

**CITY OF MARYSVILLE AGENDA BILL**

**EXECUTIVE SUMMARY FOR ACTION**

**CITY COUNCIL MEETING DATE: 11/26/2012**

<b>AGENDA ITEM:</b> Contract for Purchase of 30 year IRU for fiber to Snohomish County from Black Rock Cable	
<b>PREPARED BY:</b> Worth Norton, IS Manager	<b>DIRECTOR APPROVAL:</b>
<b>DEPARTMENT:</b> Finance / Information Services	
<b>ATTACHMENTS:</b> IRU AGREEMENT dated 12/27/2012 and Exhibit A	
<b>BUDGET CODE:</b> 10800080 542000 50300090 531000 Franchise Fee Reimbursement	<b>AMOUNT:</b> \$62,716.50 \$ 2,887.50 (\$ 2,887.50)

**SUMMARY:**

The City of Marysville currently has a fiber network connection to the Snohomish County Datacenter provided by Black Rock Cable. We use this connection for multiple functions including; traffic, video arraignment, Court connectivity to the State AOC (Administrative Office of the Courts), Police connectivity to the WSP, Fire connectivity to SNOPAC, New World, and others including potential future application sharing and offsite disaster recovery.

This fiber connection was provided at no charge for three years as part of a county wide fiber ring that was negotiated between Black Rock Cable and six cities, Snohomish County, SERS, SNOPAC, and SNOCOM. Our three year free period is about to expire. As a part of the contract, the six cities, including Marysville, were given an option to purchase a 30 year IRU (indefeasible right of use).

This contract will have a "binding delivery date" of 60 days after the signing, which will put this into the 2013 budget. Council has approved the purchase of this IRU using I-Net funding in the 2013 budget.

This fiber connection has significantly reduced monthly communications charges by eliminating multiple point to point circuits. And given the near future merger between Wave Broadband and Black Rock Cable, we believe that completing this IRU prior to the merger would be the best course of action.

**RECOMMENDED ACTION:**

City staff recommends that the City Council authorize the Mayor to sign the attached Black Rock Cable IRU agreement.

**IRU AGREEMENT**

**BY AND BETWEEN  
BLACK ROCK CABLE, INC**

**AND**

**CITY OF MARYSVILLE**

**DATED**

**November 27th, 2012**

## INDEFEASIBLE RIGHT OF USE AGREEMENT

THIS INDEFEASIBLE RIGHT OF USE AGREEMENT (the “Agreement”) is made and entered into as of November 27, 2012, by and between Black Rock Cable, a Nevada corporation DBA Black Rock Cable, Inc. (“Black Rock”), and City of Marysville (“Customer”).

### RECITALS

WHEREAS, Black Rock is planning to construct or has constructed a Cable Bundle(s) containing multiple single mode fiber optic lines between certain points identified in Exhibit A attached hereto; and

WHEREAS, Customer desires to use certain optical fibers in the Cable Bundle, and Black Rock desires to grant Customer an Indefeasible Right to Use certain fibers in the Cable Bundle, all upon the terms and conditions set forth below.

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

#### 1. DEFINITIONS

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

“Actual Delivery Date” shall mean the day following the fourteen (14) day Customer Test Period and the beginning of the Term of this IRU and payments required hereunder.

“Binding Delivery Date” shall mean the latest day that the parties agree that Black Rock must provide Customer Fibers for Customer activation and testing.

“Cable Bundle” when used herein as a defined term means the fiber optic cable and the fiber contained therein, and associated splicing connections, splice boxes, and other appurtenances that may be installed as part of the Cable Bundle.

“Continuity” shall mean the ability of the Customer Fibers to pass signals within the loss budget limitations for any specific Customer Fiber connection.

“Customer Fibers” shall mean the specific Dark Fibers in the Cable Bundle that are the subject of an IRU granted hereunder, as identified in the attached Exhibit A.

“Customer Test Period” shall mean the fourteen (14) day period beginning at the day that notice is given by Black Rock to the Customer that the Customer Fibers are ready for Customer activation and testing.

“Dark Fibers” shall mean fiber optic strands provided without electronics or optronics, and which are not “lit” or activated.

“Execution Date” shall mean the date which the Customer signs and executes this Agreement.

“Impositions” shall mean all taxes, fees, levies, imposts, duties, charges or withholdings of any nature (including, without limitation, sales, use, transfer, personal property and real property taxes, gross receipts taxes, gross income taxes, net receipts or net income taxes received by or accrued to such party, franchise, access, license and permit fees), together with any penalties, fines or interest thereon (except for penalties or interest imposed as a direct result of acts or failures to act on the part of a party) arising out of the transactions contemplated by this Agreement and/or imposed upon the Cable Bundle by any federal, state or local government or other local public taxing authority with the lawful capacity to charge, levy or impost.

“Indefeasible Right of Use” or “IRU” shall mean an exclusive indefeasible right of use for the purposes described herein, in the Customer Fibers, as granted in this Agreement, provided that the IRU’s granted hereunder do not provide Customer with any ownership interest in or other rights to physical access to, or control of, modifications of, encumbrance in any manner, or the use of the Cable Bundle except as expressly set forth herein.

“Interest Holders” shall mean any and all owners (including Black Rock and Customer) in the Cable Bundle and any and all holders of an IRU or equivalent interests (including long-term lessees) in the Cable Bundle.

“IRU Fee” shall mean the fee negotiated and stated on the Exhibit A for which an IRU has been granted to Customer as set forth in this Agreement, hereafter, and shall not include applicable charges for Maintenance Fees, Impositions incurred or accrued by reason of the IRU.

“Maintenance Fees” shall mean the fees to be paid by the Customer to Black Rock for the maintenance and repair of the Cable Bundle, as set forth in the attached Exhibit A.

“Maintenance Window” shall mean a prearranged period of time reserved for performing certain work on the Cable Bundle.

“Reasonable Efforts” shall mean efforts commercially and reasonably designed to achieve the desired results.

“Service Affecting Condition” shall mean a condition on the Cable Bundle that materially adversely affects Customer’s ability to utilize the Customer Fibers.

“Underlying Rights” shall mean all deeds, leases, easements, rights of way, licenses, franchises, permits and other rights, titles or interests as are necessary for the construction, installation, operation, maintenance or repair of the Cable Bundle.

“Underlying Rights Requirements” shall mean the terms, conditions, requirements, restrictions, and/or limitations upon Customer’s right to use the Customer Fibers as provided and permitted under this Agreement, and associated safety, operational and other rules and regulations imposed in connection with the Underlying Rights.

All sums of money expressed in this Agreement are expressed in lawful currency of the United States of America.

2. GRANT OF RIGHTS IN THE CERTAIN CABLE BUNDLE

- A. Black Rock hereby grants to Customer, and Customer hereby purchases from Black Rock, an exclusive Indefeasible Right of Use in the Customer Fibers located within the Cable Bundle, all as more specifically described in the Exhibit A attached hereto. Black Rock shall retain legal title to the entire Cable Bundle and the Customer Fibers, subject only to the IRU granted hereunder.
- B. Black Rock will provide Customer Fibers to the Customer with no bandwidth restrictions. The Customer may use the Customer Fiber for any legal and authorized purpose, pursuant to this Agreement. The Customer Fibers will be built as a discreet and dedicated connection for the Customer and no other party.

3. PERMITS; UNDERLYING RIGHTS

- A. Black Rock shall obtain on or before the Binding Delivery Date, any and all Underlying Rights relating to the grant of rights and interests in and/or access to the real property underlying the Cable Bundle, and such other rights, licenses, permits, authorizations, consents and approvals (including, without limitation, any necessary local, state, federal or tribal authorizations and environmental permits) that are necessary in order to (i) grant the IRU's, and otherwise perform its obligations hereunder, and (ii) permit Customer to use, operate and access the Customer Fibers all in accordance with the terms and conditions hereof, and the Underlying Rights Requirements.
- B. Notwithstanding anything in this Agreement to the contrary, it is expressly understood that Customer shall be solely responsible for compliance with all legal and regulatory requirements associated with its business or operation of Customer Fibers or use of the IRU including maintaining all required franchises, permits, authorizations, licenses, approvals or other consents (other than the Underlying Rights), and Black Rock shall have no responsibility or liability whatsoever in connection therewith.
- C. Black Rock shall use its Reasonable Efforts to either require that the stated term of any Underlying Right applicable to the Cable Bundle shall be for a period that does not expire in accordance with its ordinary terms prior to the last day of the Initial Term of the IRU, or if the stated term of any such Underlying Rights expires, in accordance with its ordinary terms, on a date earlier than the last day of the Initial Term of the IRU, Black Rock shall, at its cost, exercise any renewal rights thereunder, or otherwise use its Reasonable Efforts to acquire such extensions, additions and/or replacements as may be necessary in order to cause the stated term thereof to be continued until a date that is not earlier than the last day of the Initial Term of the IRU; provided, however, that Black Rock shall not be required to expend, as consideration for any such renewals or extensions, more than the fair market rate payable at such time for similar rights and terms, unless Customer agrees, at its option, to pay directly any amounts required to be paid in excess of such fair market rate to renew or extend such Underlying Rights. If

after use of Reasonable Efforts, Black Rock does not obtain such extensions, additions and/or replacements, nothing in this Agreement shall prevent Customer from seeking to obtain or obtaining any renewal or extension of any such Underlying Rights from the grantor of such Underlying Rights, but at the Customers sole cost and expense.

- D. Notwithstanding anything to the contrary contained in this Agreement, upon the expiration or termination of any Underlying Right that is necessary in order to grant, continue or maintain an IRU granted hereunder in accordance with the terms and conditions hereof, and so long as Black Rock shall have fully observed and performed its obligations in accordance with this Agreement with respect thereto, the term, either the Initial Term or any Renewal Term granted hereunder, of the IRU granted with respect to the Customer Fibers or any portion of the Cable Bundle affected thereby shall automatically expire upon such expiration or termination of the Underlying Rights.
- E. Black Rock shall use its Reasonable Efforts to cause the terms of each such Underlying Rights to provide Customer with a guarantee of non-disturbance during the term of such Underlying Rights and any renewal thereof, and shall further endeavor to include the right of Customer to obtain notice of any default on the part of Black Rock and to permit Customer to cure, on behalf of Black Rock, any such default by Black Rock and, thereafter, to continue the use of such Underlying Rights in accordance with Black Rock's rights and interests thereunder; provided that Black Rock's failure to obtain such notice and a right to cure shall not be considered a breach of this Agreement by Black Rock. If Customer at any time cures such default by Black Rock, Black Rock shall reimburse Customer for any and all amounts reasonably paid by Customer promptly upon demand.
- F. Black Rock further covenants and agrees with respect to such Underlying Rights to observe and perform its duties, obligations and responsibilities under such Underlying Rights or under this Agreement, if the failure to observe and perform any such obligation or obligations would permit the grantor of such Underlying Rights to terminate such Underlying Rights prior to its stated expiration date, or would otherwise materially adversely impair or affect Customer's ability to use the Customer Fibers, or exercise Customer's rights with respect to the IRU, as provided and permitted hereunder.
- G. Throughout the term of each such Underlying Rights, Black Rock shall at its reasonable cost and expense defend and protect Black Rock's rights in and interests under the Underlying Rights and Customer's right to use the Customer Fibers as provided and permitted hereunder against interfering or infringing rights, interests or claims of third parties.

4. SCHEDULED MAINTENANCE WINDOWS

- A. Black Rock shall have the right to perform regularly scheduled maintenance on the Cable Bundle on at least a monthly basis or more often as may be agreed between the parties. Regularly scheduled maintenance may require temporarily disconnecting of the Customer Fibers for various reasons. Black Rock will coordinate with the Customer to mutually agree to Maintenance Windows that will have the least impact on the Customer Fibers.

5. IRU FEE; MAINTENANCE FEE; INVOICING

- A. Black Rock will invoice Customer for the one-time IRU fee and annually for Maintenance Fees as described herein in Exhibit A. All invoices shall be delivered to the Customer in a customary fashion and shall be due and payable thirty (30) days after receipt of an undisputed invoice.

6. CONSTRUCTION OF THE CABLE BUNDLE

- A. Black Rock shall, at Black Rock's sole cost and expense, design, engineer, procure all fiber and material, install, and construct the Cable Bundle. Black Rock shall choose the route of the Cable Bundle and such route may not be the most direct route between the locations desired by the Customer.
- B. Black Rock shall provide the Customer Fiber to the Customer for activation and testing no later than the sixty (60) days after the Execution Date ("Binding Delivery Date"). If Black Rock cannot provide the Fiber to the Customer within the time frame in the preceding sentence, the Customer will have the option to void this Agreement and all terms conditions and payments required herein, provided, however, that the reason for Black Rock's inability to perform was under Black Rock's control or responsibility pursuant to this Agreement.
- C. Upon provision of the Customer Fibers to the Customer, the Customer payment obligations shall commence at the conclusion of the Customer Test Period.

7. TESTING AND DELIVERY OF THE CUSTOMER FIBERS

- A. Black Rock shall test all Customer Fibers for Continuity and estimated loss between the Connection Points or point of demarcation in accordance with standard industry practices. Prior to the Execution Date, Black Rock shall present Customer with the maximum loss budget and such loss budget shall be included in Exhibit B.
- B. After construction and testing have been completed, Black Rock will notify the Customer in writing that the Customer Fibers are ready for Customer use. The Customer shall have fourteen (14) calendar days ("Customer Test Period") to install, activate and test Customer owned equipment and verify that the Customer Fibers are providing connectivity between the Customer owned equipment. If

requested by the Customer, Black Rock may assist the Customer during the activation process.

- C. The calendar day of the expiration of the Customer Test Period shall be known as the Actual Delivery Date, which shall begin the Term of this Agreement and the IRU and all fees required herein.

## 8. TERM, TERMINATION, TITLE TRANSFER AND RENEWAL

- A. The grant of the IRU for the Customer Fibers shall commence on the Binding Delivery Date and shall expire on the thirtieth (30th) anniversary date of the Binding Delivery Date.
  - (i) At the expiration or other termination of this Agreement, the IRU shall immediately terminate and all rights of Customer to use the Cable Bundle or Customer Fibers shall cease and Black Rock shall owe the Customer no additional duties or consideration with respect to the Cable Bundle or Customer Fibers provided, however, that the Term has not been renewed.
  - (ii) Notwithstanding the foregoing, no termination or expiration of this Agreement shall affect the rights or obligations of any party hereto with respect to any prior breach or any then existing defaults or the obligation to make any payment hereunder for services rendered prior to the date of termination or expiration or with regard to any provisions of this Agreement that shall survive the expiration or termination hereof.

## 9. ACCESS TO CUSTOMER FIBERS

- A. Black Rock will provide Customer with access to the Customer Fiber as specified in the attached Exhibit A in order for Customer, at Customer's sole cost and expense, to connect its electronic equipment and interconnecting fibers to the Customer Fibers ("Connecting Point"). Black Rock shall provide a fiber distribution panel at each Connecting Point, which shall be the point of demarcation between the Cable Bundle and the Customer Fibers.
- B. Customer may determine and utilize any type of electronics or technologies in association with the Customer Fibers, and Customer may install and operate its interconnecting fibers, and upgrade, rearrange, maintain, repair, replace or otherwise deal with Customer's electronics and interconnecting fibers at its sole discretion, subject to mutually agreeable safety procedures; provided, however, that none of Customer's electronics or technologies shall create any risk of damage to, or otherwise interfere with the quiet use and enjoyment of the Cable Bundle by Black Rock or any other Interest Holders.

## 10. MAINTENANCE AND REPAIR OF THE CABLE BUNDLE

- A. The maintenance of the Cable Bundle shall be provided either by Black Rock or by an independent contractor to be selected by Black Rock. Customer shall pay Black Rock an annual Maintenance Fee for routine scheduled maintenance, including patrol of the route, a “Call-Before-You-Dig” program and maintenance technicians along the route.
- B. In the event that all or any part of the Cable Bundle is damaged or destroyed such that a Service Affecting Condition exists on the Customer Fibers, Black Rock shall promptly resolve such Service Affecting Condition. Notwithstanding anything contained herein to the contrary, except where a Service Affecting Condition was caused primarily by the gross negligence or willful misconduct of Black Rock, its employees or agents, Black Rock shall not incur any liability to Customer by reason of a Service Affecting Condition except its obligation to resolve such Service Affecting Condition as set forth in this Agreement, and Customer shall not be entitled to any credits for IRU Fees or any other payment paid or to be paid by the Customer pursuant to this Agreement by reason of such Service Affecting Condition.
- C. Black Rock must maintain Continuity of the Customer Fibers at all times. If the Customer suspects that Customer Fiber Continuity is lost between locations, the Customer shall notify Black Rock immediately. Once Black Rock has been notified, Black Rock will inspect the Customer Fiber and report back to the Customer within four (4) hours after gaining access to each terminated end of the Fiber. Black Rock must reestablish Continuity of the Customer Fiber as soon as possible or notify the Customer that problems encountered are not due to lack of Fiber Continuity. Subject to the Force Majeure provisions of this Agreement, if Black Rock cannot provide Continuity within forty-eight (48) hours after notification by the Customer, the Customer will have the option to terminate this Agreement.

## 11. OPERATIONS

- A. Customer acknowledges and agrees that Black Rock is not supplying nor is Black Rock obligated to supply Customer with any optronics or electronics or optical or electrical equipment for the operation of the Customer Fibers, including without limitation, generators, batteries, air conditioners, fire protection and monitoring and testing equipment, all of which are the sole responsibility of Customer.
- B. Customer represents and warrants that it shall not use the Customer Fibers in any manner that is not in compliance with (i) any and all applicable government codes, ordinances, laws, rules, regulations and/or restrictions, and (ii) the Underlying Rights Requirements, as such may be amended from time to time. Customer shall not use any product or service that fails to comply with any applicable safety rules or that would cause any portion of the Cable Bundle to violate any state or federal environmental laws.

- C. Subject to the provisions of this Agreement, Customer expressly agrees that it will not offer the IRU nor the Customer Fibers in connection with the IRU granted hereunder for use by any third party as a Dark Fiber, but will only offer services on the Customer Fibers on which Customer has installed and is operating electronics and other facilities. All Customer uses of this fiber must be consistent with the Snohomish County Emergency Radio Systems / Black Rock IRU dated May 8, 2009 and the Dark Fiber Optic Lease Facilitation Agreement dated April 22, 2010. Customer expressly acknowledges that any breach of the covenant contained in this Section shall be a material breach of this Agreement, entitling Black Rock to exercise any rights and remedies otherwise provided by reason of Customer's material default.
- D. Black Rock acknowledges and agrees that it has no right to use the Customer Fibers during the Initial Term or any applicable Renewal Term of this Agreement, and after the Actual Delivery Date of the grant of the IRU hereunder, Black Rock shall keep the Customer Fibers, and the IRU granted free from (i) any liens of any third party attributable to Black Rock, and (ii) any rights or claims of any third party attributable to Black Rock. To the extent that Black Rock has granted or shall grant any lien, encumbrance or security interest in or on all or any portion of the Cable Bundle, Black Rock shall, to the extent reasonably possible prior to such grant, provide to Customer a written non-disturbance agreement from such lienholder substantially to the effect that such lienholder acknowledges Customer's rights and interests in and to the Customer Fibers, and the IRU hereunder, and that such lienholder expressly agrees that the same shall not be diminished, disturbed, impaired or interfered with by such lienholder in the exercise of any rights it may have with regard to Black Rock's interest in the affected portion of the Cable Bundle. Black Rock shall not use any other fibers in the Cable Bundle in a way which physically interferes with or has a material adverse affect on the use of the Customer Fibers, and Black Rock shall on Customer's request, obtain from any Interest Holders a similar agreement to protect Customer's use of the Customer Fibers from interference or impairment by reason of such Interest Holder's use of other fibers in the Cable Bundle.
- E. Customer acknowledges and agrees that it has no right to use any of the fibers, other than the Customer Fibers incorporated in the Cable Bundle. Customer expressly acknowledges that the Cable Bundle includes or will include other Interest Holders, including Black Rock, of Dark Fiber IRU's and other system users. Customer shall not use the Customer Fibers or related equipment in a way which physically interferes in any way with or adversely affects the use and quiet enjoyment of any portion of the Cable Bundle, any other fibers in the Cable Bundle, any Cable within the Cable Bundle, or otherwise of any other Interest Holder using the Cable Bundle. Customer shall keep any and all of the Cable Bundle, other than the IRU in the Customer Fibers granted to Customer hereunder, free from any liens, rights or claims of any third party attributable to Customer.

## 12. INDEMNIFICATION

- A. Subject to the provisions of this Agreement, Black Rock hereby releases and agrees to indemnify, defend, protect and hold harmless Customer, its directors, officers, agents, and employees, and its respective successors or permitted assigns from and against: (i) any and all causes of action, demands, claims, suits, losses, judgments or costs (collectively “Damages”) which may be brought by or asserted by any third party against Customer as a direct result of Black Rock’s design, construction, maintenance or operation or use of the Cable Bundle, or (ii) each and every breach, or material default by Black Rock of any of its covenants, agreements, duties or obligations hereunder, or (iii) any violation by Black Rock of any regulation, rule, statute or court order of any local, state or federal governmental agency, court or body in connection with Black Rock’s performance of its obligations under this Agreement, or (iv) damages directly attributable to the negligent act or omission or willful misconduct of Black Rock.
- B. Subject to the provisions of this Agreement, Customer hereby releases and agrees to indemnify, defend, protect and hold harmless Black Rock, its directors, officers, stockholders, agents, and employees, and its respective successors or permitted assigns from and against: (i) any and all causes of action, demands, claims, suits, losses, judgments or costs (collectively “Damages”) which may be brought by or asserted by any third party against Black Rock as a direct result of Customer’s maintenance, operation or use of the Customer Fibers and IRU, or (ii) each and every breach, or material default by Customer of any of its covenants, agreements, duties or obligations hereunder, or (iii) any violation by Customer of any regulation, rule, statute or court order of any local, state or federal governmental agency, court or body in connection with Customer’s performance of its obligations under this Agreement, or (iv) damages directly attributable to the negligent act or omission or willful misconduct of Customer.

## 13. LIMITATION OF LIABILITY

- A. Notwithstanding any provision of this Agreement to the contrary, except to the extent caused by its own willful misconduct, neither party shall be liable to the other party for any special, incidental, indirect, punitive or consequential damages including, but not limited to, loss of profits or revenue, cost of capital, or claims of customers, (whether arising out of transmission interruptions or problems, any interruption or degradation of service or otherwise), whether foreseeable or not, arising out of, or in connection with the liable party’s performance or non performance of its respective obligations or breach of any provisions of this Agreement or any other cause or nature whatsoever whether occasioned by any design, engineering, construction, reconstruction, relocation, repair or maintenance performed by, or failed to be performed by, such liable party, including breach of contract, breach of warranty, tort, negligence, strict liability or otherwise, and all claims with respect to which such special, incidental, indirect, punitive or consequential damages are hereby specifically waived.

- B. Notwithstanding any provision of this Agreement to the contrary, the maximum liability to Customer, if any, of Black Rock or its affiliates in connection with this Agreement shall be limited, in the aggregate, to the aggregate amount of any IRU Fees that have been paid by Customer to Black Rock with respect to the affected portion of the Cable Bundle of which the claim is based on and at the time the claim is made, provided, however, that this limitation of maximum liability shall not apply to damages arising from the gross negligence or willful misconduct of Black Rock or its affiliates and provided further, that this limitation shall not restrict either party's right to proceed for injunctive relief.

#### 14. INSURANCE

- A. Each party shall procure and maintain in force at its sole cost and expense the following insurance coverage's that are lawfully approved to do business in the State of Washington in which the Customer Fibers are located, in the amounts and with limits as set forth below:
- (i) Commercial General Liability Insurance with limits not less than \$1,000,000 each occurrence and \$2,000,000 aggregate, on an occurrence basis, including coverage for bodily injury, personal injury and property damage, including, without limitation, injury or damage arising from the operation of equipment and liability for completed operations;
  - (ii) workers' compensation insurance in amounts required by applicable law and employers' liability insurance, with a limit of at least \$500,000;
  - (iii) Commercial Automobile Liability Insurance covering death or injury to any person or persons, or damage to property arising from the operation of vehicles, with limits of not less than \$1,000,000 each accident.
  - (iv) A Commercial Umbrella Liability policy or Excess Liability policy providing limits of not less than \$4,000,000 each occurrence and \$4,000,000 aggregate in excess of the above Commercial General Liability, Commercial Automobile Liability, and Employer's Liability.

Black Rock shall require each subcontractor who is engaged by Black Rock in connection with the construction or maintenance of the Cable Bundle to maintain insurance in the types and amounts in Section 14.A (i), (ii) and (iii) set forth herein.

- B. Each party shall be listed as an additional insured but only with respect to the operation and liability of the named insured on all policies set forth above held for the benefit of the other party, except workers' compensation. All such policies of insurance shall provide that the additional insured shall be notified in writing at least thirty (30) days prior to any cancellation of, or any material change or new exclusions in the policy. Each party shall provide the other party with certificates of insurance evidencing such insurance coverage.

15. TAXES, FEES AND IMPOSITIONS

- A. Black Rock shall be responsible for and shall timely pay any and all Impositions with respect to construction of the Cable Bundle. Black Rock shall be responsible for and shall timely pay any and all Impositions with respect to operation of the Cable Bundle.
- B. Customer shall be responsible for all Impositions, whether assessed against Customer or Black Rock, which result from Customer's operation and/or use of the Customer Fibers including any and all taxes, fees or assessments based on revenue derived from such operation and/or use by Customer.

16. DEFAULT

A. Customer's Default:

- (i) With respect to any other material obligations of Customer hereunder, unless a shorter time period for cure is expressly provided elsewhere in this Agreement, in the event Customer shall fail to perform such an obligation as set forth in this Agreement and such failure shall continue for a period of thirty (30) days after written notice of such failure to Customer, Customer shall be in material default hereunder; provided, however, that where such failure cannot reasonably be cured within such thirty (30) day period, if Customer shall proceed promptly to cure the same within the aforesaid period and continues to prosecute such cure with due diligence, the time for curing such failure shall be extended for such period of time as may reasonably be necessary to complete such cure; and provided further that if Customer certifies in good faith to Black Rock in writing that a failure has been cured, such failure shall be deemed to be cured unless Black Rock otherwise notifies Customer in writing within fifteen (15) days of receipt of such notice from Customer.
- (ii) Customer shall be in material default hereunder (i) immediately upon the making by Customer of a general assignment for the benefit of its creditors, the filing by Customer of a voluntary petition in bankruptcy or the filing by Customer of any petition or answer seeking, consenting to, or acquiescing in reorganization, arrangement, adjustment, composition, liquidation, dissolution, or similar relief; or (ii) one hundred twenty (120) days after the filing of an involuntary petition in bankruptcy or other insolvency protection against Customer which is not dismissed within such one hundred twenty (120) days.
- (iii) Upon failure to cure any material default by Customer, after written notice thereof from Black Rock, Black Rock may (i) in accordance with the terms herein, take such action as it determines, in its sole discretion, to be necessary to correct the default and recover from Customer, Black Rock's reasonable costs incurred in correcting such default; (ii) terminate any and

all of its obligations hereunder with respect to any portion of the Cable Bundle as to which the Actual Delivery Date has not yet occurred or as to which the grant of the IRU has not yet become effective, and in such case, Black Rock may apply any and all amounts previously paid by Customer hereunder with respect to such affected portion of the Cable Bundle toward the payment of any other amounts then or thereafter payable by Customer hereunder; and (iii) suspend Customer's access to and right to use any Customer Fibers, until such time as all amounts then due and owing have been paid; (iv) pursue any legal remedies it may have under applicable law or principles of equity relating to such default, including specific performance.

B. Black Rock's Default:

- (i) With respect to any other material obligations of Black Rock hereunder, in the event Black Rock shall fail to perform such an obligation and such failure shall continue for a period of thirty (30) days after written notice of such failure to Black Rock, Black Rock shall be in material default hereunder; provided, however, that where such failure cannot reasonably be cured within such thirty (30) day period, if Black Rock shall proceed promptly to cure the same within the aforesaid period and continues to prosecute such cure with due diligence, the time for curing such failure shall be extended for such period of time as may reasonably be necessary to complete such cure; and provided further that if Black Rock certifies in good faith to Customer in writing that a failure has been cured, such failure shall be deemed to be cured unless Customer otherwise notifies Black Rock in writing within fifteen (15) days of receipt of such notice from Black Rock.
- (ii) Black Rock shall be in material default hereunder (i) immediately upon the making by Black Rock of a general assignment for the benefit of its creditors, the filing by Black Rock of a voluntary petition in bankruptcy or the filing by Black Rock of any petition or answer seeking, consenting to, or acquiescing in reorganization, arrangement, adjustment, composition, liquidation, dissolution, or similar relief; or (ii) one hundred twenty (120) days after the filing of an involuntary petition in bankruptcy or other insolvency protection against Black Rock which is not dismissed within such one hundred twenty (120) days.
- (iii) Upon failure to cure any material default by Black Rock, Customer may take such action as it determines, in its sole discretion, to be necessary to correct the default, at Black Rock's sole expense, including, if reasonably required, curing any defaults under any Underlying Rights, and/or obtaining such Underlying Rights as may reasonably be required for Customer to cure such Black Rock default. In such event, Customer may recover from Black Rock its reasonable Costs in correcting such default, and Customer may also pursue any legal or equitable remedies it may have

under applicable law or principles of equity relating to such default including specific performance.

- C. Except as set forth to the contrary herein; any right or remedy of Customer or Black Rock provided in this Agreement shall be cumulative and without prejudice to the exercise of any other right or remedy.

#### 17. TAX TREATMENT

- A. It is understood and agreed that Black Rock must and does maintain legal title to the entire Cable Bundle, subject to the terms and conditions of this Agreement. Notwithstanding the foregoing, it is understood and agreed between the parties that the grant of the IRU hereunder shall be treated for accounting and federal and all applicable state and local tax purposes as the sale and purchase of the Customer Fibers, and that on or after the Actual Delivery Date, Customer shall be treated as the owner of the Customer Fibers for such purposes. The parties agree to file their respective income tax returns, property tax returns, and other returns and reports for their respective Impositions on such basis and, except as otherwise required by law, not to take any positions inconsistent therewith.

#### 18. FORCE MAJEURE

- A. Neither party shall be in default under this Agreement if, and to the extent that, any failure or delay in such party's performance of one or more of its obligations hereunder is caused by any of the following conditions, each of which shall constitute a force majeure, and the affected party shall be released from liability and shall suffer no prejudice for the failure of performance of its obligation or obligations, and, if the construction schedule is affected, the Estimated Delivery Date for the Cable Bundle or the Customer Fibers, shall be excused and extended for and during the period of any such delay: any circumstance beyond the reasonable control of the affected party, including without limitation, any change of circumstances not reasonably foreseen at the time this Agreement was executed which is beyond the reasonable control of the affected party, and which materially affects the ability of the affected party to perform its obligations hereunder; any act of God; fire; flood; lack of or delay in transportation; the adoption or amendment of government codes, ordinances, laws, rules, regulations or restrictions that materially impair the affected party's performance hereunder; war or civil disorder; strikes, lock-outs or other labor disputes; failure of a third party to grant or recognize an Underlying Right (provided Black Rock has made timely and reasonable commercial efforts to obtain the same).

#### 19. DISPUTE RESOLUTION

- A. Initially, the parties agree to negotiate in good faith to attempt to settle any disputes or claims that may arise out of or in relation to this Agreement. If after good faith negotiations, the parties cannot reach mutual resolution to any dispute or claim arising out of or in relation to this Agreement, or any breach of this

Agreement, the parties must mutually agree to settle the dispute or claim pursuant to the Rules of Mandatory Arbitration as provided by the Superior Court of Snohomish County, Washington, notwithstanding that the claim for relief or dollar amount of any claim may exceed the limits of such arbitration. Either party may initiate arbitration by filing a complaint with the Snohomish County Superior Court. The prevailing party at such arbitration shall be entitled to its costs, including reasonable attorney's fees as set by the arbitrator.

20. ASSIGNMENT AND TRANSFER

- A. Customer shall not assign, encumber or otherwise transfer this Agreement or all or any portion of its rights or obligations hereunder to any other person or entity without the prior written consent of Black Rock, which consent will not be unreasonably withheld or delayed provided that such assignment or transfer shall be subject to the assignee's or transferee's assumption of the obligations under this Agreement.
- B. Upon written notice to Customer, Black Rock may assign or transfer this Agreement including its rights and obligations hereunder without Customer's consent, provided that any assignment or transfer by Black Rock shall fully recognize and preserve the Customers rights under this Agreement.

21. REPRESENTATIONS, WARRANTIES AND ACKNOWLEDGMENTS

- A. Each party represents and warrants to the other that: (i) it has the full right and authority to enter into, execute, deliver and perform its obligations under this Agreement; (ii) all corporate actions necessary to enter into this Agreement and to perform all of the transactions contemplated hereby have been taken; (iii) this Agreement constitutes a legal, valid and binding obligation enforceable against such party in accordance with its terms, subject to bankruptcy, insolvency, creditors' rights and general equitable principles; (iv) its execution of and performance under this Agreement shall not violate any applicable existing regulations, rules, statutes or court orders of any local, state or federal government agency, court or body; and (v) no consents of any third party or governmental body are required for the execution or performance of this Agreement.
- B. Customer and Black Rock each agree to cooperate with and support the other in complying with any requirements applicable to their respective rights and obligations hereunder by any governmental or regulatory agency or authority. So long as any such action would not violate the terms of any Underlying Rights, Black Rock agrees, upon request of Customer, and at Customer's expense, to execute, file and/or record such documents or instruments as Customer shall deem reasonably necessary or appropriate to evidence or safeguard Customer's rights under the IRU.
- C. Black Rock represents and warrants that it is not in default under any of the Underlying Rights to the extent that such default would permit the grantor of such

Underlying Rights to terminate such Underlying Rights prior to its stated expiration date, or would otherwise materially, adversely impair or affect Customer's ability to use the Customer Fibers or exercise its rights with respect thereto, as provided and permitted hereunder, and, to the best of its knowledge, no grantor is in default under any Underlying Rights.

- D. EXCEPT AS SET FORTH IN THIS AGREEMENT, BLACK ROCK MAKES NO WARRANTY, EXPRESS OR IMPLIED, WITH RESPECT TO THE CUSTOMER FIBERS AND ASSOCIATED PROPERTY OR FACILITIES OR DELIVERABLES HEREUNDER, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR PARTICULAR PURPOSE OR USE, AND ALL SUCH WARRANTIES ARE HEREBY EXPRESSLY DISCLAIMED. THE WARRANTIES SET FORTH IN THIS AGREEMENT CONSTITUTE THE ONLY WARRANTIES MADE BY BLACK ROCK TO CUSTOMER WITH RESPECT TO THIS AGREEMENT AND ARE MADE IN LIEU OF ALL OTHER WARRANTIES, WRITTEN OR ORAL, STATUTORY, EXPRESS OR IMPLIED.

## 22. MISCELLANEOUS

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



with respect to the subject matter hereof and supersedes all prior agreements relating to the subject matter hereof, which are of no further force or effect. The Exhibits referred to herein are integral parts hereof and are hereby made a part of this Agreement. To the extent that any of the provisions of any Exhibit hereto are inconsistent with the express terms of this Agreement, the terms of this Agreement shall prevail. This Agreement may only be modified or supplemented by an instrument in writing executed by a duly authorized representative of each party and delivered to the party relying on the writing.

- G. Relationship of the Parties: The relationship between Customer and Black Rock shall not be that of partners, agents, or joint ventures for one another, and nothing contained in this Agreement shall be deemed to constitute a partnership or agency agreement between them for any purposes, including, but not limited to federal income tax purposes. Customer and Black Rock, in performing any of their obligations hereunder, shall be independent contractors or independent parties and shall discharge their contractual obligations at their own risk subject, however, to the terms and conditions hereof.
- H. Severability: If any term, covenant or condition contained herein shall, to any extent, be invalid or unenforceable in any respect under the laws governing this Agreement, so long as such invalidity does not materially impair the benefit of this Agreement to either party, the remainder of this Agreement shall not be affected thereby, and each term, covenant or condition of this Agreement shall be valid and enforceable to the fullest extent permitted by law.
- I. Counterparts: This Agreement may be executed in one or more counterparts, all of which taken together shall constitute one and the same instrument.
- J. Survival: Any provision of this Agreement, which by its nature extends beyond the term hereof or which is required to ensure that the parties to fully exercise their rights and perform their obligations hereunder shall survive the expiration or termination of this Agreement for any cause whatsoever.
- K. Agreement Binding: This Agreement and each of the parties' respective rights and obligations under this Agreement, shall be binding upon and shall inure to the benefit of the parties hereto and each of their respective successors and permitted assigns.

**IN WITNESS WHEREOF**, the Customer and Black Rock have executed this Agreement as of the date first above written.

**CUSTOMER**

**BLACK ROCK CABLE, INC.**

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Title

\_\_\_\_\_  
Title

\_\_\_\_\_  
Date

\_\_\_\_\_  
Date

**APPROVED AS TO FORM:**

\_\_\_\_\_  
Grant K. Weed, City Attorney

\_\_\_\_\_  
Date

**EXHIBIT A**  
**TO THE IRU AGREEMENT**  
**BY AND BETWEEN**  
**BLACK ROCK CABLE, INC. and CITY OF MARYSVILLE**

**Connection Points**

From the City of Marysville, Black Rock demarc, located at 1049 State Avenue, Marysville WA to Black Rock demarc at the Snohomish County Data Center, located at 3000 Rockefeller Ave, Everett WA.

**Identification of Customer Fibers**

One (1) strand(s), Single Mode Fiber to be designated by Black Rock within the Cable Bundle. The estimated distance between the two connection points is 9.8 km (6.1Miles).

**Binding Delivery Date**

The Binding Delivery Date will be sixty (60) days from the date of execution of this IRU agreement.

**Franchise Fee**

Black Rock will pay the Customer a Franchise Fee of five percent (5%) for the right to operate fiber within the Marysville City Limits.

**IRU Fee**

The Customer will pay Black Rock a one-time IRU fee of Fifty-Seven Thousand, Seven Hundred Fifty Dollars and No Cents (\$57,750.00) plus applicable Washington State Sales Tax.

**Maintenance Fee**

The Maintenance Fees will be comprised of two (2) parts:

1. The maintenance fee for pole attachments, pole transfers, and damages will be One Dollar (\$1.00) per strand mile per month for an approximate cost of Seventy-Three Dollars and Twenty Cents (\$73.20) per year.
2. For major undergrounding of overhead fiber routes and/or relocations due to Marysville City ordinance, orders or plans due to City Projects, the Customer will share the costs of moving the Cable Bundle at pro rata cost. Pro Rata means the affected City share will be determined by dividing number of fibers owned by affected City into the total number of fibers used by all customers at that location. By way of example and for

illustrative purposes only, if a relocation project will cost \$100,000.00; the Cable Bundle has 60 fibers with 40 of those fiber “lit” and actively used by twenty (20) Black Rock Customers (two (2) fibers/customer), the allocated share of relocation cost to affected City would be \$5,000.00 (\$100,000.00 divided by the number of active fibers in the Fiber Bundle). Notwithstanding the foregoing, nothing herein shall be interpreted to waive any right or obligation under any applicable franchise agreement.

Black Rock will notify the Customer in writing at least one hundred eighty days (180) days in advance of any major underground work and specify any Customer costs associated with the work.

### **Issue with the Everett Slough**

Black Rock currently leases fiber from SNOPUD to cross the Everett Slough. We use CWDM gear for this 7 mile crossing with customers owning to the north and south of the crossing. This allows a 1 gig circuit. City of Marysville accepts that this segment of the IRU will belong to SNOPUD and not be owned by either Black Rock or the City of Marysville.

We are currently constructing an alternate path to the Snohomish Data Center through Cathcart. This should be complete February or March of 2013. At any time, the City of Marysville can request switching to this wholly owned and IRUd fiber path. Note this path is 90 km and will take different optics.

City of Marysville accepts this condition as part of this IRU.

### **Initial Here:**