

2012-0211

**INTERLOCAL AGREEMENT
BETWEEN
THE CITY OF BELLINGHAM
AND
WHATCOM TRANSPORTATION AUTHORITY**

FiberOptic Use Agreement

THIS AGREEMENT is made and entered into this 8th day of March, 2012 (the "Effective Date"), by and between the CITY OF BELLINGHAM, a first-class municipal corporation of the State of Washington, hereinafter referred to as "City", and Whatcom Transportation Authority, hereinafter referred to as "WTA", and pursuant to the authority granted by Chapter 39.34 RCW. By separate written Agreement between the City and other additional governmental entities, such other governmental entities may gain use rights and service under the terms and conditions of this Agreement, subject to separate rates and charges and additional or different conditions as agreed by the City and such other public agency.

THE PURPOSE OF THIS AGREEMENT IS TO provide WTA telecommunications connectivity to the City owned, operated, and maintained fiber optic system, hereinafter referred to as "City Fiber System" at a predetermined yearly use fee.

THIS AGREEMENT REPLACES any prior Agreements between WTA and the City for fiber optic use.

I. RECITALS

WHEREAS, the City has installed fiber optic cabling infrastructure, which includes, or is anticipated to include, a network of bank conduit, access vaults, Network Operations Centers (NOCs), and fiber optic cable, which infrastructure is intended to provide Telecommunications services to various parts of the Whatcom County area;

WHEREAS, the Fiber System was designed and intended, in part, to provide its users with access to external high-speed bandwidth for Telecommunications purposes. Currently, the Fiber System is utilized by government entities and private parties in Whatcom County as an institutional network; and

WHEREAS, excess capacity exists on the Fiber System, such that the City desires to make such capacity available to additional governmental entities to satisfy the growing demand in Whatcom County for access to a high-speed network; and

WHEREAS, outside agencies have purchased fiber and related equipment to connect to the City Fiber System; and

WHEREAS, pursuant to Chapter 39.34 RCW, the Interlocal Cooperation Act, and pursuant to their inherent statutory and constitutional powers, the Parties desire to set forth their respective responsibilities for the use of the Fiber System and the ownership, use and maintenance of auxiliary facilities;

NOW, THEREFORE, in consideration of the mutual promises and obligations hereinafter set forth, the Parties agree as follows:

II. AGREEMENT

1. DEFINITIONS

1.1. "Agency" means, collectively, Whatcom Transportation Authority and any other governmental entity with use rights and service rights based on a separate Agreement with the City. "Agency," singularly, means Whatcom Transportation Authority.

1.2. "Auxiliary Facilities" means the fiber optic infrastructure owned by the Agency, and shall include, but not be limited to, cabinets, equipment racks, ducts, conduits, equipment, handholds, lines, manholes, poles, telephone lines, splice boxes, surface location markers, vaults, tunnels, NOCs and any other appurtenances or tangible property owned, leased, operated, used, licensed or controlled by Whatcom Transportation Authority, located at any time within facilities owned or leased by an Agency or situated upon property owned by the Agency. The term does not include the City Fiber System.

1.3. "Content" means information, communications, software, photos, video, graphics, music, sounds, services and other material that is accessed through Telecommunications services.

1.4. "Demarcation Point—Agency" means that point at which ownership of Telecommunications facilities and maintenance responsibilities changes from the Agency to a third party, or any other licensee. For the purposes of this Agreement, the Demarcation Point--Agency shall be the interface point between any licensee or customer-owned premises equipment ("CPE"), and the Auxiliary Facilities.

1.5. "Fiber System Infrastructure" shall include, but not be limited to, cabinets, equipment racks, ducts, conduits, equipment, handholds, lines, manholes, poles, telephone lines, splice boxes, surface location markers, vaults, tunnels, NOCs and any other appurtenances or tangible property owned, leased, operated, used, licensed or controlled by the City, located at any time and from time to time in the Public Right-of-Way, within City-owned or leased facilities, or situated upon property owned by the City.

1.6 "Fiber System" means the fiber optic cable situated as described, together with that Fiber System Infrastructure necessary to operate the Fiber System. The City Fiber System shall include such infrastructure up to the Demarcation Point. It is anticipated by this Agreement that the Fiber System shall be modified from time-to-time as system expansion occurs.

1.7. "Parties" means the Agency and the City.

1.8. "Service Provider" means any third party entity that provides Telecommunications and is duly licensed to connect to the City Fiber System by the City.

1.9. "Telecommunications" shall have the same meaning as set forth in RCW 80.04 and/or 53.08.370 as those statutes currently exist or may hereafter be amended, and shall mean the transmission of information by wire, radio, optical cable, electromagnetic, or other similar means. As used in this definition, "information" means knowledge or intelligence represented by any form of writing, signs, signals, pictures, sounds, or any other symbols.

2. SCOPE OF AGREEMENT AND GENERAL RESPONSIBILITIES

2.1. SCOPE OF AGREEMENT.

This Agreement addresses (A) the Agency's' license to use the City Fiber System; (B) the Agency's' use, ownership and maintenance of the Auxiliary Facilities; and (C) technical support and maintenance services regularly provided by the City, and/or any agent of the City.

2.2. GENERAL RESPONSIBILITIES OF THE CITY.

The City shall be responsible, either through its own forces or through an agent or contractor, for the overall operations, management, installation, and maintenance of the Fiber System. The City shall be responsible; either through its own forces or through an agent or contractor to perform all of the work associated with the deployment or maintenance of the Fiber System and shall be responsible with an agent or contractor to provide management of the Fiber System. The City also shall, either through its own forces or through an agent or contractor, maintain the Auxiliary Facilities in the event a further written Agreement for such services is reached between the City and the Agency.

2.3. GENERAL RESPONSIBILITIES OF THE PARTICIPATING AGENCY.

The Agency shall be responsible, either through their own forces or through an agent or contractor, to select, install, and maintain all compatible infrastructure as may be necessary to design and construct the Auxiliary Facilities needed to utilize the City Fiber System.

2.4. GENERAL RESPONSIBILITIES OF THE PARTIES.

The Parties shall cooperate with respect to the use and maintenance of the Auxiliary Facilities.

3. GENERAL CONDITIONS

3.1. USE OF THE CITY FIBER SYSTEM.

- A. The City hereby grants a license to the Agency, for use by the Agency's staff, employees, Sub-Users and Tenants, to access the City Fiber System for the specific purpose of conducting Telecommunications or data networking activities specific to the Agency or a permitted Sub-User. The City shall provide access to the Fiber System over those strands of fiber optic cable and infrastructure as it shall determine in its sole discretion needed for data networking and telecommunication activities. Agency staff, employees, and Sub-Users using the Fiber System Infrastructure pursuant to the Agency License granted hereunder shall have complete free and unrestricted use of such fiber for any lawful governmental, public, intergovernmental or public utility purpose. Such license shall not limit the City from extending or expanding its Fiber System, unless such extension or expansion significantly interferes with the Agency use of the City Fiber System as allowed hereunder.
- B. The license granted hereunder is hereby granted to the Agency (including their employees, staff or agents) or Sub-Users, as described herein, and shall not be assignable unless otherwise permitted by this Agreement or the City. The Agency may allow third persons and/or entities ("Sub-Users") to connect to the Auxiliary Facilities or extend the Auxiliary Facilities for use of the Agency or Sub-Users so long as such use of the Auxiliary Facilities is consistent with the provisions of this Agreement and the Agency incorporate the terms of this Agreement into an Agreement the Agency shall enter into with any Sub-Users. The foregoing notwithstanding, the Agency shall not allow third parties to use the Auxiliary Facilities to establish intra-user network systems.
- C. The City shall allow the Agency's, employees, agents and Sub-Users' internet service providers ("ISPs") access to the Fiber System through duly licensed ISP providers and the Auxiliary Facilities in a non-discriminatory manner and on terms and conditions substantially similar to those for existing ISPs.
- D. With respect to the usage of the City Fiber System by the Agency or its Sub-User, the Agency shall:
 - i. Stipulate and agree that nothing in this Agreement shall be construed so as to place the City into a contractual arrangement with any third party or Sub User. No third party or Sub User to this Agreement shall be construed to be a third-

party beneficiary of this Agreement. All Agency Agreements with Sub-Users shall include a release of any claim against the City and shall hold harmless and indemnify the City against any and all claims for the services provided to the Sub User through the City Fiber System.

- ii. Take such steps as may be reasonable and prudent to disclaim on behalf of the City any liability based on contract or tort, to any Sub User that may utilize the City Fiber System to access the Agency's networks. Such reasonable and prudent steps shall include the incorporation of this Section 3 into any Agreements providing for access to the City Fiber System between the Agency's and any Sub User.
- iii. Indemnify, pay the defense costs of, and hold harmless the City and its officers, employees and volunteers from any and all actions, causes of action, claims, demands, costs, losses, liabilities, expenses, expenses, and damages (including reasonable attorneys' fees) arising out of or in connection with any claim which, if true, would constitute (a) a breach by the Agency and/or their Sub-Users, Tenants, officers, employees, or volunteers of any representation or warranty made by the Agency in this Agreement; (b) the Agency and/or their Sub-Users, Tenants, officers, employees, or volunteers misrepresentation or other misconduct in connection with its acts or omissions relating to this Agreement; and/or (c) infringement by the Agency and/or their Sub-Users, Tenants, employees, students, or staff, of any right of publicity or privacy, or a trade secret, of any third party. For purposes of this Section 3.1(D)(iii) and Section 3.1(D)(iv), "volunteers" of a party mean volunteers acting within the scope of their assigned duties and under the direct supervision of the party in question.
- iv. The City will indemnify, pay the defense costs of, and hold harmless the Agency and their Sub-Users, Tenants, officers, directors, and staff from any and all actions, causes of action, claims, demands, costs, losses, liabilities, expenses and damages (including reasonable attorneys' fees) arising out of or in connection with any claim which, if true, would constitute (a) a breach by the City and/or its officers, employees, or volunteers of any representation or warranty made by the City in this Agreement; (b) the City and/or its officers, employees, or volunteers misrepresentation or other misconduct in connection with its acts or omissions relating to this Agreement; and/or (c) infringement by the City and/or its officers, employees, or volunteers, or any of its services provided hereunder, of any patent, copyright, trademark, service mark, right of publicity or privacy, trade secret, or any other right of any third party.

3.2. DISSEMINATION OF INFORMATION.

Use of the City Fiber System is limited to the transfer of data or Telecommunications services to the Agency (including their Sub-Users, staff, and employees) unless otherwise permitted by this Agreement or the City. No access to City data is deemed granted under this

Agreement. The City shall not access any Agency, or Sub-User data except for the purposes of troubleshooting transmission issues reported by the Agency.

3.3. PROPRIETARY INFORMATION.

- A. Confidentiality. A portion of the equipment and locations may include descriptions of vital infrastructure, which are critical to the operation of public safety departments and security. As such, the information contained in this Agreement thereto may be considered to be confidential by the Parties, the disclosure of which would be inimical to public health, safety, and local, regional, and national security. The Parties shall not disclose such information except as necessary to facilitate the proper functioning of the City Fiber System and/or the Auxiliary Facilities or as required under any applicable public disclosure laws of the state of Washington. In the event any party becomes aware of a request for information disclosing the location of the City Fiber System Infrastructure or the Auxiliary Facilities, the Party shall take all reasonable steps to advise the other Parties of such request. To the extent that descriptions of vital infrastructures are developed, which are critical to the operation of Parties' public safety departments and security, they shall be maintained by the Parties in a fashion that will not cause their public disclosure when this Agreement is publicly disclosed.
- B. Proprietary information disclosed by either party to the other for the purposes of this Agreement, which shall be clearly identified in writing as proprietary, shall be protected by the recipient in the same manner and to the same degree that the recipient protects its own proprietary information. Except as required by public records law, such information will be disclosed only to those employees of the recipient requiring access thereto in order to perform this Agreement.
- C. In no event shall confidential or proprietary information include information that is: (i) generally available to the public other than as a result of a disclosure in violation of this Agreement, or (ii) available to a party on a non-confidential basis from a source other than the other party.

3.4. CITY NOTICES.

The City reserves the right to distribute informative e-mails to the Agency on an ad hoc basis that the City feels is pertinent to the quality of its service. These announcements may include information about revisions to this Agreement and/or modifications to the services provided under this Agreement or other information about the City's services. The Agency agrees to forward this information to its authorized Sub Users as appropriate.

3.5 INDEPENDENT CONTRACTORS.

The Parties are acting as independent contractors and shall have exclusive control of the manner and means of performing their obligations. Accordingly, each Party shall be responsible for the administration of its obligations hereunder. The parties will not be responsible for performance of their obligations hereunder (except with regard to payment obligations) where

delayed or hindered by war, riots, embargoes, strikes or acts of its vendors or suppliers, accidents, Acts of God or any other event beyond their control.

4. RATES AND CHARGES.

4.1. PAYMENT BY THE AGENCY.

The Agency shall pay all applicable rates and charges set forth in this Agreement. The Agency shall pay each bill in full, less any disputed amounts, by the payment due date on each bill which shall be no less than 30 days from the date the invoice is transmitted to the Agency. The Agency shall promptly notify the City of any billing disputes, and the Parties agree to cooperate to resolve the dispute. Any amount not paid within such period shall bear interest at the lesser of (A) the rate of one and one-half percent (1 ½ %) per month, or (B) the highest rate permitted by applicable law, *provided*, however, that no interest will accrue on any late payment that is the subject of a good faith dispute.

4.2. MAINTENANCE FEES.

- A. A Maintenance Fee shall be paid to the City to fund maintenance and repairs of the City Fiber System by the Agency, as set forth below. The Agency is responsible for the maintenance and repair of its own facilities. The Agency may contract with the City for such repairs and maintenance by separate Agreement.
- B. Purpose. The purpose of the Maintenance Fee shall be to establish a contingency fund from which ordinary maintenance and extraordinary repair costs may be paid. It is anticipated that the Agency as well as third parties who utilize the City Fiber System through separate Agreement shall share in the establishment and continuation of a maintenance and repair fund. The Maintenance Fee shall be paid in the form of a contribution as set forth in Section 4.2-B. below.
- C. Contribution by the Agency. Promptly after the execution of this Agreement, the Agency shall contribute to the maintenance fee as follows:

Two Thousand Five Hundred dollars (\$2,500.00) per year

The initial contribution is for the 2012 calendar year and will be pro-rated. The Agency shall contribute an additional Two Thousand Five Hundred & 00/100 dollars (\$2,500.00) on an annual basis effective January 1, 2013, and will continue for a 10 year term to 2023. Additional 10 year term renewals of the contract will be granted by the City provided both parties mutually agree to any reasonable increases to the maintenance fee to effectively maintain the City's Fiber System. The foregoing notwithstanding, should "extraordinary repair costs" for "an unexpected event" (as described Subsection D below) be incurred, the Agency may be billed for reimbursement of such costs according to its pro-rata share as established under this Section, which reimbursement shall be made within sixty (60) days of receipt of such invoice provided.

- D. Use of Funds. The City shall utilize the funds for ordinary maintenance, and extraordinary repair costs, attributed to the City Fiber System. For the purpose of this section, "ordinary maintenance" is defined as work that is performed on a regularly scheduled basis to service, check, or replace items that are not broken; or work that is not regularly scheduled but is required to maintain the asset so that repair does not become necessary. For the purpose of this section, "extraordinary repair costs" shall include all other repair costs attributed to the Fiber System, including those costs necessary to effectuate repairs as a consequence of an unexpected event.

5. INSTALLATION, EQUIPMENT, AND SUPPLIES

5.1. INSTALLATION AND MAINTENANCE.

Only Qualified Individuals shall perform installation and/or maintenance work on the City Fiber System and the Auxiliary Facilities. For purposes of this Section 5.1., the term "Qualified Individuals" shall mean those individuals trained to perform such installation and/or maintenance.

5.2. EQUIPMENT.

The Agency shall be solely responsible for obtaining and maintaining, at the Agency's expense, any communications equipment necessary to connect to the City Fiber System and/or Auxiliary Facilities, including modems, computer hardware and software, and long distance or local telephone service. The Agency shall be responsible for ensuring that such equipment or service is compatible with the City's requirements. In addition, the Agency shall be responsible for maintaining the security of the Agency's accounts, passwords, files, network and user access, and any information the Parties disseminate through the CityFiber System and for all use of the Agency's account with or without the Agency's knowledge or consent, including, without limitation, any use of the account by minors.

5.3 AGENCY OWNERSHIP OF AUXILIARY FACILITIES.

The Agency shall own the Auxiliary Facilities as described Subsection 1.2. and 1.9.

6. SECURITY AND INTEGRITY

6.1 SECURE CONNECTIONS.

The Parties (including Sub-Users authorized by the Agency) utilizing the City Fiber System or Auxiliary Facilities, including the City, will have in place during the term of this Agreement a network firewall, to help prevent unauthorized access from the Internet. However, the Agency and its Sub Users accessing the City Fiber System through the Auxiliary Facilities

are responsible for maintaining their own firewall, and securing their computing and data resources from all unauthorized access. Due to the nature of the Internet connectivity, addressing, and associated security risks, the Agency, City, and any Sub User permitted by the Agency shall agree to the following conditions:

- A. Parties will connect only to fiber strands that have been allocated to them.
- B. Connections between the Parties and providers will be done only with the permission of the Parties.
- C. The City or its agent will be allowed access and connectivity for the purpose of troubleshooting the City Fiber System and Auxiliary Facilities issues. Such actions will be performed on a case by case basis with the permission of the Agency.
- D. The Agency will not make connections beyond those contemplated by Section 3. on or to the City Fiber System or Auxiliary Facilities without prior review and approval by the Parties, which approval shall not be unreasonably withheld.
- E. In the event of connections between Parties, the Parties agree to provide relevant information necessary to implement and maintain communications. This may include but not be limited to network addressing, router addressing, and network address translation.

6.2. AUTHORIZED USE.

The hosts, systems, gateways, etc., connected to the Agency' networks will be restricted to authorized use by physical security to the extent reasonably practicable (i.e., the hosts will be in locations preventing unauthorized use) and/or user authentication managed by the Agency (e.g., user-id and passwords or other authentication). Extending use to non-Agency locations will not be permitted unless such use is under the control and management of the Agency. Note that failure to coordinate new network connections may result in routing problems, including data packets not being able to reach their target destination.

6.3. INDIRECT ACCESS.

The Parties will take reasonable measures to prevent unauthorized third-party indirect access to the City Fiber System and Auxiliary Facilities. Examples of this would be gateways, dial-up, or cascaded telnet sessions where the originator is not the Agency or an Agency-authorized user of the City Fiber System, but whose resultant IP address would appear to the network as being the Agency's address.

7. REPRESENTATIONS AND WARRANTIES

7.1. AGENCY'S AUTHORITY TO ENTER AGREEMENT.

The Agency represents, warrants and covenants that: (A) it has and shall have full right and authority to enter into this Agreement and to perform its obligations hereunder; (B) the Agency's Data shall not include obscene, indecent or defamatory material or violate or infringe

the rights of others, including, without limitation, any patent, copyright, trademark, trade secret, contract, privacy, publicity, or other personal or proprietary right; and (C) it shall comply with applicable laws and government regulations, including all relevant export and encryption laws. For purposes of this Section 7.1, the "Agency Data" shall mean the text, data, images, sounds, photographs, illustrations, graphics, programs, code and other materials transmitted or stored through the City Fiber System, whether by the Agency or the Agency's Users or Sub Users. For purposes of this Agreement, "the Agency's Users" shall refer to employees, agents, contractors or other representatives of the Agency authorized by the Agency to utilize the City Fiber System, or authorized by the Agency to utilize technology that makes use of the City Fiber System and Auxiliary Facilities.

7.2. TRADEMARK AND COPYRIGHT INFRINGEMENT.

The Agency represents and warrants to the City that it:

- A will not publish or distribute content that infringes any third party's trademark, copyright, patent, trade secret, publicity, privacy or other personal or proprietary right; and
- B will use the City Fiber System in compliance with all laws and regulations including, without limitation, prohibition on the use of Telecommunications facilities to transmit illegal, obscene, threatening, libelous, harassing, other offensive messages or otherwise unlawful material.

The Agency agrees to indemnify and hold harmless the City, its officers, employees and agents from and against any liability and costs incurred in connection with any claim arising out of any breach by the Agency of the representation and warranties contained in this Section 7.2. The City may participate in the defense at its expense. The City has no obligation, and undertakes no responsibility, to review the Agency's content to determine whether any such content may give rise to liability to third parties.

7.3. PARTIES'S AUTHORITY TO ENTER AGREEMENT.

The Parties represent, warrant, and covenant that they have and shall have the full right and authority to enter into this Agreement, to grant the licenses hereunder without restriction or consent of a third party and to perform its obligations hereunder. The City further represents, warrants, and covenants that the licenses and services provided by each do not and will not infringe upon, violate, or misappropriate any patent, copyright, trade secret, trademark, contract, or any other publicity right, privacy right, or proprietary right of any third party.

8. DISCLAIMER OF WARRANTIES

8.1 MAINTENANCE OF NETWORK.

The parties shall use commercially reasonable efforts to:

- A monitor their network and its interconnection to other networks and
- B maintain their network, including interconnections, in an operational state and in accordance with the technical specifications customary for publicly owned telecommunications facilities.

The Agency assumes total responsibility for the Agency's use and the Agency's users' and sub user's use of the service, software or equipment, whether or not provided by the parties. The Agency acknowledges that the internet contains materials which may be offensive or otherwise objectionable and is accessible by persons who may attempt to breach the security of the City's and/or the Agency's network(s). The City expressly disclaims any responsibility for such materials or actions and that the Agency accesses the service at its own risk. Except as specifically set forth herein or in an addendum, the City Fiber System, and related software and/or equipment provided by the City, if any, are provided on an "as is" and "as available" basis without warranties of any kind, either express or implied, including but not limited to warranties of title, non-infringement or implied warranties of merchantability or fitness for a particular purpose.

8.2. LOSS OR DAMAGE.

Except to the extent that such disclaimers are expressly prohibited by law, the City disclaims any and all loss, damage or liability arising out of or relating to the Agency's use of the City fiber system, including, but not limited to, any loss, damage or liability relating to:

- A loss or corruption of data;
- B loss of or damage to software or hardware;
- C access delays or access interruptions;
- D computer viruses;
- E non-delivery or miss-delivery of data;
- F the negligent acts and/or omissions of the parties or the parties subscribers;
- G any defects, failures, errors, omissions, or misstatements in any and all information, goods, or services obtained on or through the service; and;
- H loss or liability resulting from acts beyond the City's control.

8.3. NO ORAL WARRANTIES.

The Agency may not rely on oral or written information or advice given by the City's officers, employees, agents, authorized representatives, subcontractors or affiliates and/or their officers, directors, employees, agents, authorized representatives, or subcontractors or affiliates to create a warranty or increase the scope of warranty already established in these terms and conditions.

8.4. CONSEQUENTIAL DAMAGES.

To the maximum extent permitted by law, in no event shall the City, its officers or employees be liable for any indirect, incidental, special, punitive or consequential damages or

lost or imputed profits or royalties, lost data or cost of procurement of substitute goods or services related to the service or this Agreement whether for, among other things, breach of warranty, and whether liability is asserted in, among other things, contract or tort (including but not limited to negligence and strict product liability) whether or not the Agency has been advised of the possibility of any such loss or damage. The City's total aggregate liability hereunder shall in no event exceed an amount equal to the aggregate amount owed to the Agency under this Agreement. The Agency hereby waives any claim that these exclusions deprive it of an adequate remedy or cause this Agreement to fail of its essential purpose.

8.5. EXCLUSIVE REMEDY.

As to claims based on warranties, loss, or damage, as set forth in this Section, the foregoing sets forth each party's exclusive remedy for breach of this Agreement by the other party.

9. TERM

9.1 EFFECTIVE DATE.

The term of this Agreement shall be for a period of ten(10) years, commencing on the Effective Date, unless earlier terminated pursuant to its terms. Parties shall give notice one hundred eighty (180) days prior to termination of its intent to discontinue participation in this Agreement. In the event the "Effective Date" is not specified above in the introductory paragraph to this Agreement, the Effective Date shall be the date upon which both the City and WTA have fully executed this Agreement.

9.2. TERMINATION OF AGREEMENT - SALE OR ABANDONMENT OF CITY FACILITIES OR AUXILIARY FACILITIES.

Either party may terminate this Agreement within thirty (30) days' written notice in the event of the sale, abandonment, lease, or other event, which causes the City or the Agency to close, evacuate, or cease operations in any of the facilities where the City Fiber System or Auxiliary Facilities are terminated or transitioned through.

9.3. DEFAULT OF THE AGENCY.

The City may terminate this Agreement and/or cease or suspend the provision of all or any component of the service hereunder provided upon default of the Agency.

Default includes

- A the failure to pay any undisputed amount when due hereunder (after ten (10) days prior written notice of such failure to pay);

- B or any material breach of this Agreement, or conduct that subjects the City or its affiliates, agents or contractors to civil or criminal litigation, claims and/or damages.

9.4. DEFAULT OF THE CITY.

The Agency may terminate this Agreement or portions thereof upon default of the City. Default includes

- A the failure to properly manage, install, or maintain its Fiber System or to maintain the Auxiliary Facilities;
- B the failure to provide reliable service to the Agency;
- C the failure of the Fiber System or service to support the Agency's intended uses thereof as contemplated by the parties;
- D the filing of a petition in bankruptcy by or against the City; or
- E any material breach of this Agreement, or conduct that subjects the Agency or their, agents or contractors to civil or criminal litigation, claims and/or damages.

9.5 REGULATORY MODIFICATION/RESERVATION TO TERMINATE FOR PUBLIC CONVENIENCE BY THE CITY.

In the event a law or regulatory action impairs the provision of service under this Agreement or the City, in its sole discretion, determines it is unable to provide the service cost-effectively, the City may, at its option and without liability, terminate this Agreement or propose modifications to the service or the terms and conditions of this Agreement in order to conform to such action or circumstance and allow the City to continue to provide cost-effective service *provided*, however, that the City shall provide forty-five (45) days prior written notice to the Agency of any such modification, unless the City determines, in its good faith business judgment, that it is necessary to reduce the foregoing notice period. Within forty-five (45) days of receiving a proposed modification from the City, an Agency may, at its option and without liability, accept the modification, propose revisions to the modifications, or terminate this Agreement.

9.6 TERMINATION FOR CONVENIENCE

The Agency may terminate and cancel this Agreement for any reason upon written notice of termination and cancellation given to the City and this Agreement shall terminate and cancel thirty (30) days from the date of the written notice.

10. PROVISION OF ACCESS

The City may limit, control or prioritize the access described herein to any extent necessary to prevent such from unreasonably disrupting the City's operations and to prevent excessive interference with other essential functions of the City. This may include scheduled shutdowns for backups or maintenance and unscheduled shutdowns due to hardware or software

malfunctions. To the maximum extent possible, the City shall provide advance notice of any such shutdown.

11. SERVICE INTERRUPTION AND REPAIR

11.1 THE CITY

The City shall remain responsible to conduct repairs of the City Fiber System in order to avoid service interruption. There will be no additional charge to the Agency for such repairs, unless the Agency, or an agent working on behalf or at the request of the Agency, is directly responsible for the interruption in service. Examples of Agency-caused outages may include:

- A. Work on network equipment by the Agency or agent of the Agency.
- B. Inadvertent disconnection of fiber optic line by a Telecommunications provider working on behalf or at the request of the Agency.

Examples of services repairs that will not be charged to the Agency are:

- A. The loss of fiber optics lines to the Agency site through an external force, such as wind or automobiles.
- B. An inadvertent drop in connection by City employees.

12. PROBLEM RESOLUTION PROCESS

The Agency shall attempt to resolve any performance or network failures through the use of their own technical staff first. The process for resolving a problem shall be as follows:

- A. Contact Agency personnel first. The Agency personnel will track the call and route to the appropriate resource. The Agency personnel will attempt to resolve the problem. They will verify that all Agency network equipment is operating correctly.
- B. If the Agency network support personnel verify that Agency's network equipment is functioning correctly and the issue is with the City Fiber System they will contact the City or its agent, to log a trouble call.
- C. City personnel or their agent will notify and dispatch a qualified engineer to assist in troubleshooting the problem.

13. ENGINEER SUPPORT.

Engineer support shall be based on a priority and availability basis. The City or its agents shall make a reasonable effort to respond to any Agency problem within one business day,

provided that an engineer is available. The City may prioritize access to technical engineers based on internal business or emergency needs taking first priority.

If the City's technical staff or agent cannot resolve the issue, then, after an Agency has consented in writing through electronic mail, facsimile transmission, or other written form, the City may contract for a third party to participate in troubleshooting the problem. The third party shall have expertise in the area of fiber optics. Third party troubleshooting shall be at the Agency' expense unless the issue in connection with such third party troubleshooting is otherwise the responsibility of the City under this Agreement.

14. SUPPLEMENTAL CHANGES.

All revisions and amendments to this Agreement shall be mutually agreed upon in writing in advance. The City may notify the Agency of any proposed revisions to this Agreement, including revisions to the fees and charges provisions, in writing by sending notice of such revision to the Agency' contract administrators identified in Section 19. Such notice may be made by e-mail, and, except for modifications discussed in Section 9.5., such revisions shall become effective not earlier than 30 days following transmission of the message unless objected to in writing by the Agency within 30 days of receipt of such notice. The Agency agrees that, by continuing to use the City Fiber System following notice of any revision to this Agreement pursuant to Section 9.5 or this Section 14. without submitting a written rejection of such transmission during the time periods set forth therein, the Agency accepts any such revisions and agrees to abide by any such revisions.

15. DISPUTES.

In the event of any dispute relating to this Agreement, any such dispute shall be submitted to binding arbitration as provided herein. The parties shall select an independent and unbiased arbitrator who is not affiliated directly or indirectly with either party within fifteen (15) days after any party demands arbitration. If the parties fail to select, or cannot agree upon, an arbitrator within this time, then either party may apply to the Superior Court of WhatcomCounty pursuant to RCW 7.04A et seq. for an order appointing an arbitrator. Such application may be made at any time after the fifteen day period has expired. Upon application to the court for an arbitrator, the Court shall select an arbitrator, who shall render his/her decision no later than 60 days after his/her appointment. If the arbitrator requests a hearing prior to rendering his/her decision, such hearing shall be held in Bellingham, Washington within 45 days of the arbitrator's appointment. The arbitrator's decision shall be binding on both parties. Each party shall bear its own expenses associated with the arbitration but shall share equally the costs of the arbitrator. This paragraph shall be referred to herein as the "Binding Arbitration Clause." The foregoing Binding Arbitration Clause, RCW Chapter 7.04A, and Rules 5.2 through 5.4 of the Mandatory Arbitration Rules for Superior Court ("MAR") shall govern the arbitration. In the event of any inconsistencies between the Binding Arbitration Clause, RCW Chapter 7.04A, and MAR 5.2 through 5.4, the terms of the Binding Arbitration Clause shall take precedence over RCW

Chapter 7.04A and MAR 5.2 through 5.4; and RCW Chapter 7.04A shall take precedence over MAR 5.2 through 5.4.

The laws of the state of Washington shall govern this Agreement. In the event that any portion of this Agreement is held to be unenforceable, the remaining enforceable provisions shall remain in full force and effect unless the absence of the unenforceable provisions frustrates the intent of this Agreement, in which case the terms contained in Subsection 20.7 shall apply. Except with regard to Addenda, either party's failure to insist upon strict performance of any provision of this Agreement shall not be construed as a waiver of any of its rights hereunder. The terms and conditions of this Agreement, including all Addenda, shall prevail notwithstanding any different or additional terms and conditions of any purchase order or other form for purchase or payment submitted by the Agency to the City. All terms and provisions of this Agreement which should by their nature survive the termination of this Agreement shall so survive, including but not limited to Sections 3.3., 6., 7., and 8. Any cause of action a Party may have with respect to the service must be commenced within one (1) year after the claim or cause of action arises or such claim or cause of action is barred. In any proceeding to enforce the terms of this Agreement, the party prevailing shall be entitled to recover all of its expenses, including, without limitation, reasonable attorneys' fees. The Agency, by its execution of this Agreement, agrees to the terms and conditions stated herein.

16. COMPLIANCE WITH REGULATIONS AND LAWS.

The Parties shall comply with all applicable rules and regulations pertaining to them in connection with the matters covered herein. It shall be the obligation of the Party placing or fulfilling an order for goods or services to be certain that all legal requirements applicable to that party have been met.

17. ASSIGNMENT.

The Parties shall not assign this Agreement or any interest, obligation or duty therein without the express written consent of the other Party, which consent shall not be unreasonably withheld.

18. ATTORNEYS' FEES.

Each party shall bear its own expenses associated with attorney's fees in connection with any action under this Agreement.

19. NOTICES.

All notices hereunder may be delivered or mailed. If mailed, they shall be sent to the following respective addresses:

City of Bellingham
Attn: Bill Hanes, Communications Manager
2221 Pacific Street
Bellingham, WA 98229
360-778-7822
E-Mail: whanes@cob.org

Whatcom Transportation Authority
Attn: Josh Nylander
4111 Bakerview Spur Rd
Bellingham WA 98226
360-752-4595
E-Mail: JoshN@RideWTA.com

or to such other respective addresses as any Party hereto may hereafter from time to time designate in writing. All notices and payments mailed by regular post (including first class) shall be deemed to have been given on the second business day following the date of mailing, if properly mailed and addressed. Notices and payments sent by certified or registered mail shall be deemed to have been given on the day next following the date of mailing, if properly mailed and addressed. For all types of mail, the postmark affixed by the United States Postal Service shall be conclusive evidence of the date of mailing. For e-mail delivery shall be the next business day after the day sent; a delivery or a read receipt shall be conclusive evidence of the date of mailing.

20. MISCELLANEOUS.

20.1. All of the covenants, conditions and agreements in this Agreement shall extend to and bind the legal successors and assigns of the Parties hereto.

20.2. This Agreement shall be deemed to be made and construed in accordance with the laws of the State of Washington. In the event of any claim or action beyond the scope of the Binding Arbitration Clause, jurisdiction and venue for any action arising out of this Agreement shall be in WhatcomCounty, Washington.

20.3. The captions in this Agreement are for convenience only and do not in any way limit or amplify the provisions of this Agreement.

20.4. Unless otherwise specifically provided herein, no separate legal entity is created hereby, as each of the Parties is contracting in its capacity as a municipal corporation of the state of Washington.

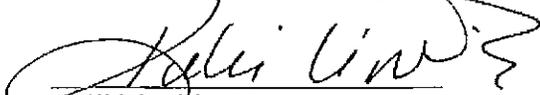
20.5. Each Party shall perform its duties under this Agreement in accordance with its standard operating procedures and customary practices.

20.6. If any term or provision of this Agreement or the application thereof to any person or circumstance shall, to any extent, be held to be invalid or unenforceable by a final decision of any court having jurisdiction on the matter, the remainder of this Agreement or the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable shall not be affected thereby and shall continue in full force and effect, unless such court determines that such invalidity or unenforceability materially interferes with or defeats the purposes hereof, at which time either party shall have the right to terminate the Agreement.

20.7. This Agreement constitutes the entire agreement between the parties. There are no terms, obligations, covenants or conditions other than those contained herein. No modifications or amendments of this Agreement shall be valid or effective unless evidenced by an Agreement in writing signed by both parties.

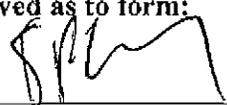
IN WITNESS WHEREOF the parties hereto have executed this Agreement as of the day and year first above written.

FOR CITY OF BELLINGHAM



Kelli Linville, Mayor

Date: 3/8/12

Approved as to form:


Office of the City Attorney

Date: 3-6-2012

City Departmental Approval:


Public Works Director

Date:

Attest:


Finance Director

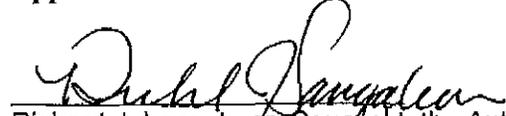
Date:

FOR WHATCOM TRANSPORTATION AUTHORITY


Richard G. Walsh, General Manager

Date: 2-14-12

Approved as to Form:


Richard J. Langabeer, Counsel to the Authority

Date: February 9, 2012