



# **AGREEMENT FOR THE CONSTRUCTION AND MAINTENANCE OF A WIDE AREA NETWORK**

WHEREAS, the City of Poulsbo (“City”) wishes to undertake the construction of a wide area network for a wide variety of data transmittal and telecommunications purposes and uses;

WHEREAS, the City has issued KPUD a Telecommunications Master Permit for use at public Rights-of-Way, and

WHEREAS, the KPUD and City wish to enter into an agreement to facilitate the distribution of a data network, NOW, THEREFORE,

The Kitsap Public Utilities District (“KPUD”), a non-profit corporation organized under the provisions of RCW 54, and the City of Poulsbo, Washington, (“City”) a municipal corporation organized pursuant to the provisions of Title 35A RCW, have entered into this Agreement in consideration of the mutual promises and undertakings referenced herein and the mutual benefits to be derived:

**1. Statement of Undertaking and Interpretation.** The purpose of this Agreement is to facilitate the construction of a wide area network for the transmission of data, information, telecommunications and any and all other lawful purposes consistent with the respective statutory roles of the Parties. KPUD has been authorized to construct, purchase, acquire, develop, finance, lease, license, handle, provide, add to, contract for, interconnect, alter, improve, repair, operate, and maintain any telecommunications facilities within or without the district's limits. The City is an entity authorized pursuant to Title 35A RCW to utilize, contract for and operate a telecommunications service. The purposes of this Agreement are to provide for the construction, reconstruction and maintenance of telecommunications infrastructure consistent with the purposes of this Agreement as well as to provide for all basic electronic equipment and software necessary to facilitate the wholesale transmission of data and other telecommunication purposes within the City. Given the rapidly expanding technology and changing regulatory atmosphere, it is the Parties’ intention to establish a relatively simple and straight forward agreement which shall be interpreted broadly in order to effectuate its purpose construing its provisions whenever ambiguity or conflict arise in accordance with the laws and regulations of the United States of America and the State of Washington, in order to preserve its legality.

**2. Undertakings of KPUD.**

2.1 Network Installation. KPUD shall install a telecommunications network and related infrastructure capable of functioning as a wide area network for data transmission between facilities owned by the City and used by KPUD. The basic infrastructure and electronic equipment (“Infrastructure”) are detailed on the attached Exhibit A and incorporated by this reference as fully as if herein set forth. The Infrastructure shall be constructed to and within the

City facilities ("City Facilities") shown within the attached Exhibit C and incorporated by this reference as fully as if herein set forth. The Infrastructure shall be constructed to the City Facilities in accordance with a schedule to be determined between the Parties, PROVIDED, HOWEVER, that such Infrastructure and basic electronic equipment identified as phase one shall be installed in fiscal year 2003.

2.2 WAN. KPUD shall use its best efforts to maintain and repair the infrastructure in order to provide and maintain a telecommunications network assuring clear, uninterrupted service.

2.2.1 Emergency Response. KPUD shall maintain a 24-hour per day 7-day emergency response team in order to maintain continuous service through its fiber optic backbone to and through the Infrastructure. KPUD shall maintain an emergency response telephone number and shall respond promptly to requests for emergency service. KPUD shall not be liable or responsible for any damages to Poulsbo or third persons for any loss or interruption in service.

2.2.2 Annual Upgrades. The Parties shall meet and confer in October of each year, commencing on or after October 1, 2003 to discuss system upgrades. Either party may propose such upgrades to be mutually agreed upon in their respective budget process. In the event that the Parties cannot agree, the issue of what upgrades are required in order to maintain the system shall be referred to the dispute resolution procedures set forth in Paragraph ~~4.5~~ 3.6. 

2.2.3 Usage. Broadband service rates will be limited to ensure that the City's usage does not exceed the capacity requested. Additional capacity will be made available upon 30 days written notification for provision to end users. . The City shall be required to utilize a retail provider who shall purchase wholesale services from KPUD for at least a 1 meg internet connection.

2.3 Stipulated Value of Installation and Service. While no monetary consideration shall be paid by KPUD to the City under the initial provisions of this Agreement, the Parties stipulate that the annual value of the installation costs, repair, maintenance and reconstruction service to the system have an economic value equivalent to \$10,000 per year. In the event that this Agreement is terminated with respect to the provision of wholesale telecommunications service to the City, and KPUD wishes to maintain or continue access to City property granted pursuant to ~~Paragraph 2.6.1~~ Exhibit C below, KPUD shall pay to the City the sum of \$10,000 per year each year after termination of this agreement, adjusted by the Seattle-Tacoma CPI for the relevant period so that the original \$10,000 stipulated value is adjusted to provide present value consideration consistent with inflation. KPUD shall be reimbursed by the City in the event of termination by the City paying to KPUD the percentage of KPUD investment determined by the percentage of the remainder of the term after termination. 

## 2.4 Undertakings of the City.

2.4.1 Facilities Use Permit. The City hereby grants to KPUD a Facilities Use Permit in the form shown on the attached Exhibit C, and incorporated by this reference as fully as if herein set forth.

2.4.2 Ethernet and Firewalls. The City shall be solely responsible for the purchase, installation, maintenance and upgrade of the Ethernet software and firewalls detailed on the attached Exhibit B. KPUD shall have no obligation to repair or replace equipment shown on Exhibit B but shall purchase, design, maintain, replace and upgrade the infrastructure provided under Section 2.2 and the sub-paragraphs thereof to be compatible with the City's infrastructure. The Parties will meet and confer annually under Section 2.3 to coordinate the City's and KPUD's infrastructure

2.4.3 Non-discrimination. The City hereby undertakes to provide on a non-discriminatory basis retail internet services to consumers, public and private, in accordance with such rules and rates as may be established by the City Council of the City of Poulso. Nothing herein shall be interpreted to prohibit the City Council from exercising any lawful authority with respect to the provision of retail, utility-style services, PROVIDED, HOWEVER, that such services shall be provided on a non-discriminatory basis within such classes of customers as the City Council shall determine appropriate.

## 3. Mutual Provisions

3.1 Confidentiality. During the course of this contract, either party may come into contact with or be provided limited access to confidential information, proprietary information, and/or copyrighted software. To the extent practical, the Parties shall attempt to identify any confidential, proprietary, or copyrighted materials at the date access is provided, PROVIDED, HOWEVER, that in the event that either party has any question or doubt regarding the nature of any material to which it has been provided access, that party shall have the obligation to inquire as to whether there is a limitation or restriction on its use, re-use or dissemination. Upon notification, or in the event that a reasonable person would be put on notice of inquiry, the party gaining such access shall have the obligation to hold such information in a confidential manner and to refrain from use, re-use, or dissemination of such material without the express written consent of the other party and, should be it required, the holder of the copyright thereto. In the event of a breach of confidentiality, re-use of proprietary information or the violation of any copyright or patent, the breaching party shall indemnify and hold harmless the other party, from any loss, claim or liability of any kind or nature whatsoever, including but not limited to the reasonable cost of defense by counsel of the Indemnitee's choosing.

3.2 Preservation of Warranty and Transfer of Copyrights. In the event that KPUD acquires a warranty or the right to use a copyright or similar use right through the purchase of the materials, or software described on the attached Exhibit A, or acquires such rights in the course of an annual upgrade, KPUD shall take every step necessary to preserve such warranties for the benefit of the City.

3.3 Indemnity. Except as expressly provided herein, no indemnities are provided by the Parties. No third-party rights are created by this Agreement. Rather, except for the express indemnities provided herein and the contractual rights created by this Agreement, the Parties intend and desire that their rights shall be determined in accordance with the laws of the State of Washington based upon the facts of any particular dispute or claim.

3.3.1 Indemnity of KPUD. Except as provided in paragraph 2.2.1 with respect to service interruptions, KPUD promises to indemnify the City, its officers, agents and employees from claim loss, damage or liability of any kind or nature arising from the negligence, tortious or criminal acts or failures to act of its officers, agents, or employees. To the extent necessary to fully indemnify the City, KPUD waives its immunity under Title 51 RCW. This agreement to indemnify shall include the reasonable costs of defense by counsel of the indemnitee's choosing.

3.3.2 Indemnity of City. The City promises to indemnify KPUD, its officers, agents and employees from claim loss, damage or liability of any kind or nature arising from the negligence, tortious or criminal acts or failures to act of its officers, agents, or employees. To the extent necessary to fully indemnify KPUD the City waives its immunity under Title 51 RCW. This agreement to indemnify shall include the reasonable costs of defense by counsel of the indemnitee's choosing.

3.4 Title: Title to any fiber optic cable, basic electronic equipment, paid for by the City and installed pursuant to Exhibit A on City-owned property under the Facilities Use Permit and any and all annual upgrades thereto, upon inspection and acceptance by the City, shall be and are the sole property of the City of Poulsbo. Infrastructure within the Public Right-of-Way pursuant to the Telecommunications Master Permit shall be the property of KPUD unless title passes to the city pursuant to said Master Permit. Any document necessary to confirm such ownership or transfer ownership thereto, shall be provided by KPUD to the City. KPUD agrees and warrants that it shall resolve any lien, purchase money security interest, and/or any other security interest or mortgage of any kind at its cost, necessary to ensure transfer to the City of title clear of any lien or ownership right in any other party whatsoever.

3.5 Termination.

3.5.1 Term. This Agreement shall have an initial term of ten (10) years unless terminated as provided herein. It may be extended for a future term on the express written consent of the parties.

3.5.2 The City and KPUD may terminate the Facilities Use Permit only in accordance with the provisions of Exhibit C.

3.5.3 Either party may terminate this Agreement for cause including but not limited to breach of its provisions after thirty (30) days written notice. If the cause, breach or defect has not been cured, this Agreement shall be at an end.

3.6 Alternative Dispute Resolution. It is the desire and intention of the Parties that this Agreement be interpreted and applied in a way that facilitates a smooth working relationship between the Parties. To that end, they agree that in the event of any conflict between the Parties regarding the application, interpretation, breach or enforcement of any term of this contract, the Parties shall first attempt to resolve this matter between themselves, by referring any dispute to the Mayor of the City of Poulsbo, or her designee and the Executive Director or his designee of KPUD. If those Parties cannot, through mutual discussions, resolve this matter, the dispute shall be submitted to arbitration in accordance with the rules established by the Kitsap County Superior Court MAR rules except that the decision shall be final or such other arbitration agency as the Parties, by their mutual agreement, shall designate. The costs of arbitration shall be borne equally between the Parties, PROVIDED, HOWEVER, if the Arbitrator determines that one of the Parties has breached the terms of this contract and failed, after written notice to correct its breach, the Arbitrator shall have the ability to award the costs of arbitration as well as reasonably incurred attorneys' fees, to the prevailing party.

3.7 Amendment; Entire Agreement. This Agreement may be amended only in writing with the express written consent of the Parties hereto. Any annual upgrade approved pursuant to the provisions of Paragraph 2.3.2 shall be deemed incorporated as an addendum to Exhibit A of this Agreement. This is the entire agreement between the Parties, and any prior understanding, written or oral, shall be deemed merged with its provisions.

3.8 Interpretation, Venue, Jurisdiction. This Agreement shall be interpreted in accordance with the laws of the State of Washington. Venue for any action brought to enforce the terms of any arbitration award or, in the event that any party refuses to submit a matter to arbitration, any action to require a matter to be resolved by arbitration shall lie in Kitsap County, Washington.

DONE this 5<sup>th</sup> day of March, 2003.

CITY OF POULSBO

By:   
Mayor Donna Jean Bruce

ATTEST/AUTHENTICATED:

By:   
Karol Jones, City Clerk

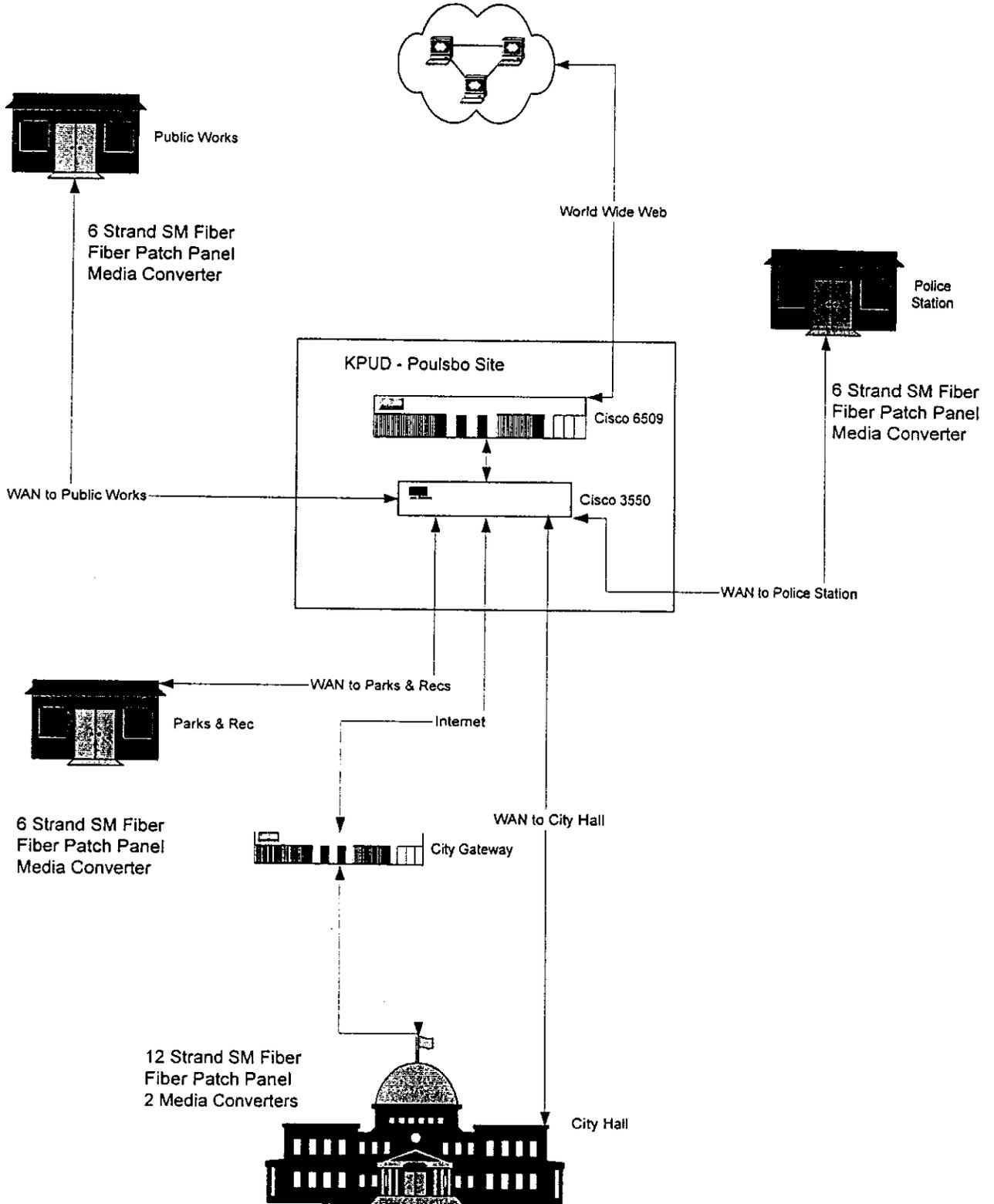
APPROVED AS TO FORM:

By:   
W. Scott Snyder

KITSAP PUBLIC UTILITIES DISTRICT

By: 

# City of Poulsbo WAN Schematic



## **EXHIBIT B**

City provided WAN infrastructure

1 each. Cisco Firewall/router Part # CIS-PIX-515E-R-BUN or equivalent.

3 each Cisco switches or equivalent.

## EXHIBIT C

### FACILITIES USE AGREEMENT

Section 1. Definitions. For the purposes of this Facilities Use Agreement, the following terms, phrases, words, and abbreviations shall have the meanings ascribed to them below. When not inconsistent with the context, words used in the present tense include the future tense, words in the plural number include the singular number and words in the singular number include the plural number.

1.1 “Affiliate” means an entity which owns or controls, is owned or controlled by, or is under common ownership with the Permittee.

1.2 “City” means the City of Poulsbo, Washington.

1.3 “Communication Service” shall mean any telecommunications services, telecommunications capacity, or dark fiber, provided by the Permittee using its Communication Facilities, either directly or as a carrier for its subsidiaries, Affiliates, or any other person engaged in telecommunication services, including, but not limited to, the transmission of voice, data or other electronic information, facsimile reproduction, burglar alarm monitoring, meter reading and home shopping, or other subsequently developed technology which carries an electronic signal over fiber optic cable. However, Communications Service shall not include the provision of cable television, open video, or similar services, as defined in the Communications Act of 1934, as amended, for which a separate permit would be required.

1.4 “Communication Facilities” or “Facilities” shall mean the Permittee’s (or other valid Permit holder’s) wireless communications installations and attendant structures constructed and operated upon public property.

1.5 “FCC” means the Federal Communications Commission, or any successor federal governmental entity hereto.

1.6 “Permittee” means Kitsap Public Utility District (KPUD), or the lawful successor, transferee, or assignee thereof.

1.7 “Person” means an individual, partnership, association, joint stock company, trust, corporation, or governmental entity.

1.8 “Public property” means the following designated public sites within the areas described, and only such areas:

## PHASE ONE

1. Poulsbo City Hall  
19050 Jensen Way NE
2. Poulsbo Police Department  
367 NE Hostmark
3. Poulsbo Public Works Administration Bldg  
780 NE Iverson
4. \*Parks and Recreation Department  
19540 Front Street NE  
\*Kitsap PUD shall sign a Facilities use permit  
with the Kitsap County Housing Authority.

## PHASE TWO

5. Pugh Road Water Tank  
20230 Pugh RD NE
6. Olhava Water Tank  
900 Olympic College Way
7. 4<sup>th</sup> Ave. Water Tank  
19898 4<sup>th</sup> Ave
8. Raab Park Water Tank  
18349 Caldart Ave NE
9. Finn Hill Water Tank  
TBD

1.9 “Public Ways” means all public rights-of-way, streets, roads, or pedestrian paths whether held in fee or by easement by the City.

Section 2. Authority Granted. The City hereby grants to the Permittee, its heirs, successors, legal representatives, and assigns, subject to the terms and conditions hereinafter set forth, the right, privilege, and authority to construct, reconstruct, upgrade, expand, operate, maintain, replace, and use all necessary equipment thereto necessary for the operation of Permittee’s Communication Facilities. However, the Permittee is only authorized to place its Communication Facilities in, under, on, across, over, through, along, or below the Public Property of the City described in Paragraph 1.8. above.

Section 3. Grant Limited to Occupation. Nothing contained herein shall be construed to grant or convey any right, title, or interest in the designated Public Property of the City to the Permittee, nor shall anything contained herein constitute a warranty of title.

Section 4. Term of Facilities Use Agreement. The term of this Facilities Use Agreement shall be for a period of ten (10) years from the date of acceptance as set forth in Section 28, unless sooner terminated as provided herein.

Section 5. Non-Exclusive Grant. This Agreement shall not in any manner prevent the City from entering into other similar agreements or granting other or further Facilities Use Agreements, Right-of-Way Use Permits, or franchise in, under, on, across, over, through, along or below the Public Property and the Public Ways of the City. However, the City shall not permit any such future Permittee or Franchisee to physically interfere with the Permittee's Communication Facilities. In the event that such physical interference or disruption occurs, the Community Services Director may assist the Permittee and such subsequent Permittee or Franchisee in resolving the dispute. Further, this Agreement shall in no way prevent or prohibit the City from using any of its Public Property, Public Ways or affect its jurisdiction over them, or any part of them, and the City shall retain power to make all necessary changes, relocations, repairs, maintenance, establishment, improvement, dedication of the same as the City may deem fit, including the dedication, establishment, maintenance, and improvement of all new Public Ways, and in compliance with Section 6, below.

Section 6. Relocation of Communication Facility.

6.1 The Permittee agrees and covenants, at its sole cost and expense, to protect, support, temporarily disconnect, relocate, or remove from any Public Property any portion of its Communication Facilities when so required by the City Engineer by reason of public safety, or the construction of any public improvement or structure by any governmental agency acting in a governmental capacity; provided that the Permittee shall in all cases have the privilege to temporarily relocate, in the authorized portion of the same or similar Public Property offering the same utility to the Permittee upon approval by the City Engineer, any section of cable or any other facility required to be temporarily disconnected or removed.

6.1.1 Upon the reasonable request and prior written notice, in non-emergency situations at least thirty (30) days notice by the City Engineer and in order to facilitate the design of public improvements, the Permittee agrees to, at its sole cost and expense, locate, and if reasonably determined necessary by the City, to excavate and expose portions of its Communication Facilities for inspection so that the location of same may be taken into account in the improvement design, PROVIDED that, Permittee shall not be required to excavate and expose its Facilities unless the Permittee's as-built plans and maps of its Facilities submitted pursuant to Section 9 of this Agreement are reasonably determined by the City Engineer to be inadequate for purposes of this paragraph. The decision to require relocation of said Facilities in order to accommodate the City's

improvements shall be made by the City Engineer upon review of the location and construction of the Permittee's Facilities.

6.1.2 If the City Engineer determines that the project necessitates the relocation of the Permittee's then existing Facilities, the City shall:

6.1.2.1 Within a reasonable time, which shall be no less than 30 days, prior to the commencement of such improvement project, provide the Permittee with written notice requiring such relocation. In the event that such relocation requires land use approvals by the City, such notice period shall be extended by an additional ninety (90) days. Provided, however, that in the event an emergency posing a threat to public safety, health or welfare, or in the event of an emergency beyond the control of the City and which will result in severe financial consequences to the City, the City shall give the Permittee written notice as soon as practicable; and

6.1.2.2 Provide the Permittee with copies of information for such improvement project and a proposed location for the Permittee's Facilities so that the Permittee may relocate its Facilities in other Public Property of equal utility in order to accommodate such improvement project.

6.1.2.3 The Permittee shall complete relocation of its Facilities at no charge or expense to the City so as to accommodate the improvement project at least ten (10) days prior to commencement of the project. In the event of an emergency as described herein, the Permittee shall relocate its Facilities within a reasonable time period specified by the City Engineer.

6.1.3 The Permittee may, after receipt of written notice requesting a relocation of its Facilities, submit to the City written alternatives to such relocation. The City shall evaluate such alternatives and advise the Permittee in writing if one or more of the alternatives are suitable to accommodate the work, which would otherwise necessitate relocation of the Facilities. If so requested by the City, the Permittee shall submit additional information to assist the City in making such evaluation. The City shall give each alternative proposed by the Permittee full and fair consideration, within a reasonable time, so as to allow for the relocation work to be performed in a timely manner. In the event the City ultimately determines that there is no other reasonable alternative, the Permittee shall relocate its Facilities as otherwise provided in this Section.

6.1.4 The provisions of this Section shall in no manner preclude or restrict the Permittee from making any arrangements it may deem appropriate when responding to a request for relocation of its Facilities by any person or entity other than the City, where the Facilities to be constructed by said person or entity are not or will not become City-owned, operated or maintained Facilities provided that such arrangements do not unduly delay a City construction project.

6.1.5 Except as provided in Sections 14.5 and 14.7 the Permittee will indemnify, hold harmless, and pay the costs of defending the City against any and all claims, suits, actions, damages, or liabilities for delays on City construction projects caused by or arising out of the failure of the Permittee to relocate its Facilities in a timely manner; provided, that the Permittee shall not be responsible for damages due to delays caused by the City or circumstances beyond the control of the Permittee.

Section 7. The Permittee's Maps and Records. After construction is complete, the Permittee shall provide the City with accurate copies of all as-built plans and maps in a form and content prescribed by the City Engineer. These plans shall be provided at no cost to the City, and shall include hard copies and digital copies in a format specified by the City Engineer.

Section 8. Work on Public Property. During any period of relocation, construction, or maintenance, all surface structures, if any, shall be erected and used in such places and positions upon said Public Property and other adjoining Public Ways so as to interfere as little as possible with the governmental use of said property. The Permittee shall at all times post and maintain proper barricades and comply with all applicable safety regulations during such period of construction as required by the ordinances of the City or the laws of the State of Washington, including RCW 39.04.180 for the construction of trench safety systems.

8.1 During the progress of the work, the Permittee shall not unnecessarily obstruct the passage or government's use of the Public Property, and all work by the Permittee in the area covered by this Agreement and as described in this Section shall be performed in accordance with City of Poulsbo Public Works Construction Standards and warranted for a period of one (1) year, if any standard is applicable.

8.2 If either the City or the Permittee shall at any time after the initial installation of the Facilities plan make excavations in area covered by this Agreement and as described in this Section, the party planning such excavation shall afford the other, upon receipt of written request to do so, an opportunity to share such an excavation. PROVIDED THAT:

8.2.1 Such joint use shall not unreasonably delay the work of the party causing the excavation to be made or unreasonably increase its costs;

8.2.2 Such joint use shall be arranged and accomplished on terms and conditions satisfactory to both parties;

8.2.3. Either party may deny such request for safety reasons or if their respective uses of the trench are incompatible, and

8.2.4. Such joint use shall not interfere with the operation of the Communication Facility.

8.3 The joint use provisions of this Section shall apply only to joint use by the City and the Permittee. Nothing in this Section is intended to require the Permittee to afford other similar users the opportunity to share the Permittee's excavations.

Section 9. Restoration after Construction. The Permittee shall, after installation, construction, relocation, maintenance, removal, or repair of its Communication Facilities upon the Public Property, restore said Public Property and any other City-owned property which may be disturbed by the work, to the same condition the public way or City-owned property was in immediately prior to any such installation, construction, relocation, maintenance, or repair, reasonable wear, and tear excepted. The City Engineer shall have final approval of the condition of such public ways and City-owned property after restoration, all in accordance with the Poulsbo City Code and Public Works Construction standards. All survey monuments which are to be disturbed or displaced by such work shall be referenced and restored, as per WAC 332-120, as the same now exists or may hereafter be amended, and all pertinent federal, state and local standards and specifications. The Permittee agrees to promptly complete all restoration work and to promptly repair any damage caused by such work to the Public Property or other affected area at its sole cost and expense, all in accordance with the applicable provisions of the Poulsbo City Code, as the same now exists or as it may hereafter be amended or superseded. All work and restoration by the Permittee pursuant to this Section shall be performed in accord with City of Poulsbo Public Works Construction standards and warranted for a period of one (1) year.

Section 10. Emergency Work – Notice Waiver. In the event of any emergency in which any of the Permittee's Communication Facilities located in, above, or under any Public Property breaks, are damaged, cease to provide service, or if the Permittee's construction area is otherwise in such a condition as to immediately endanger the property, life, health, or safety of any individual, the Permittee shall immediately take the proper emergency measures to repair its Facilities, to cure or remedy the dangerous conditions for the protection of property, life, health, or safety of individuals without first applying for and obtaining a any permit otherwise required under this Agreement. However, this shall not relieve the Permittee from the requirement of notifying the City of the emergency work and obtaining any Permits necessary for this purpose after the emergency work. The Permittee shall notify the City by telephone immediately upon learning of the emergency and shall apply for all required Permits not later than the second succeeding day during which the Poulsbo City Hall is open for business.

Section 11. Dangerous Conditions, Authority for City to Abate. Whenever construction, installation, or excavation of the Communication Facilities authorized by this Agreement has caused or contributed to a condition that appears to substantially impair the lateral support of the adjoining public way, street, or public place, or endangers the public, street utilities, or City-owned property, the City Engineer may reasonably require the Permittee, at the Permittee's own expense, to take action to protect the public, adjacent public places, City-owned property, streets, utilities, and Public Ways. Such action may include compliance within a prescribed time.

In the event that the Permittee fails or refuses to promptly take the actions directed by the City, or fails to fully comply with such directions, or if emergency conditions exist which require

immediate action, the City may enter upon the property and take such actions as are necessary to protect the public, the adjacent streets, utilities, Public Ways, to maintain the lateral support thereof, or actions regarded as necessary safety precautions; and the Permittee shall be liable to the City for the reasonable costs thereof.

Section 12. Recovery of Costs. Where the City incurs costs and expenses for review, inspection, or supervision of activities undertaken through the authority granted in this Agreement, or any ordinances relating to any subject not addressed in this Agreement, the Permittee shall reimburse the City directly for any and all reasonable costs, after receipt of an itemized bill.

12.1 In addition to the above, the Permittee shall promptly reimburse the City for any and all reasonable costs the City incurs in response to any emergency involving the Permittee's Communication Facilities, after receipt of an itemized bill.

12.2 The time of City employees shall be charged at their respective rate of salary, including overtime if applicable, plus benefits. All billings will be itemized as to specifically identify the costs and expenses for each project for which the City claims reimbursement. The billing may be on an annual basis, but the City shall provide the Permittee with the City's itemization of costs at the conclusion of each project for information purposes.

Section 13. Consideration. Consideration for this permit is set forth in a contemporaneous agreement between the parties for installation of a Wide Area Network (WAN).

Section 14. Indemnification and Waiver.

14.1 Permittee hereby releases, covenants not to bring suit and agrees to indemnify, defend and hold harmless the City, its officers, employees, agents and representatives from any and all claims, costs, judgments, awards or liability to any person arising from injury, sickness, or death of any person or damage to property:

14.1.1 For which the negligent acts or omissions of Permittee, its agents, servants, officers or employees in performing the activities authorized by this Facilities Use Agreement are the proximate cause:

14.1.2 By virtue of the Permittee's exercise of the rights granted herein;

14.1.3 By virtue of the City's permitting Permittee's use of the City's Public Property or other public property that are the subject of this Agreement;

14.1.4 Based on the City's inspection or lack of inspection of work performed by Permittee, its agents and servants, officers or employees in connection with work authorized on the Public Property or property over which the City has control

pursuant to this Agreement or pursuant to any other site-specific Permit or other approval issued in connection with this Agreement;

14.1.5 Arising as a result of the negligent acts or omissions of Permittee, its agents, servants, officers or employees in barricading, instituting trench safety systems or providing other adequate warnings of any excavation, construction, or work upon the Public Property, in any public way, or other public place in performance of work or services permitted under this Agreement.

14.2 The provisions of Subsection 4.1 of this Section shall apply to claims by Permittee's own employees and the employees of the Permittee's agents, representatives, contractors, and subcontractors to which Permittee might otherwise be immune under Title 51 RCW. This waiver of immunity under Title 51 RCW has been mutually negotiated by the parties hereto, and Permittee acknowledges that the City would not enter into this Agreement without Permittee's waiver thereof

14.3 Inspection or acceptance by the City of any work performed by the Permittee at the time of completion of construction shall not be grounds for avoidance of any of these covenants of indemnification. Provided that Permittee has been given prompt written notice by the City of any such claim, said indemnification obligations shall extend to claims which are not reduced to a suit and any claims which may be compromised with Permittee's consent prior to the culmination of any litigation or the institution of any litigation. The City has the right to defend or participate in the defense of any such claim, and has the right to approve any settlement or other compromise of any such claim, provided that Permittee shall not be liable for such settlement or other compromise unless it has consented thereto.

14.4 In the event that Permittee refuses the tender of defense in any suit or any claim, said tender having been made pursuant to this Section, and said refusal is subsequently determined by a court having jurisdiction (or such other tribunal that the parties shall agree to the matter), to have been a wrongful refusal on the part of the Permittee, then Permittee shall pay all of the City's costs for defense of the action, including all reasonable expert witness fees, reasonable attorney's fees, and the reasonable costs and fees to City associated with recovering under this Subsection.

14.5 The obligations of Permittee under the indemnification provisions of this Section shall apply regardless of whether liability for damages arising out of bodily injury to persons or damages to property were caused or contributed to by the City, its officers, agents, employees or contractors except to the extent that such claims, actions, damages, costs, expenses, and attorneys fees were caused by the negligence or any willful or malicious action on the part of the City, its officers, agents, employees or contractors. In the event that a court of competent jurisdiction determines that this Agreement is subject to the provisions RCW 4.24.115, the parties agree that the indemnity provisions hereunder shall be deemed amended to conform to said statute and liability shall be allocated as provided therein.

14.6 Notwithstanding any other provisions of this Section, Permittee assumes the risk of damage to its Communication Facilities located on Public Property from activities conducted by the City, its officers, agents, employees and contractors, except to the extent any such damage or destruction is caused by or arises from the negligence or any willful or malicious action on the part of the City, its officers, agents, employees or contractors. Permittee releases and waives any and all such claims against the City, its officers, agents, employees or contractors. Permittee further agrees to indemnify, hold harmless and defend the City against any claims for damages, including, but not limited to, business interruption damages and lost profits, brought by or under users of Permittee's Facilities as the result of any interruption of service due to damage or destruction of Permittee's Facilities caused by or arising out of activities conducted by the City, its officers, agents, employees or contractors, except to the extent any such damage or destruction is caused by or arises from the negligence or any willful or malicious actions on the part of the City, its officers, agents, employees or contractors.

14.7 City shall indemnify, save harmless and defend KPUD from and against any and all injury, loss, damage or liability (or any claims in respect of the foregoing), and costs or expenses (including reasonable attorneys' fees and court costs) arising directly out of the negligence or tortious acts of the city or its employees or agents.

Section 15. Insurance. The Permittee shall procure and maintain insurance against claims for injuries to persons or damages to property which may arise from or in connection with the exercise of the rights, privileges and authority granted hereunder to the Permittee, its agents, representatives or employees. The Permittee shall provide to the City an insurance certificate naming the City as an additional insured for its inspection prior to the commencement of any work or installation of any Facilities pursuant to this Agreement. Such insurance certificate shall evidence:

15.1 Comprehensive general liability insurance, written on an occurrence basis, including contractual liability coverage, with limits not less than:

- (1) \$3,000,000.00 for bodily injury or death to each person; and
- (2) \$3,000,000.00 for property damage resulting from any one accident.

15.2 Automobile liability for owned, non-owned and hired vehicles with a limit of \$3,000,000.00 for each person and \$3,000,000.00 for each accident.

15.3 Worker's compensation within statutory limits and employer's liability insurance with limits of not less than \$1,000,000.00.

15.4 The liability insurance policies required by this Section shall be maintained by the Permittee throughout the term of this Agreement, and such other period of time during which the Permittee is operating without a Right-of-Way Use Permit hereunder, or is engaged in the

removal of any of its Communication Facilities in the right of way. Payment of deductibles and self-insured retentions shall be the sole responsibility of the Permittee. The insurance certificate required by this Section shall contain a clause stating that the coverage shall apply separately to each insured against whom a claim is made or suit is brought, except with respect to the limits of the insurer's liability. The Permittee's insurance shall be primary insurance with respect to the City. Any insurance maintained by the City, its officers, officials, employees, consultants, agents, and volunteers shall be in excess of the Permittee's insurance and shall not contribute with it.

15.5 In addition to the coverage requirements set forth in this Section, the insurance certificate required by this Section shall contain language which provides that the policy may not be canceled, reduced in coverage, nor the intention not to renew be stated until at least thirty (30) days after receipt by the City of written notice of the same via U.S. mail. Within fifteen (15) days after receipt by the City of said notice, and in no event later than five (5) days prior to said cancellation or non-renewal, the Permittee shall obtain and furnish to the City replacement insurance certificate(s) meeting the requirements of this Section

Section 16. Abandonment and Removal of the Permittee's Communication Facilities. Upon the expiration, termination, or revocation of the rights granted under this Agreement, the Permittee shall remove all of its Communications Facilities from the Public Property of the City within ninety (90) days of receiving notice from the City Engineer. Provided, however, that the City may permit the Permittee's improvements to be abandoned and replaced in such a manner as the parties shall agree, subsequent always to the City's standard construction requirements. Upon permanent abandonment, and Permittee's agreement to transfer ownership of any Communication Facilities to the City, the Permittee shall submit to the City a proposal and instruments for transferring ownership to the City. Any such Facilities abandoned in place without City's consent and not removed within ninety (90) days of receipt of notice thereof shall automatically become the property of the City, unless Permittee is prevented from removing its Facilities by causes beyond its reasonable control including, but not limited to, acts of God, war, or governmental restrictions. In such case, Permittee's time for performance of its obligations under this section will be extended by a reasonable period of time, not to exceed an additional thirty (30) days following conclusion of the act or restriction, in any event, without City's consent thereto. Provided, however, that nothing contained within this Section shall prevent the City from compelling the Permittee to remove any such Facilities through judicial action when the City has not consented to the Permittee's abandonment of said Facilities in place.

Section 17. Modification. The City and the Permittee hereby reserve the right to alter, amend or modify the terms and conditions of this Agreement upon the written agreement of both parties to such alteration, amendment or modification. Said modifications shall be approved by the City by ordinance and accepted by the Permittee consistent with Section 28 hereof.

Section 18. Forfeiture and Revocation. If the Permittee willfully violates or fails to comply with any of the material provisions of this Agreement, or through willful misconduct or gross negligence fails to heed or comply with any notice given the Permittee by the City under

the provisions of this Agreement, then the Permittee shall, at the election of the City Council, forfeit all rights conferred hereunder and this Agreement may be revoked, terminated or annulled by the City Council after a hearing held upon reasonable written notice to Permittee. The City Council may decide, after consideration of the reasons for the Permittee's failure to comply with this Agreement, to allow the Permittee additional time to cure before such termination or revocation. The City may elect, in lieu of the above, and without prejudice to any of its other legal rights and remedies, to obtain an order from the superior court having jurisdiction compelling the Permittee to comply with the provisions of this Agreement and to recover its reasonable, documented damages and costs incurred by the City as a direct result of the Permittee's failure to comply with the terms of this Agreement.

Section 19. City Ordinances and Regulations. Nothing herein shall be deemed to direct or restrict the City's ability to adopt and enforce all necessary and appropriate ordinances regulating the performance of the conditions of this Agreement, including any valid ordinance made in the exercise of its police powers in the interest of public safety and for the welfare of the public. The City shall have the authority at all times to control by appropriate regulations the locations, elevation, manner or construction and maintenance of any Facilities by the Permittee, and the Permittee shall promptly conform with all such regulations, unless compliance would cause the Permittee to violate other requirements of the law.

Section 20. Survival. All of the provisions, conditions, and requirements of this Agreement shall be in addition to any and all other obligations and liabilities the Permittee may have to the City at common law, by statute, or by contract. The provisions, conditions, and requirements of Sections 6, Relocation of Communication System; 8, Work on Public Property; 9, Restoration after Construction; 11, Dangerous Conditions, Authority for City to Abate; 14, Indemnification and Waiver; 15, Insurance; and 16, Abandonment and Removal of the Permittee's Communication Facilities, shall survive the expiration or termination of this Facilities Use Agreement, and any renewals or extensions thereof, and remain effective until such time as the Permittee removes its Communication Facilities from the Public Property, transfers ownership of said Facilities to a third-party, or abandons said Facilities in place, all as provided herein. All of the provisions, conditions, regulations and requirements contained in this Agreement shall further be binding upon the heirs, successors, executors, administrators, legal representatives and assigns of the Permittee; and all privileges, as well as all obligations and liabilities of the Permittee shall inure to its heirs, successors, and assigns equally as if they were specifically mentioned wherever the Permittee is named herein.

Section 21. Severability. In any section, sentence, clause, or phrase of this Agreement should be held to be invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of any other section, sentence, clause, or phrase of this Agreement.

Section 22. Assignment. This Agreement may not be assigned or transferred without the written approval of the City, such approval not to be unreasonably withheld or delayed. In the case of transfer or assignment as security by mortgage or other security instrument in whole or in

part to secure indebtedness, such consent shall not be required unless and until the secured party elects to realize upon the collateral. The Permittee shall provide prompt, written notice to the City of any such assignment.

Section 23. Notice. Any notice or information required or otherwise provided as between the parties under this Agreement shall be sent to the following addresses unless otherwise specified by the parties:

23.1 City:

City of Poulsbo  
Planning Dept.  
P. O. Box 98  
Poulsbo, WA 98370  
360-779-3006  
Fax: 360-779-5112

23.2 Permittee:

KPUD

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

23.3 Shall be deemed provided upon receipt in the case of personal delivery, three (3) days after deposit in the United States Mail in the case of regular mail, or the next day in the case of overnight delivery.

Section 24. Entire Agreement. This Agreement constitutes the entire understanding and agreement between the parties hereto as to the subject matter herein and no other agreements or understandings, written or otherwise, shall be binding upon the parties upon approval and acceptance of this Agreement.

Section 25. Attorneys Fees. If any suit or other action is instituted in connection with any controversy arising under this Agreement, the prevailing party shall be entitled to recover all of its costs and expenses including such sum as the court may judge reasonable for attorneys fees, including fees upon appeal of any judgment or ruling.

Section 26. Non-waiver. Failure of the City to declare any such breach or default immediately upon the occurrence thereof, or delay in taking any action in connection therewith, shall not waive such breach or default, but the City shall have the right to declare any such breach or default at any time. Failure of the City to declare one breach or default does not act as a waiver of the City's right to declare another breach or default.

Section 27. Governing Law/Venue. This Agreement shall be governed by and construed in accordance with the laws of the State of Washington. The venue and jurisdiction over any dispute related to this Agreement shall be with the Kitsap County Superior Court.

Section 28. Acceptance. By its signature below, this Agreement has been unconditionally accepted by Permittee.

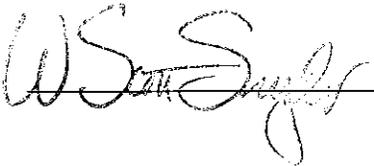
CITY OF POULSBO

By: \_\_\_\_\_  
Mayor Donna Jean Bruce

ATTEST/AUTHENTICATED:

By: \_\_\_\_\_  
Karol Jones, City Clerk

APPROVED AS TO FORM:  
OFFICE OF THE CITY ATTORNEY:

By:  \_\_\_\_\_

ACCEPTED BY:

KITSAP PUBLIC UTILITIES DISTRICT

On the \_\_\_\_\_ day of \_\_\_\_\_, 2003.

By: \_\_\_\_\_  
Its: \_\_\_\_\_

STATE OF WASHINGTON )

COUNTY OF KITSAP )

On this day, personally appeared before me \_\_\_\_\_, the \_\_\_\_\_ of **Kitsap Public Utilities District** and stated that he/she is authorized to sign this instrument on behalf of said company for the uses and purposes therein mentioned.

SUBSCRIBED AND SWORN TO before me this \_\_\_\_\_ day of \_\_\_\_\_, 2003.

\_\_\_\_\_  
NOTARY

\_\_\_\_\_  
Print Name  
My Commission expires: \_\_\_\_\_