



Master Service Agreement

This Master Service Agreement ("Agreement") is made by and between _____ ("Customer") and the **CITY OF ANACORTES** ("City") each referred to in this Agreement as a "Party" and severally as the "Parties." This Agreement provides the general terms and conditions applicable to Customer's purchase of communications services ("Service") from City.

1.0 SERVICE ORDERS

1.1 Submission and Acceptance of Service Orders. Customer may submit requests for Service in a form designated by City ("Service Order"). Customer acknowledges and agrees that Customer is solely responsible for the accuracy of all Service Orders and other information that it provides to City. Each Service Order shall incorporate by reference, and shall be subject to, the terms and conditions of this Agreement and shall clearly set forth the term, pricing, service type and location(s), monthly recurring charge ("MRC"), non-recurring charge ("NRC"), and any additional specific terms for the Services. Any purchase order submitted by the Customer to City shall be used only for invoice processing and order purposes. All Service Orders shall be subject to availability and acceptance by City. Service Orders may contain the duration for which Service is ordered ("Service Term"). Unless indicated otherwise in the Service Order, Service will continue on a month to month basis at the expiration of the Service Term at City's then current rates. City will notify Customer of acceptance of the Service Order by delivering (in writing or electronically) the date by which City will install Service (the "Customer Commit Date") or by delivering the Service. Renewal Service Orders will be accepted by City's continuation of Service. If Customer submits Service Orders electronically, Customer shall assure that any passwords or access devices are available only to those having authority to submit Service Orders. Customer will pay City's then current charges for moves, adds or changes agreed to by City respecting any Service Order or Service.

1.2 Credit Approval and Deposits. Customer will provide City with credit information as requested. City may from time to time conduct a review of Customer's credit rating and payment history. City may require Customer to make a deposit as a condition of City's acceptance of any Service Order or continuation of Services where, Customer fails to timely pay City hereunder or City reasonably determines that Customer has had an adverse change in financial condition. Deposits will not exceed two months' estimated charges for Service and are due upon City's written request. When Service is discontinued, the deposit will be credited to Customer's account and the balance refunded.

1.3 Equipment. City: (a) is the owner of all right, title and interest in all Equipment supplied, built or otherwise provided by City, whether or not the Customer has paid any costs towards the purchase and supply of such Equipment (the "City Equipment"); or (b) has obtained the right to make the City Equipment available for use by the Customer from a third party. The Customer shall have no rights in the City Equipment and shall not create or permit any liens or encumbrances on the City Equipment.

The Customer shall not make any change or repair to City's Equipment, connect any of the Customer-provided Equipment to City's Equipment, or allow access to City's Equipment without City's prior written consent. Similarly, the Customer shall be responsible for the security of and any loss or damage to City Equipment located on the Customer's premises, reasonable wear and tear excepted.

City may access and make any routine or unscheduled maintenance, inspections, tests, repairs and adjustments ("Maintenance Activities") it deems reasonably necessary upon reasonable notice of any such Maintenance Activities that may impact Service, except in cases of emergency (in which case, City will notify the Customer as soon as reasonably possible thereafter).

City shall not be liable for any resulting Service problem in the event that the Customer does not provide such timely access.

Customer will bear the costs of any additional apparatus reasonably required to be installed because of the use of City's Equipment.

City will maintain City's Equipment at no additional charge to Customer, except where work or service calls result from failure or malfunction in, or improper operation of, Customer's Equipment and/or equipment. In such event, Customer will reimburse City for the cost of the required maintenance at City's standard time and

material rate plus any taxes imposed upon City related to such maintenance, and Customer shall be responsible for the cost of repair or replacement of City equipment that is damaged by Customer's actions or equipment.

Upon the expiration or termination of this Agreement, the Customer shall provide City with access to the Customer-provided Equipment to enable the removal of City's Equipment.

- 1.4 Scheduled Maintenance and Local Access.** Scheduled maintenance may result in Service interruption. If scheduled maintenance requires Service interruption, City will: (i) attempt to provide Customer thirty days' prior written notice, (ii) work with Customer to minimize such interruptions and (iii) use commercially reasonable efforts to perform such maintenance between midnight and 6:00 a.m. local time.

2.0 BILLING AND PAYMENT

- 2.1 Commencement of Billing.** City will deliver written or electronic notice (a "Connection Notice") to Customer when Service is installed, at which time billing will commence ("Service Commencement Date"). If Customer notifies City within 3 days after delivery of the Connection Notice that Service is not functioning properly, City will correct any deficiencies and, upon Customer's request, credit Customer's account in a proportional amount per day of the monthly charge for each day Service did not function properly.

- 2.2 Payment of Invoices and Disputes.** City will deliver an invoice each month to Customer, and payment will be due no later than the date stated on the face of the invoice (the "Due Date"). Past due amounts bear interest at 1.5% per month or the highest rate allowed by law (whichever is less). Customer is responsible for all charges respecting the Service, even if incurred as the result of unauthorized use except that Customer shall not be responsible for fraudulent or unauthorized use (A) by City or its employees, (B) by third parties to the extent that such use (i) is caused by City's gross negligence or willful misconduct, or (ii) originates on City's side of the demarcation point. If Customer reasonably disputes an invoice, Customer must pay the undisputed amount by the Due Date and submit written notice of the disputed amount (with details of the nature of the dispute and the Services and invoice(s) disputed). Disputes must be submitted in writing within 90 days from the date of the invoice. If the dispute is resolved against Customer, Customer shall pay such amounts plus interest from the date originally due. Any payments shall be applied as set forth in Anacortes Municipal Code Section 13.08.110.

- 2.3 Taxes and Fees.** Excluding taxes based on City's net income, Customer is responsible for all taxes and fees arising in any jurisdiction imposed on or incident to the provision, sale or use of Service, including but not limited to value added, consumption, sales, use, gross receipts, foreign withholding (which will be grossed up), excise, access, bypass, ad valorem, franchise or other taxes, fees, duties or surcharges (including regulatory and 911 surcharges), whether imposed on City or a City affiliate, along with similar charges stated in a Service Order (collectively "Taxes and Fees"). Some Taxes and Fees are recovered through imposition of a percentage surcharge on the charges for Service. Charges for Service are exclusive of Taxes and Fees. Customer may present City with an exemption certificate eliminating City's liability to pay certain Taxes and Fees; City will give effect thereto prospectively.

- 2.4 Regulatory and Legal Changes.** If changes in applicable law, regulation, rule or order materially affect delivery of Service, the Parties will negotiate appropriate changes to this Agreement. If the Parties cannot reach agreement within thirty days after City's notice requesting renegotiation: (a) City may, on a prospective basis after such thirty days period, pass any increased delivery costs on to Customer and (b) if City does so, Customer may terminate the affected Service on notice to City delivered within thirty days.

- 2.5 Cancellation and Termination Charges.**

A. Customer may cancel a Service Order (or portion thereof) prior to the delivery of a Connection Notice upon written notice to City identifying the affected Service Order and Service. If Customer does so, Customer shall pay City a cancellation charge equal to the sum of: (i) 1 month's monthly recurring charges for the cancelled Service; (ii) the non-recurring charges for the cancelled Service; and (iii) City's out of pocket costs (if any) incurred in constructing facilities necessary for Service delivery.

B. Customer may terminate specified Service(s) after the delivery of a Connection Notice upon thirty days' written notice to City. If Customer does so, or if Service is terminated by City hereunder as the result of Customer's default, Customer shall pay City a termination charge equal to the sum of: (i) all unpaid amounts for Service actually provided; (ii) 100% of the remaining monthly recurring

charges for months 1-12 of any applicable Service Term; (iii) 50% of the remaining monthly recurring charges for month 13 through the end of any applicable Service Term; and (iv) if not recovered by the foregoing, any termination liability payable to third parties resulting from the termination. Customer acknowledges that the charges in this Section are a genuine estimate of City's actual damages and are not a penalty.

- 2.6 **Equipment Return.** All City equipment is and at all times shall remain the sole and exclusive personal property of the City and Customer shall acquire no interest therein by virtue of payments provided or the attachment of any portion of City equipment to Customer's property. Customer must return all City equipment within fifteen (15) days of the date on which Services are disconnected or changed in working order, with the exception of normal wear and tear. If customer does not return all City equipment within fifteen (15) days of the date on which Services are disconnected or changed, the City will charge Customer a non-refundable Unreturned Equipment Fee.

3.0 **DEFAULT; SUSPENSION OF SERVICE**

- 3.1 **Customer Default.** Customer is in default of this AGREEMENT if Customer (a) fails to cure any monetary breach within five (5) days of receiving notice of the breach from City; (b) fails to cure any non-monetary breach of any terms of the agreement within thirty (30) days of receiving notice of the breach from City; or (c) files or initiates proceedings or has proceedings filed or initiated against it, seeking liquidation, reorganization or other relief (such as the appointment of a trustee, receiver, liquidator, custodian or such other official) under any bankruptcy, insolvency or other similar law (each such event shall be a "Customer Default").

In the event of a Customer Default, City may suspend Services to Customer until Customer remedies the Customer Default, or City may terminate this AGREEMENT and/or any or all of the Services being provided hereunder. City may at its sole option, but without any obligation, cure a non-monetary breach at Customer's expense at any point and invoice Customer for the same. These remedies are in addition to and not a substitute for all other remedies contained in this AGREEMENT or available to City at law or in equity.

- 3.2 **City Default.** City is in default of this AGREEMENT if City fails to cure any non-monetary breach of any material term of this AGREEMENT within thirty (30) days of receiving written notice of the breach from Customer ("City Default"); provided, however, that Customer expressly acknowledges that Service related failure or degradation in performance is not subject to a claim of a City Default. Customer's sole and exclusive remedy for any failure of Service is limited to any SLA set forth in the applicable Service Schedule.

In the event of a City Default, Customer may terminate the Services and this Agreement upon written notice to City. Any termination shall not relieve Customer of its obligations to pay all charges incurred hereunder prior to such termination.

4.0 **LIABILITIES AND SERVICE LEVELS**

- 4.1 **General Limitations.** To the extent allowed by law, City shall not be liable for injury to or death of any person and for damage to or loss of any property arising out of or attributable to its operations and performance under this Agreement. City's total liability for any and all causes and claims whether based in contract, warranty, negligence or otherwise shall be limited to the lesser of:

- A. The amount of actual and direct damages that are proven; or
- B. The service charges incurred by Customer for the period of service during which such mistake, omission, interruption, delay, error, defect, or failure of service occurred.

- 4.2 **Statute of Limitations**

Excluding payments due under any Service Order that have not been paid, no cause of action under any theory which accrued more than one (1) year prior to the filing of a complaint alleging such cause of action may be asserted by either Party against the other Party.

- 4.3 **Special Damages.** EXCEPT FOR A PARTY'S INDEMNIFICATION OBLIGATIONS SET FORTH BELOW IN ARTICLE 5 AND EXCEPT FOR CLAIMS ARISING FROM A PARTY'S INTENTIONAL MISCONDUCT, IN NO EVENT SHALL EITHER PARTY BE LIABLE TO THE OTHER PARTY FOR ANY INDIRECT, INCIDENTAL,

SPECIAL, PUNITIVE OR CONSEQUENTIAL DAMAGES WHATSOEVER, ARISING OUT OF, OR IN CONNECTION WITH, THIS AGREEMENT, INCLUDING BUT NOT LIMITED TO, LOST PROFITS, LOST REVENUE, LOSS OF GOODWILL, LOSS OF ANTICIPATED SAVINGS, LOSS OF DATA, INCURRED OR SUFFERED BY EITHER PARTY, WHETHER IN AN ACTION IN CONTRACT OR TORT, EVEN IF THE OTHER PARTY OR ANY OTHER PERSON HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. EXCEPT AS EXPRESSLY SET FORTH IN THE AGREEMENT, CITY MAKES NO WARRANTY, EXPRESS, IMPLIED, STATUTORY OR OTHERWISE AS TO THE DESCRIPTION, QUALITY, MERCHANTABILITY, COMPLETENESS OR FITNESS FOR ANY PARTICULAR PURPOSE OR USE OF THE SERVICE, LOCAL ACCESS OR ANY OTHER MATTER, AND ANY SUCH WARRANTIES ARE HEREBY EXCLUDED AND DISCLAIMED.

- 4.4 No Liability for Certain Actions.** City is not responsible for the content of any information transmitted or received through the Services. Other than as expressly stated in a Service Schedule, Customer shall be solely responsible for all of the security and confidentiality of information it transmits using a Service. Customer shall be solely responsible for all Customer support, pricing and service plans, billing and collections with respect to its End User Customers, including obtaining all necessary legal or regulatory approvals to provide or terminate the provision of the services to its End User Customers. City exercises no control over, and accepts no responsibility for, the content of the information passing through its network, or Customer equipment, and use of any such Service is at Customer's own risk.

4.5 Service Levels.

A. The "Service Level" commitments applicable to Services are contained in the Service Schedules for each Service. If City does not meet a Service Level for ethernet or dedicated internet access Customers, a credit will be issued to Customer if and as stated in the applicable Service Schedule on Customer's written request. Interruptions of service for residential and business-class internet Customers do not qualify for a credit.

B. To request a credit, an ethernet or dedicated internet access Customer must deliver a written request per the provisions of Section 6.5 of this Agreement (with sufficient detail to identify the affected Service) within sixty days after the end of the month in which the event occurred. Total monthly credits will never exceed the charges for the affected Service for that month. Customer's sole remedies for any non-performance, outages, failures to deliver or defects in Service are contained in the Service Levels applicable to the affected Service.

- 4.6 Right of Termination for Installation Delay.** In lieu of installation Service Level credits, if City's installation of Service is delayed by more than thirty business days beyond the Customer Commit Date, Customer may terminate the affected Service without liability upon written notice to City, provided such written notice is delivered prior to City delivering a Connection Notice for the affected Service. This Section shall not apply where City is constructing facilities to a new location not previously served by City.

5.0 INDEMNIFICATION

- 5.1 Indemnification.** The Customer agrees to make payment of all proper charges for labor and services required under this Agreement and Customer shall indemnify City and hold it harmless from and against any loss or damage, claim or cause of action, and any attorneys' fees and court costs, arising out of: any unpaid bills for labor, services or materials furnished pursuant to this Agreement; any failure of performance of Customer under this Agreement; or the negligence of the Customer in the performance of its duties under this Agreement, or any act or omission on the part of the Customer, his agents, employees, or servants. The City is not obligated to indemnify Customer, and Customer shall defend and indemnify City hereunder, for any claims by any third party, including End User Customers, arising from services provided by Customer that incorporate any of the Services including but not limited to (a) violation of any applicable law by End User Customers; (b) damage to property or personal injury (including death) arising out of the acts or omissions of End User Customers; (c) termination or suspension of Services of Customer or End User Customers, due to a Customer Default; or (d) claims by a third party, including without limitation End User Customers, arising out of or related to the use or misuse of any Service.

6.0 GENERAL TERMS

- 6.1 "Terms of Service"** means the provisions set out in Articles 1 through 6 in this AGREEMENT.

- 6.2 Force Majeure.** Neither Party shall be responsible for failure or delay of performance if caused by: an act of war, hostility, or sabotage; act of God; electrical, internet, or telecommunication outage that is not caused by the obligated Party; government restrictions; or other event outside the reasonable control of the obligated Party, except as limited by Paragraph 4.5 above. Force Majeure Events and scheduled maintenance under Section 1.4 are considered excused outages and shall not make City a defaulting Party per Section 3 of this Agreement.
- 6.3 No Sub-Licensing; Non-Compete.** Any Services provided to Customer pursuant to the Agreement are for the sole benefit of Customer. Customer shall not grant to any third party the right to use any of the Services, regardless of whether such grant were to take the form of a license, sublicense, lease, sublease, or any other form. Nor shall Customer use the Services for commercial purposes that are competitive with City's business (e.g., use the Services to sell Internet access services, point-to-point data transport services, VoIP services, etc., to third parties within City's service area).
- 6.4 Affiliates.** Customer's affiliates may purchase Service pursuant to this Agreement, and Customer shall be jointly and severally liable for all claims and liabilities related to Service ordered by any Customer affiliate.
- 6.5 Notices.** Any notices provided by one Party to the other Party pursuant to this Agreement shall be in writing and deemed received if delivered personally, sent via facsimile, pre-paid overnight courier, electronic mail (if an e-mail address is provided) or sent by U.S. Postal Service or First Class International Post, addressed as follows:
- | IF TO CITY: | IF TO CUSTOMER: |
|---|------------------------|
| City of Anacortes | Name: _____ |
| 904 6 th Street | Street: _____ |
| PO Box 547 | City/State: _____ |
| Anacortes, WA 98221 | Attn: _____ |
| Attn: Municipal Fiber Mgr | Email: _____ |
| Email: broadband@cityofanacortes.org | |
- If no electronic or physical Customer address is indicated above, notices may be provided to any electronic or physical address identified on the Service Order. Either Party may change its notice address upon notice to the other Party. All notices shall be deemed given on (i) the date delivered if delivered personally, by e-mail (or the next business day if delivered on a weekend or legal holiday), (ii) the business day after dispatch if sent by overnight courier, or (iii) the third business day after dispatch if otherwise sent.
- 6.6 Acceptable Use Policy; Data Protection.** Customer's use of Service shall comply with City's Acceptable Use Policy and Privacy Policy, as communicated in writing to Customer from time to time and which are also available through City's web site. Customer consents that City may use Customer data for the performance of City's obligations and the exercise of City's rights under this Agreement, including storing, processing or transferring data to or from the United States.
- 6.7 Intellectual Property and Publicity.** Neither Party is granted a license or other right (express, implied or otherwise) to use any trademarks, copyrights, service marks, trade names, patents, trade secrets or other form of intellectual property of the other Party or its affiliates without the express prior written authorization of the other Party. Neither Party shall issue any press release or other public statement relating to this Agreement, except as may be required by law or agreed between the Parties in writing.
- 6.8 Governing Law; Amendment.** This Agreement shall be governed and construed in accordance with the laws of the State of Washington, without regard to its choice of law rules and jurisdiction for any claim or cause of action shall lie only in Skagit County, Washington. The City of Anacortes reserves the right to make changes to the Access Anacortes Fiber Internet policies and agreements, including but not limited to the Master Services Agreement, Acceptable Use Policy, and Right of Entry agreements. The most current versions of all policies and agreements will be available on the Policies & Agreements subpage of the City of Anacortes fiber department website. No failure by either Party to enforce any right(s) hereunder shall constitute a waiver of such right(s).
- 6.9 Relationship and Counterparts.** The relationship between the Parties is not that of partners, agents, or joint ventures. This Agreement may be executed in one or more counterparts, all of which taken together shall constitute one instrument.
- 6.10 Attorneys' Fees.** In the event litigation is required by the City to enforce the terms of this Agreement, if the City is the prevailing Party of such action shall, in addition to all other relief granted or awarded by the court,

the City shall be entitled to judgment for reasonable attorney's fees, incurred by reason of such action and all costs of arbitration or suit and those incurred in preparation thereof at both the trial and appellate levels, and in bankruptcy proceedings.

- 6.11 Order of Precedence.** In the event of any conflict between this Agreement and the terms and conditions of any Service Schedule and/or Service Order, the order of precedence is as follows: (1) any Service Order signed by Customer and accepted by City but solely with respect to the Service covered by that Service Order, 2) any Service Schedule either attached hereto or hereafter signed by Customer, and (3) this Agreement.
- 6.12 Term.** This Agreement shall become effective upon its execution by both Customer and City and shall continue in force for as long as any Service Schedule or Service Order entered into under this Agreement remains in force. This Agreement shall terminate one-hundred, eighty (180) days after all Service Schedules and Service Orders enter into under this Agreement terminate.
- 6.13 Severability.** If a court of competent jurisdiction finds or holds any part of this Agreement or any Service Schedule or any Service Order entered into under this Agreement to be unenforceable, then only the unenforceable provision or section shall be affected and the remaining portions of this Agreement or any Service Schedule or any Service Order entered into under this Agreement shall continue in full force and effect.
- 6.14 Regulatory Requirement.** If the Federal Communications Commission, the Canadian Radio-television and Telecommunications Commission ("CRTC"), a regulatory body, or a court of competent jurisdiction, issues a rule, regulation, law or order which has the effect of increasing the cost to provide the Services or cancelling, changing, or superseding any material term or provision of this Agreement (collectively "Regulatory Requirement"), then this Agreement shall be deemed modified in such a way as is necessary to comply with such Regulatory Requirement
- 6.15 Entire Agreement.** This Agreement, including any Service Schedule(s) and Service Order(s) executed hereunder, constitutes the entire and final agreement and understanding between the Parties with respect to the Service and supersedes all prior agreements, understandings, proposals, or representations relating to the Service, which are of no further force or effect. The Service Schedules are listed at www.anacorteswa.gov and are integral parts hereof and are hereby made a part of this Agreement.

CITY OF ANACORTES ("City")

<<customer>> ("Customer")

By _____

By _____

Name _____

Name _____

Title _____

Title _____

Date _____

Date _____