enforceable only against the corporate assets of such Party. No Party shall seek to pierce the corporate veil or otherwise seek to impose any liability relating to, or arising from, this Agreement against any shareholder, employee, officer, director or agent of the other Party. Each such person is an intended beneficiary or the mutual promises set forth in this Section and shall be entitled to enforce the obligations or provisions of this Section.

In confirmation of their consent and agreement to the terms and conditions contained in this Agreement and intending to be legally bound hereby, the Parties have executed this Agreement as of the date first above written.

City of _____, a municipal corporation

Signed By: _____
 Name: _____
 Title: _____

Date: _____

_____, Inc, a Washington corporation

Signed By: _____
 Name: _____
 Title: _____

Date: _____

EXHIBIT A – Conduit System Map and Drawings

EXHIBIT B – Fees

EXHIBIT C - Maintenances and Restoration Specifications and Procedures

1. MAINTENANCE RESTORATION OF THE CONDUIT SYSTEM.

(a) Scheduled Maintenance. Routine maintenance of the identified Conduit shall include the following activities:

(i) Drive-by inspection the System Route as a regular part of the City's normal course of business.

(ii) Maintenance of a "Call-Before-You-Dig" program and all required and related cable locates for the City System.

(iii) Maintenance of "One Call" markers as required by applicable law and of fiber identification tags within the City System as appropriate.

(b) Unscheduled Maintenance. Non-routine maintenance and repair of the Conduit, which is not included as Scheduled Maintenance, shall be performed by or under the direction of the City ("Unscheduled Maintenance"). The Customer shall promptly report the need for Unscheduled Maintenance to the City in accordance with procedures promulgated by the City from time to time and provided to the Customer in writing. The City will verify the problem and dispatch personnel to take corrective action as described below. Customer agrees to cover the City's reasonable cost and expense if the condition is not caused by or the result of a failure of the City System.

(i) Emergency Unscheduled Maintenance (maintenance required by the existing of imminent failure of the Conduit System). Throughout the term of this agreement the City shall contract with a qualified vendor to provide Emergency Unscheduled Maintenance on a four (4) hour response time 24 x 7 x 365 in response to notification by Customer or notification by any third party of any failure, interruption or impairment in the operation of the Conduit System, or any event imminently likely to cause the failure, interruption or impairment in the operation of the Conduit System.

(ii) Non-Emergency Unscheduled Maintenance (maintenance required because of a condition is expected to lead to failure of the Conduit). Throughout the term of this agreement the City shall in provide Non-Emergency Unscheduled Maintenance within in a commercially reasonable time in response to notification by Customer or notification by any third party to prevent any failure, interruption or impairment in the operation of the Conduit .

(iii) Standby Services. The City shall have qualified inspectors on site to periodically inspect construction activity any time the City has reasonable advance knowledge that another person or entity is engaging in construction activities or otherwise excavating within five (5) feet of the Conduit.

(iv) Demand Maintenance (requested maintained that is not required by failure or expected failure of the Conduit System). In addition to the Maintenance and services above, Customer may request additional services on a demand basis (“Request for Demand Services”). Request for Demand Services shall be made in writing to the City. Upon a receipt of a request for Demand Services, the City will determine whether or not it agrees to perform such services, and if it agrees to perform the services, will provide Customer with a written estimate (including overhead cost estimate) of the associated costs. If, after receiving the cost estimate, Customer desires to proceed with the Demand Services, it will notify City in writing within ten (10) days after receiving the written estimate. The City shall perform the Demand Services and the Customer shall pay the actual and reasonable costs (including overhead) incurred by the City in providing such Demand Services.

2. COOPERATION AND COORDINATION.

(a) In performing its services hereunder, the City or its contractors shall take workmanlike care to prevent impairment to the signal continuity and performance of the Customer Facilities. The precautions to be taken by the City shall include notifications to Customer. In addition, the City shall reasonably cooperate with Customer in planning the work, sharing information and analyzing the situation. In the event that any Scheduled or Unscheduled Maintenance hereunder requires a traffic roll by the Customer or reconfiguration involving Customer Facilities, electronic equipment, or other facilities of the Customer, then Customer shall, at the City’s reasonable request, make such personnel of Customer available as may be necessary in order to accomplish such maintenance, which personnel shall coordinate and cooperate with the City in performing such maintenance.

(a) The City shall maintain sufficient capability to teleconference with Customer during an Emergency Unscheduled Maintenance in order to provide regular communications during the restoration process.

(b) During restoration, the parties agree to work together to restore all facilities as quickly as possible. The City, promptly upon arriving on the site of the damage, shall determine the course of action to be taken to restore the Conduit and shall begin restoration efforts.

(c) When repairing conduit damage, including but not limited to, an event of Emergency Unscheduled Maintenance, the City shall use Reasonable Efforts to repair service-affecting discontinuity in the Conduit within eight (8) hours after the City’s maintenance employee’s or contractors arrival at the problem site. In order to accomplish such objective, it is acknowledged that the repairs so effected may be temporary in nature. In such event, within forty-eight (48) hours after completion of any such temporary Emergency Unscheduled Maintenance, the City shall commence its planning for permanent repair, and thereafter shall promptly notify Customer of such plans, and shall implement such permanent repair within an appropriate time thereafter.

(d) In performing permanent repairs, the City shall use Reasonable Efforts comply with industry standards and specifications. The City shall provide to Customer any modifications

to these specifications as may be necessary or appropriate in any particular instance for Customer's approval, which approval shall not be unreasonably withheld.