

CITY OF MARYSVILLE AGENDA BILL

EXECUTIVE SUMMARY FOR ACTION

CITY COUNCIL MEETING DATE: October 23, 2017

AGENDA ITEM:	
Contract for Purchase of 30 year IRU (irrevocable right of use) for fiber to the Edward Springs Water Treatment Plant from Wave Business Solutions LLC	
PREPARED BY:	DIRECTOR APPROVAL:
Worth Norton, IS Manager	<i>AT</i>
DEPARTMENT:	
Finance / Information Services	
ATTACHMENTS:	
Dark Fiber IRU Agreement	
BUDGET CODE:	AMOUNT:
10800080 549000 1715	\$ 33,193.00
10800080 549000 1605	\$ 51,407.00
40140780 542000	\$ 36,000.00
Cell Service Savings	\$(14,400.00)
SUMMARY:	

City staff has identified multiple needs for increased City network bandwidth to Edward Springs and beyond. The critical nature of Edward Springs requires the best telemetry uptime possible. Currently, commercial cell modems are being used with occasional downtime. Other needs identified that are not compatible with the current connection are increased telemetry for the plant and security cameras for the sensitive infrastructure.

The City did a formal RFP in 2016 to expand the network to Edward Springs. The RFP bids were rejected. The RFP revealed that it would be less expensive for the City to purchase a 30-year dark fiber IRU (irrevocable right of use) then it was to build out the City owned fiber.

The City requested bids for the IRU from all of the RFP respondents and all telecommunications companies with infrastructure in Marysville. Only Wave Business Solutions chose to bid on the IRU. Comcast replied that they are no longer selling dark fiber. Wave's bid was significantly less than a build out option.

The IRU purchase is being funded by I-Net and the ongoing maintenance will be paid for by utilities.

<p>RECOMMENDED ACTION: City staff recommends that the City Council authorize the Mayor to sign the attached Wave Business Solutions LLC IRU agreement</p>

DARK FIBER IRU AGREEMENT

This DARK FIBER IRU AGREEMENT (this “**Agreement**”) is made and entered into as of this ____ day of _____, 2017 (the “**Execution Date**”), by and between WAVE BUSINESS SOLUTIONS, LLC, a Washington limited liability company, for itself and as agent for its Affiliates (“**Wave**”), and the CITY OF MARYSVILLE, a Washington municipal corporation (“**Customer**”). Each of Wave and the Customer may be referred to in this Agreement as a “**Party**,” and collectively as the “**Parties**.” With respect to either Party, the term “**Affiliate**” shall mean any person who directly or indirectly controls, is controlled by, or is under common control with that Party.

Background

- A. Wave and its Affiliates own and operate a fiber optic communications network (the “**Wave Network**”) used by Wave to provide telecommunications, data transport, Internet access, dark fiber, video, telephone and related services to its residential, business and wholesale customers. A portion of the Wave Network is located in the northwest region of Washington.
- B. Customer desires to obtain from Wave the exclusive, irrevocable right to use certain strands of single mode dark fiber belonging to Wave, for a period of thirty (30) years, as more fully described in this Agreement.
- C. Wave is willing to grant Customer an irrevocable right of use in and to the IRU Fiber for the IRU Term on the terms and conditions set forth in this Agreement.

Agreement

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

ARTICLE 1: THE IRU FIBER

1.1 Description of IRU Fibers. This Agreement involves the following segment of dark fiber (the “**Segment**”):

Fiber Route Identifier	Location A End Point	Location Z End Point	Description of Fiber	Maximum Loss Budget
Segment 1	Public Safety Building 1635 Grove Street Marysville, WA 98270	Edward Springs Treatment Plant 614 Lakewood Road Arlington, WA 98223	1 strand single mode dark fiber	7 dB @ 1550 nm

The one (1) strand of fiber contained in Segment 1 that Customer shall receive the right to use under this Agreement may be referred to as the “**IRU Fiber**.”

1.2 Illustrative Maps. A map depicting the approximate locations and route of Segment 1 is attached to this Agreement as Exhibit A. The routes depicted in Exhibit A is for illustrative purposes only, for the convenience of the Parties. In the event of any conflict between Exhibit A and the specific terms and conditions of the main body of this Agreement, the specific terms and conditions of the main body of this Agreement shall control.

1.3 Wave's Control Over Segment Route. Notwithstanding the route depicted on Exhibit A, Wave shall at all times have full and complete control and responsibility for determining any routing configurations of the Segments, and may route the fiber optic cable or cables (each, a "Cable") containing the IRU Fiber through any Wave facility in its reasonable discretion, so long as (i) the End Points of each Segment are located as described in Section 1.1 above, and (ii) the "Maximum Loss Budget" for the Segment does not exceed that set forth in Section 1.1 above.

ARTICLE 2: EQUIPMENT

2.1 Equipment. "Equipment" means network components including, but not limited to, any gateway or edge electronic device, antenna, node, concentrator, bridge, receiver, transmitter, transceiver, router, switch, hub or communications lines/cables, and associated software.

2.2 Customer Equipment. Any Equipment provided by the Customer in connection with the IRU Fiber shall be referred to as the "Customer Equipment." Except as expressly provided to the contrary elsewhere in this Agreement, throughout the IRU Term (as that term is defined in Article 6 below), the Customer Equipment shall remain the property of the Customer and the Customer shall be responsible for all maintenance and repair of the Customer Equipment. Neither Wave nor any third party acting under Wave's authority will relocate, modify, tamper with, attempt to repair or otherwise interfere with the Customer Equipment.

2.3 Wave Equipment. Any Equipment provided by Wave in connection with the IRU Fiber shall be referred to as the "Wave Equipment." Except as expressly provided to the contrary elsewhere in this Agreement, throughout the IRU Term (as that term is defined in Article 6 below), the Wave Equipment shall remain the property of Wave and Wave shall be responsible for all maintenance and repair of the Wave Equipment. Neither the Customer nor any third party acting under the Customer's authority will relocate, modify, tamper with, attempt to repair or otherwise interfere with the Wave Equipment.

ARTICLE 3: INSTALLATION, TESTING AND ACCEPTANCE OF IRU FIBER

3.1 Construction. Wave anticipates that construction of Segment 1 will be completed within approximately 12 – 14 weeks of the Execution Date of this Agreement.

3.2 Connecting the IRU Fiber. Upon Wave's completion of construction of the Segment, the Customer shall provide appropriate connecting Equipment and facilities, including all cross-connect facilities, at each End Point, and Wave shall interconnect the Customer's communications system with the IRU Fiber at the applicable End Points. All interconnections of the IRU Fiber and all other work with respect to the Wave Network shall be performed by Wave and in accordance with Wave's applicable specifications and operating procedures. It is the responsibility of the Customer to obtain all governmental and other approvals and consents necessary with respect to the Customer's placement of the Customer Equipment at the End Points.

3.3 Joint Testing. When Wave has completed the installation and configuration of a Segment, the Parties shall jointly test (the "Joint Testing") the applicable dark fibers in the Segment to verify that they are performing consistent with the specifications set forth on Exhibit B (the "Fiber Specifications"). Wave shall provide the Customer with at least three (3) business days' advance notice of the date and time on which Wave intends to perform the Joint Testing of the Segment (the "Joint Testing Notice"). If the Customer informs Wave within said time period that the Customer desires to participate in the Joint Testing, the Parties shall agree on a mutually convenient date and time for same. If the Customer fails to timely respond to Wave's Joint Testing Notice, the Customer shall be deemed to have elected not to participate in Joint Testing of the Segment at issue and Wave may proceed with testing the Segment by itself.

3.4 Service Commencement Date. If the Customer participates in Joint Testing and the Joint Testing demonstrates that the applicable dark fibers in the Segment at issue are properly installed and operating in accordance with the Fiber Specifications, then the “**Service Commencement Date**” for that Segment shall be the first calendar day following the day on which the Joint Testing was successfully completed. If the Customer elects not to participate in Joint Testing, either by affirmatively foregoing said opportunity or by failing to timely respond to Wave’s Joint Testing Notice, and Wave’s unilateral testing demonstrates that the applicable dark fibers in the Segment are properly installed and operating in accordance with the Fiber Specifications, then the Service Commencement Date for Segment 1 shall be the first calendar day after Wave’s successful completion of its unilateral testing. If either Joint Testing or Wave’s unilateral testing reveals problems with Segment 1, Wave shall correct same and deliver another Joint Testing Notice to the Customer once the problems have been corrected. In such event, the Parties shall repeat the process described in Section 3.3 above.

3.5 Acceptance of Segment; Revision to Service Commencement Date. The Customer shall have a period of five (5) business days after the Service Commencement Date for the Segment in which the Customer may notify Wave that the IRU Fiber is not functioning properly. If the Customer notifies Wave of problems with the Segment pursuant to this Section 3.5, Wave shall investigate same. If Wave determines there are problems with the IRU Fiber, Wave shall correct same and the Service Commencement Date for the Segment shall be revised to be the first calendar day after the date on which Wave has corrected the problems. Unless the Customer delivers notification of problems to Wave within the time period set forth above, the Customer shall be deemed to have accepted the applicable dark fibers in the Segment at issue and to have confirmed that the Segment has been installed and is functioning in accordance with the Fiber Specifications as of the Service Commencement Date.

ARTICLE 4: GRANT OF IRU

4.1 Grant of IRU. Wave hereby grants, transfers and conveys to the Customer, and the Customer receives and accepts from Wave, an exclusive, unrestricted, irrevocable and indefeasible right of use in the IRU Fiber, together with the right to access the IRU Fiber at the End Points of each Segment. The Customer’s rights in the IRU Fiber granted pursuant to this Section 4.1 shall be referred to as the “**IRU.**” The IRU is granted to the Customer subject to the terms and conditions set forth in this Agreement. The IRU shall take effect upon the IRU Effective Date (as that term is defined in Article 6 below).

4.2 Effect of IRU. To the fullest extent permitted by law, the Parties intend that the IRU shall grant, transfer and convey to the Customer all beneficial right, title and interest in the IRU Fiber and that the Customer shall have exclusive possession, use and control over and shall be for all purposes the equitable owner of the IRU Fiber during the Term; provided, however, the IRU does not convey legal title or legal ownership of the IRU Fiber. For the sake of clarity, the IRU is intended by the parties to be a beneficial property interest (as distinguished from a mere contractual interest) and the grant, transfer and conveyance of the IRU effected by this Agreement is intended by the parties to be fully completed and effective, with all conditions precedent deemed to have been satisfied in all respects immediately on the IRU Effective Date (as that term is defined in Article 6 below). For the further sake of clarity, this Agreement is not intended by the Parties to be a revocable license, a lease or executory contract, but rather to effect the sale and purchase of the IRU by Wave to the Customer for the IRU Term (as that term is defined in Article 6 below).

4.3 No Revocation. Notwithstanding the occurrence of a breach or violation by the Customer of any legal duty or obligation imposed by any contract, including this Agreement, by the law of torts (including simple or gross negligence, strict liability or willful misconduct), or by any federal, state or local laws, rules, regulations, orders, standards, judicial decrees or ordinances, during the IRU Term (as that term is defined in Article 6 below), Wave shall have no right to revoke or restrict the IRU in any manner or to any degree whatsoever, through injunctive relief or otherwise. The Parties mutually understand and agree that any breach by the Customer shall be compensable, if at all, by a remedy at law for monetary damages and not at equity. Conversely, and in recognition

that the IRU cannot be readily obtained in the open market and that the Customer will be irreparably injured if this Agreement cannot be specifically enforced, the Customer shall be entitled, in addition to bringing suit at law or equity for monetary or other damages, to obtain specific performance to order implementation of the IRU contemplated by this Agreement. In any action to enforce the provisions of this Agreement, Wave hereby irrevocably and forever waives the defense that there is an adequate remedy at law and hereby irrevocably agrees that the Customer shall have the right to obtain specific performance of the IRU contemplated by this Agreement.

4.4 Limitations. The IRU shall not include: (i) the right to own, control, maintain, modify, relocate or repair the Cables in which each Segment of the IRU Fiber is located, any Wave Equipment, or any other portion of Wave's network facilities; (ii) except for the right to access the Segments of the IRU Fiber at its respective End Points, the right to physically access the Cables or any other portion of Wave's network facilities; (iii) the right to encumber the Cables or any other portion of Wave's network facilities in any manner; or (iv) the right to use the Cables or any other portion of Wave's network facilities except as expressly set forth herein. The Customer expressly acknowledges and agrees that the Customer shall receive no rights to use any of the Wave Equipment in connection with the IRU. Wave is not supplying nor is Wave obligated to supply to the Customer any optronics or electronics or optical or electrical equipment or other facilities, all of which are solely the responsibility of the Customer, nor is Wave responsible for performing any work in connection with the IRU Fiber other than as specified in this Agreement. The Customer shall keep the Cables, the IRU Fiber, the Wave Equipment and all other portions of Wave's network facilities, free from any liens, rights or claims of any third party attributable to the Customer.

4.5 Network Configuration. Each Party shall have full and complete control and responsibility for determining its own network and service configurations or designs, regrooming, rearrangement or consolidation of channels or circuits and all related functions with regard to the use of that Party's fiber contained in each of the Cables; provided that such control and responsibility by the Customer shall not adversely affect the use by Wave or any other authorized user (each, an "**Authorized User**") of the Cables, of Wave's network facilities and/or of any Equipment used by Wave or an Authorized User in connection therewith.

ARTICLE 5: CONSIDERATION FOR IRU

5.1 IRU Fee. In consideration of receiving the IRU, Customer shall pay to Wave a non-recurring "**IRU Fee**" fee in the amount of Eighty-Four Thousand Six Hundred and No/100 Dollars (\$84,600.00). Fifty percent (50%) of the IRU Fee shall be due and payable to Wave within ten (10) days after the Execution Date of this Agreement and the other fifty percent (50%) within ten (10) days after the Acceptance Date. The Customer will be responsible for all charges associated with (i) any cross connects requested by the Customer, and (ii) any changes or additions to the IRU Fiber that are requested by the Customer and agreed to by Wave.

5.2 Scheduled Maintenance Fees. Beginning on the IRU Effective Date (as that term is defined in Article 6 below), Customer shall pay to Wave monthly "**Scheduled Maintenance Fees**" with respect to the IRU Fiber, in the amount of One Hundred and No/100 Dollars (\$100.00) per month.

5.3 CPI Adjustment of Scheduled Maintenance Fees. The term "**CPI**" shall mean the Consumer Price Index for Seattle-Tacoma-Bremerton, WA for Urban Consumers, All Items, compiled by the United States Department of Labor, Bureau of Labor Statistics, or its successor. If the CPI is no longer published, the parties shall mutually agree on a replacement indicator most nearly equivalent to the CPI. Scheduled Maintenance Fees shall be adjusted on the tenth (10th) anniversary of the IRU Effective Date and again on the twentieth (20th) anniversary of the IRU Effective Date. To obtain the new amount of Scheduled Maintenance Fees, the Scheduled Maintenance Fees for the current year shall be multiplied by a fraction, the numerator of which is the Current Index Number and the denominator of which is the Base Index Number. The "**Current Index Number**" shall be the CPI figure for the most

recent month available as of the applicable anniversary of the IRU Effective Date. The “**Base Index Number**” shall be the CPI figure for the month in which the IRU Effective Date occurred.

5.4 Unscheduled Maintenance Costs. Customer shall be responsible for paying its Proportionate Share of Unscheduled Maintenance Costs, as those terms are defined in Article 7 below.

5.5 Invoicing and Payment for Maintenance Costs. Wave shall invoice the Customer for Scheduled Maintenance Fees and Unscheduled Maintenance Costs. Customer shall pay all undisputed invoices within sixty (60) days of receipt. If the Customer in good faith disputes any portion of a Wave invoice, Customer shall pay the undisputed portion of the invoice and submit written notice to Wave regarding the disputed amount, which notice shall include documentation supporting the alleged billing error (each such notice, a “**Fee Dispute Notice**”). A Fee Dispute Notice must be submitted to Wave within ninety (90) days from the date the invoice at issue is received by the Customer. Wave shall respond to a Fee Dispute Notices within thirty (30) days of receiving same. The Parties shall negotiate in good faith to attempt to resolve any such disputes within forty five (45) days after the Customer’s delivery of the applicable Fee Dispute Notice. If, after participating in good faith negotiations to resolve a fee dispute, the Parties are unable to resolve any fee dispute within sixty (60) days after the Wave received the Fee Dispute Notice, then the fee dispute shall be resolved by the mediation and arbitration procedures set forth in Sections 18.2 and 18.3 below.

ARTICLE 6: TERM OF IRU

6.1 IRU Effective Date. The IRU shall become effective on the Service Commencement Date for Segment 1 (the “**IRU Effective Date**”).

6.2 IRU Term. Unless earlier terminated pursuant to this Agreement, the term of the IRU shall be for thirty (30) years (the “**IRU Term**”), commencing on the IRU Effective Date, and expiring on the date that is one day prior to the thirtieth (30th) anniversary of the IRU Effective Date (the “**IRU Expiration Date**”).

6.3 Effect of Expiration. Upon the expiration of the IRU Term, all rights to the use of the IRU Fiber shall revert to Wave without reimbursement of any of the IRU Fee or other amounts previously paid, or required to be paid, by Customer hereunder, and Customer shall have no further right hereunder to use the IRU Fiber.

ARTICLE 7: AVAILABILITY, MAINTENANCE AND REPAIR

7.1 Availability. During the Term, Wave shall use commercially reasonable efforts in keeping with normal industry standards to ensure that the IRU Fiber is available to the Customer twenty-four (24) hours per day, seven (7) days per week consistent with the service level agreement (the “**SLA**”) contained in Exhibit C to this Agreement. It is possible, however, that there will be interruptions in the availability of the IRU Fiber. The Customer understands and agrees that the IRU Fiber, or certain portions or components of the IRU Fiber, may be unavailable from time to time either for scheduled or unscheduled maintenance, due to fiber cuts or other reasons beyond Wave’s reasonable control. Temporary interruptions in the availability of the IRU Fiber for such reasons, as well as interruptions or outages caused by the Customer, its agents and employees, or by Force Majeure Events, will not constitute failures by Wave to perform its obligations under this Agreement. Instead, the Customer’s sole remedy for any such failures in the IRU Fiber shall be as set forth in the SLA.

7.2 Regular Maintenance. At all times during the IRU Term, Wave shall be responsible for performing regular maintenance and repair activities with respect to the IRU Fiber as described in Exhibit C to this Agreement. Customer agrees to pay Wave for maintenance in accordance with Section 5.2 above. Notwithstanding anything to the contrary contained elsewhere in this Agreement, Wave’s obligation to provide maintenance services in accordance with this Article 7 is contingent upon Customer’s timely payment of (i) the Scheduled Maintenance Fee,

and (ii) Customer's Proportionate Share of any **Unscheduled Maintenance Costs**. Should, at any time during the IRU Term, Customer be in Default (as that term is defined in Article 16 below) for failure to pay Scheduled Maintenance Fees and/or Customer's Proportionate Share of **Unscheduled Maintenance Costs**, Wave's obligation to perform maintenance under this Agreement shall cease until such time as the Default is remedied and Customer's account is current.

7.3 **Unscheduled Maintenance.** At all times during the IRU Term, Wave shall be responsible for performing any necessary unscheduled maintenance with respect to the IRU Fibers as described in Exhibit C. Except for the costs of unscheduled maintenance necessitated due to the negligence or intentional misconduct of Customer, for which Customer shall be solely responsible, the costs of performing **Unscheduled Maintenance** (the "**Unscheduled Maintenance Costs**") will be allocated among Wave, Customer and other authorized users of the affected portion of the Cable at issue. For purposes of this Agreement, Customer's "**Proportionate Share**" of any costs related to a Cable shall be determined by the ratio to which the number of fiber optic strands comprising the IRU Fiber in that Cable bears to the total number of fiber optic strands in said Cable that are currently in use (whether by Wave, Customer or other Authorized Users). If this fraction varies over portions of the Cable, then the Proportionate Share shall be equal to the weighted average (weighted by length as set forth in Wave' as-built drawings) of such relevant portions. For example, if the fraction for 100 feet of the affected segment is 0.1 and the fraction for the remaining 50 feet of the affected segment is 0.07, the weighted average for the entire Cable would be 0.09. Wave shall invoice Customer for Customer's Proportionate Share of any **Unscheduled Maintenance Costs**, and Customer shall pay same within thirty (30) days of the invoice date.

7.4 **Customer's Maintenance.** Except to the extent otherwise expressly provided in the Agreement, Customer will be solely responsible for providing and paying for any and all maintenance of all electronic, optronic and other equipment, materials and facilities used by Customer in connection with the operation of the IRU Fiber, none of which is included in the maintenance services to be provided by Wave hereunder.

ARTICLE 8: TAXES, FEES AND OTHER IMPOSITIONS

8.1 **Definition of Impositions.** As used in this Agreement, the term "**Impositions**" shall mean all taxes, fees, assessment levies, imposts, duties, charges or withholdings of any nature (including, without limitation, ad valorem, real property, gross receipts, franchise, license and permit fees), together with any penalties, fines or interest thereon arising out of the transactions contemplated by this Agreement and/or imposed upon the Cable, or any part thereof, by any federal, state or local government or other public taxing authority, including "Access Fees." The term "**Access Fees**" shall mean all fees charged or assessed by any governmental authority in respect of those portions of the Cable located on or crossing or passing through lands owned or administered by such governmental authority including, without limitation, such as are calculated or otherwise based on the number of crossings, the aggregate distance of crossings, land value or the revenue, projected revenue, receipts, income, profits or other amounts calculated in a similar manner.

8.2 **Minimization and Equitable Distribution of Impositions.** The Parties acknowledge and agree that it is their mutual objective and intent to (i) minimize the aggregate Impositions payable with respect to the Cables, and (ii) share such Impositions according to their respective interests in the Cables. The Parties agree to cooperate with one another and coordinate their efforts to achieve such objectives in accordance with the provisions of this Article 8.

8.3 **Payment of Impositions Prior to IRU Effective Date.** Prior to the IRU Effective Date, Wave shall be responsible for and shall timely pay any and all Impositions with respect to the operation or physical location of the Cables.

8.4 Payment of Impositions During the IRU Term. Beginning on the IRU Effective Date and continuing through the IRU Expiration Date, Customer shall be responsible for and shall pay: (i) all Impositions imposed on, based on, or otherwise measured by the gross receipts, gross income, net receipts or net income received by or accrued to Customer with respect to its use of the IRU Fiber; and (ii) all Impositions which have been separately assessed, allocated to, or imposed on the IRU Fiber. If the IRU Fiber constitutes the only fibers located in a Cable from the point where the Cable leaves the Wave Network right-of-way to a Customer POP, Customer shall be solely responsible for any and all Impositions imposed on or with respect to such portion of the Cable. To the extent such Impositions are not separately assessed, allocated to or imposed on the IRU Fiber, Wave will pay, or request proportionate payment by Wave and Customer of, all such Impositions. Wave shall notify Customer of such Imposition, and Customer shall promptly reimburse Wave for (or pay directly) Customer's share of all such Impositions, which shall be determined as follows:

- (a) to the extent that such Impositions are calculated based on the revenue, projected revenue, receipts, income or profits of Customer or its Affiliates, Customer will be responsible for the portion of the amount of such Impositions as is calculated based on the revenue, projected revenue, receipts, income or profits of Customer or its Affiliates;
- (b) to the extent that such Impositions are calculated based on the revenue, projected revenue, receipts, income or profits of Wave or its Affiliates, Wave will be responsible for the portion of the amount of such Impositions as is calculated based on the revenue, projected revenue, receipts, income or profits of Wave or its Affiliates; and
- (c) otherwise, Customer will be responsible for its Proportionate Share of the Impositions and Wave, and any other Authorized Users of the Cable, will be responsible for their respective Proportionate Shares of the Impositions.

8.5 Right to Contest. Wave shall have the right to contest in good faith any Imposition (including by nonpayment of such Imposition) and Customer shall have the sole and exclusive right to contest any Imposition applicable only to Customer or the Customer Equipment. The out-of-pocket costs and expenses (including reasonable attorneys' fees) incurred by Wave in any such contest shall be shared by Wave and Customer in the same proportion as to which the parties would have shared in such Impositions as they were assessed. Any refunds or credits resulting from a contest brought pursuant to this Section 8.5 shall be divided between Wave and Customer in the same proportion as originally assessed.

8.6 Preparation of Returns and Reports. Wave and Customer agree to cooperate fully with one another in the preparation of any returns or reports relating to the Impositions.

ARTICLE 9: PERMITS; UNDERLYING RIGHTS; RELOCATION

9.1 Underlying Rights. Subject to the terms and provisions of this Agreement, Wave shall use commercially reasonable efforts to obtain and maintain during the IRU Term, all rights-of-way use and other use or access permits or agreements which are necessary for the installation, location, maintenance and use of the Cables in accordance with this Agreement (the "**Underlying Rights**"). The IRU is subject to the terms of the Underlying Rights, and subject to the terms under which the applicable rights-of-way are owned or held by the grantor of the Underlying Rights.

9.2 Relocation. After the IRU Effective Date, Wave may relocate all or any portion of any one or more of the Cables, including any one or more of the Segments of the IRU Fiber and/or any of the facilities used or required in providing any of the Segments of the IRU Fiber to the Customer, under any of the following circumstances: (i) Wave is required to relocate by a third party with legal authority to so require (including, without limitation, the grantor

of an Underlying Right); (ii) in Wave's good faith business judgment, it is commercially reasonable for Wave to relocate; or (iii) the Customer agrees to the relocation. Should any of the foregoing occur, Wave shall proceed with such relocation, including without limitation, the right, in good faith, to reasonably determine the extent of, the timing of, and methods to be used for such relocation; provided that any such relocation shall incorporate fibers meeting or exceeding the specifications of the IRU Fiber. In the event of any such relocation, Wave shall use commercially reasonable efforts to minimize any service interruptions to the Customer. In the event of a relocation pursuant to either Sections 9.2(i) or (iii) above, Customer shall be responsible for its Proportionate Share of the costs of the relocation, which will be invoiced to Customer by Wave. Any relocation pursuant to Section 9.2(ii) shall be at Wave's sole cost and expense.

ARTICLE 10: OPERATION AND USE OF THE IRU FIBER

10.1 Compliance with Underlying Rights Requirements. The requirements, restrictions, and/or limitations on the Customer's right to use the IRU Fiber contained in this Agreement, all applicable government codes, ordinances, laws, rules and regulations, and safety, operational and other rules and regulations imposed in connection with the Underlying Rights are referred to collectively as the "**Underlying Rights Requirements.**" The Customer represents, warrants and covenants to Wave that it will use the IRU Fiber in compliance with and subject to the Underlying Rights Requirements.

10.2 Permits and Approvals. Customer shall secure, prior to the IRU Effective Date, any franchises, licenses or similar approvals from governmental authorities (other than the Underlying Rights to be obtained by Wave) which are necessary for the Customer's use and operation of the IRU Fiber.

10.3 Use Limitations. The IRU and the IRU Fiber are for the sole benefit of Customer or other government agency that works directly with the Customer (including but not limited to Snohomish County, SNOPAC, SERS, City of Arlington, and the Marysville Fire District). Customer shall not grant to any third party the right to use the IRU Fiber, regardless of whether such grant were to take the form of a license, sublicense, lease, sublease, indefeasible right of use, or any other form. Nor shall Customer use the IRU Fiber for commercial purposes that are competitive with Wave's business (e.g., use the IRU Fiber to provide Internet access service, data transport service, VoIP services, etc. to third parties within Wave's service area). Customer may use the IRU Fiber for any other lawful purpose. Customer agrees and acknowledges that it has no right to use any of the fibers that are part of the Cables or any other portion of the Wave Network facilities other than the IRU Fiber.

10.4 Cooperation. Each of the Customer and Wave agree to promptly notify the other Party of any matters pertaining to, or the occurrence (or impending occurrence) of, any event which would be reasonably likely to give rise to any damage or impending damage to or loss of any one or more of the Cables, or traffic thereon, that becomes known to such Party. The Customer and Wave each agrees to cooperate with and support the other in complying with any requirements applicable to their respective rights and obligations under this Agreement.

10.5 Non-Interference. The Customer shall not use its telecommunications systems in a way that physically interferes in any way with or otherwise adversely affects the use of the other fibers in the Cables by Wave or any other Authorized User of the Cables and/or other portions of Wave's network. The Customer acknowledges that the Cables and the locations at which the Cables are installed include other participants, including Wave, other Authorized Users, and other owners and users of telecommunication systems.

ARTICLE 11: THIRD – PARTY INDEMNIFICATION

11.1 Third-Party Indemnification by Wave. Wave hereby agrees to indemnify, defend and hold harmless Customer, its employees, officers and directors (the "**Customer Indemnified Persons**"), from and against any and all third-party suits, actions, damages or claims of any character suffered by the Customer Indemnified Persons due

to or arising out of: (i) any injuries or damage to persons or property to the extent the same are caused by the negligent acts or omissions of Wave in the performance of its obligations under this Agreement; or (ii) any Default by Wave under this Agreement.

11.2 Third-Party Indemnification by the Customer. Customer hereby agrees to indemnify, defend and hold harmless Wave, its Affiliates, and their employees, agents, officers and directors (the “**Wave Indemnified Persons**”), from and against any and all third-party suits, actions, damages or claims of any character suffered by the Wave Indemnified Persons due to or arising out of: (i) any injuries or damage to persons or property to the extent the same are caused by the negligent acts or omissions of the Customer in the performance of its obligations under this Agreement; (ii) Customer’s use of the IRU Fiber; or (iii) any Default by Customer under this Agreement.

11.3 Procedure. Wave and the Customer each agree to promptly provide the other with notice of any claim which may result in an indemnification obligation hereunder. The indemnifying party may defend such claim with counsel of its own choosing provided that no settlement or compromise of any such claim shall occur without the consent of the indemnified party, which consent shall not be unreasonably withheld, conditioned or delayed.

11.4 Survival. The indemnification obligations contained in this Article shall survive the expiration or termination of this Agreement for a period of two (2) years.

ARTICLE 12: LIMITATION OF LIABILITY

12.1 No Special Damages. EXCEPT FOR THE OBLIGATIONS OF THE PARTIES CONTAINED IN ARTICLE 11 (INDEMNIFICATION) AND ARTICLE 15 (CONFIDENTIALITY), NEITHER PARTY SHALL BE LIABLE TO THE OTHER PARTY FOR ANY SPECIAL, INCIDENTAL, INDIRECT, PUNITIVE OR CONSEQUENTIAL COSTS, LIABILITIES OR DAMAGES, INCLUDING LOST PROFITS OR REVENUES, WHETHER FORESEEABLE OR NOT, ARISING OUT OF, OR IN CONNECTION WITH, SUCH PARTY’S PERFORMANCE OR NONPERFORMANCE OF ITS OBLIGATIONS UNDER THIS AGREEMENT, INCLUDING, CLAIMS OF LESSEES OR CUSTOMERS, CLAIMS FOR WHICH DAMAGES ARE HEREBY SPECIFICALLY WAIVED; AND PROVIDED FURTHER THAT THIS LIMITATION SHALL NOT RESTRICT EITHER PARTY’S RIGHT TO PROCEED FOR INJUNCTIVE RELIEF. NOTHING CONTAINED HEREIN SHALL OPERATE AS A LIMITATION ON THE RIGHT OF EITHER PARTY TO BRING AN ACTION FOR DAMAGES AGAINST ANY THIRD PARTY, INCLUDING CLAIMS FOR INDIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES, BASED ON ANY ACTS OR OMISSIONS OF SUCH THIRD PARTY.

12.2 Disclaimer of Warranties. EXCEPT FOR AND EXCLUDING COVENANTS, REPRESENTATIONS OR WARRANTIES EXPRESSLY SET FORTH IN THIS AGREEMENT AND/OR ANY EXHIBIT(S) ATTACHED HERETO, WAVE MAKES NO WARRANTIES, EXPRESS OR IMPLIED, WITH RESPECT TO THE IRU FIBERS, THE WAVE EQUIPMENT OR ANY OTHER PORTION OF THE WAVE NETWORK, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR PARTICULAR PURPOSE, AND ALL SUCH WARRANTIES ARE HEREBY EXPRESSLY DISCLAIMED.

ARTICLE 13: INSURANCE

13.1 Required Insurance. Beginning on the IRU Effective Date, and continuing through the expiration of the IRU Term, each Party shall procure and maintain in force, at its own expense, insurance coverage in amounts that a reasonably prudent business person would maintain considering the obligations of the Parties hereunder, but in no event less than coverage of the following types and limits:

- (a) Workers’ compensation as required by applicable law(s);
- (b) Employer’s liability with minimum limits of \$1,000,000 each accident;

- (c) Commercial General Liability including coverage for (i) premises/operations, (ii) independent contractors, (iii) products/completed operations, (iv) personal injury, (v) contractual liability, and (vi) explosion, collapse and underground hazards, with combined single limit of not less than \$1,000,000 each occurrence or its equivalent;
- (d) Automobile liability with minimum limits of \$1,000,000 each accident; and
- (e) Excess or Umbrella Liability, applicable to items (b), (c) and (d), with minimum limits of \$5,000,000, per occurrence.

13.2 Insurance Providers. Each Party shall maintain the required insurance coverage with insurers licensed to conduct business in the applicable jurisdiction(s) and having an AM Best Rating of A – /VII, or equivalent from another recognized rating agency, and each Party shall, upon request, provide the other Party with an insurance certificate confirming compliance with the requirements of this Article.

13.3 Failure to Carry. In the event either Party fails to maintain the required insurance coverage and, a claim is made or suffered, such Party shall defend, indemnify and hold harmless the other Party from any and all claims for which the required insurance would have provided coverage.

ARTICLE 14: NOTICES

Notices under this Agreement shall be in writing and delivered by overnight courier (e.g., Federal Express, UPS) or certified mail, return receipt requested, to the persons whose names and business addresses appear below and such notice shall be effective on the date of receipt or refusal by the receiving Party:

If to Wave:
 Wave Business Solutions, LLC
 401 Parkplace Center, Suite 500
 Kirkland, WA 98033
 ATTN: Patrick Knorr
 Email: pknorr@wavebroadband.com

If to Customer:
 City of Marysville

 ATTN:
 Email:

With a Copy to:
 WaveDivision Holdings, LLC
 401 Parkplace Center, Suite 500
 Kirkland, WA 98033
 ATTN: James A. Penney
 Email: jpenney@wavebroadband.com

With a Copy to:

 ATTN:
 Email:

A Party may change its address and point of contact by notifying the other Party in writing in accordance with this Article.

ARTICLE 15: CONFIDENTIALITY

The Parties understand and acknowledge that Customer is a governmental entity, and that Washington law limits the ability of Customer to shield from public disclosure any information given to Customer. Accordingly, the Parties agree to work together to avoid disclosures to Customer by Provider of confidential information which would result in economic loss or damage to Provider if such information were to be disclosed to third persons by

Customer pursuant to a request submitted under the Public Records Act, chapter 42.56 RCW, or other similar public disclosure law. In the event that Customer receives a request pursuant to the Public Records Act (or other similar law) to disclose information identified by Wave in writing as confidential, Customer's sole obligations to Provider shall be: (i) to promptly notify Wave; and (ii) to refrain from disclosing such records for a period of up to ten (10) business days to allow Wave an opportunity to seek legal protection against disclosure from a court of competent jurisdiction. Customer will not be required to withhold requested records beyond the ten (10) business days unless it may do so based on good faith reliance upon an exception to disclosure under the Public Records Act, or unless Customer is ordered to withhold disclosure by the order of a court having competent jurisdiction. Customer may, but shall not be required, to join in any legal proceedings relating to the requested disclosure unless required to do so by the court. In the event that Wave initiates legal proceedings, or Customer initiates legal proceedings or withholds requested records at Wave's request, Wave shall indemnify and hold Customer harmless from and against all costs, attorneys' fees, expenses, liabilities, damages or other liabilities Customer may incur due to the legal proceedings initiated at and/or Customer's withholding of records at Wave's request. Customer shall not be liable to Wave for any loss, cost or expense relating to the disclosure of requested records if Wave fails to obtain legal protection against disclosure and Customer releases the records in good faith.

ARTICLE 16: DEFAULT

16.1 Definition. A "Default" shall be deemed to have occurred under this Agreement under the following circumstances:

- (a) in the case of a failure to pay any amount when due under this Agreement, a Party fails to pay such amount within fifteen (15) days after written notice from the other Party specifying such breach; or
- (b) in the case of any other material breach of this Agreement, a Party fails to cure such breach within thirty (30) days after written notice from the other Party specifying such breach, provided that if the breach is of a nature that cannot reasonably be cured within said thirty (30) day time period, a Default shall not have occurred so long as the breaching Party has commenced cure within said thirty (30) day time period and thereafter diligently pursues cure to completion.

16.2 Remedies. In the event of any Default hereunder, the non-Defaulting Party may do any one or more of the following: (i) take such actions as it deems reasonably necessary to correct the Default; (ii) pursue any other remedies available to it under this Agreement; and/or (iii) initiate the dispute resolution process contained in Article 18. The Parties intend for a Party's good faith participation in the dispute resolution process described in Article 18 to constitute a necessary pre-requisite to the commencement by such Party of any legal action regarding this Agreement.

16.3 No Waiver. A waiver by either Party at any time of any of its rights regarding a particular breach or Default of the other Party under this Agreement shall not be deemed a permanent waiver of such rights, nor shall any such waiver be deemed a waiver of any subsequent breach or Default.

ARTICLE 17: FORCE MAJEURE

Neither Party will have any claim or right against the other for any failure of or delay in performance by the other Party if the failure or delay is caused by or the result of any act of God, fire, flood, hurricane or other natural catastrophe, terrorist actions, vandalism, cable cut or other similar catastrophe, any law, order, regulation, direction or action of any governmental, civil or military authority, national emergency, insurrection, riot or war; inability to obtain equipment, material or other supplies, strike, lockout or other similar occurrence beyond the control and without the fault or negligence of the affected party (each, a "Force Majeure Event"). Notwithstanding the

foregoing, if the force majeure delay exceeds thirty (30) days, either Party may terminate this Agreement on written notice without incurring any liability hereunder.

ARTICLE 18: DISPUTE RESOLUTION

18.1 General Provisions. Except for actions seeking a temporary restraining order or injunction, or suits to compel compliance with this dispute resolution process, the Parties agree to use the dispute resolution procedures set forth in this Article 18 with respect to any controversy or claim (each, a “Dispute”) arising out of or relating to this Agreement. All discussions occurring and documents exchanged pursuant to Sections 18.2 and 18.3 below are confidential and inadmissible for any purpose in any legal proceeding involving the Parties; provided that evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its use in the negotiation or mediation process.

18.2 Negotiations. Should any Dispute arise, either Party may give the other Party written notice of the Dispute (each, a “Dispute Notice”). The Parties shall use good faith efforts to resolve the Dispute through negotiation within thirty (30) days of the date on which the Dispute Notice is delivered. With respect to fee disputes arising under Section 5.5, compliance with the negotiation procedures described in Section 5.5 shall be in lieu of the provisions of this Section 18.2. If the Parties do not resolve the Dispute within such thirty (30) day period, either of the Parties may submit the matter to non-binding mediation through a professional mediation service.

18.3 Mediation. If a Dispute is submitted to mediation, the Parties will cooperate in selecting a qualified mediator from a panel of neutral mediators having experience in the telecommunications and broadband internet industry. The Parties shall share equally in the costs of mediation. Any Dispute that cannot be resolved through mediation within sixty (60) days of submitting the Dispute to mediation shall be resolved by binding arbitration as provided in Section 18.4 below.

18.4 Binding Arbitration. Any arbitration hearing shall be before a single neutral arbitrator and shall be held in the Seattle, Washington offices of Judicial Arbitration & Mediation Services, Inc., or a similar professional dispute resolution organization. The arbitration shall be administered pursuant to the rules and procedures of the American Arbitration Association. The parties shall equally share the fees of the arbitrator. The Federal Arbitration Act, 9 U.S.C. §§ 1-15, not state law, shall govern the arbitrability of all disputes.

18.4 Governing Law. This Agreement and all matters arising out of this Agreement shall be governed by the laws of the State of Washington. Any judicial action arising in connection with this Agreement shall be in the Superior Court of the State of Washington in and for King County, or in the Federal District Court for the Western District of Washington, as applicable. Customer waives all defenses of lack of personal jurisdiction and forum non conveniens. ***Each Party waives, to the fullest extent permitted by law, trial by jury of any disputes, claims or issues arising under the Agreement.***

ARTICLE 19: ASSIGNMENT

Neither Party shall assign its rights under this Agreement without the prior written consent of the other Party, which will not be unreasonably withheld, delayed or conditioned; provided, however, that either Party may, without obtaining the consent of the other Party, assign its interest in and to this Agreement to: (i) any entity acquiring such Party, whether through merger or through purchase of substantially all the assets of said Party; or (ii) an Affiliate of such Party.

ARTICLE 20: MISCELLANEOUS

20.1 Warranty of Authority. Each of the signatories hereto warrants and represents that he or she has been duly authorized to execute this Agreement on behalf of the Party for whom he or she purports to sign this Agreement, and that this Agreement is binding on such Party in accordance with its terms.

20.2 Entire Agreement. This Agreement constitutes the entire agreement between the Parties regarding the subject matter hereof, and supersedes any and all prior oral or written agreements between the Parties regarding the subject matter contained herein. This Agreement may not be modified or amended in any manner except by a written document signed by the Party against whom such modification is sought to be enforced.

20.3 Interpretation. This Agreement shall be governed and interpreted in accordance with the laws of the State of Washington. This Agreement and each of the terms and provisions of it are deemed to have been explicitly negotiated by the Parties, and the language in all parts of this Agreement shall, in all cases, be construed according to its fair meaning and not strictly for or against either of the Parties hereto. The captions and headings in this Agreement are used only for convenience and are not intended to affect the interpretation of the provisions of this Agreement. This Agreement shall be construed so that wherever applicable the use of the singular number shall include the plural number, and vice versa, and the use of any gender shall be applicable to all genders.

20.4 Survival. Those provisions of this Agreement that by their nature and import must survive the expiration or earlier termination of this Agreement in order to be given their full force and effect shall so survive.

20.5 Severability. If any provision of this Agreement or the application thereof to any person or circumstance shall, for any reason and to any extent, be found invalid or unenforceable, the remainder of this Agreement and the application of that provision to other persons or circumstances shall not be affected thereby, but shall instead continue in full force and effect, to the extent permitted by law.

20.6 Attorneys' Fees. If any proceeding is brought by a Party to enforce or interpret any term or provision of the Agreement, the substantially prevailing Party in such proceeding will be entitled to recover, in addition to all other relief as set forth in the Agreement, that Party's reasonable attorneys' and experts' fees and expenses.

20.7 No Joint Venture. The relationship between Customer and Wave shall not be that of partners, agents, or joint venturers 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.

20.8 No Third Party Beneficiaries. This Agreement is made and entered into for the sole benefit of Customer and Wave. No third party shall be deemed to have any rights under this Agreement; there are no third party beneficiaries to this Agreement.

20.9 Standard of Performance. All actions, activities, consents, approvals and other undertakings of the Parties in this Agreement shall be performed in a reasonable and timely manner, it being expressly acknowledged and understood that time is of the essence in the performance of obligations required to be performed by a date expressly specified herein. Except as specifically set forth herein, for the purpose of this Agreement the standards and practices of performance within the telecommunications industry in the relevant market shall be the measure of a Party's performance.

20.10 Compliance with Law. Each Party shall exercise its rights and perform its obligations under this Agreement in full compliance with all applicable laws, rules and regulations of any governmental authority having proper jurisdiction.

20.11 Exhibits. The following Schedules are attached to this Agreement and incorporated herein by this reference:

- EXHIBIT A - Map Depicting Segment 1
- EXHIBIT B - Fiber Specifications
- EXHIBIT C - Service Level Agreement for Maintenance, Repair and Availability

20.12 Execution in Counterparts. This Agreement may be executed in one or more counterparts, all of which taken together shall constitute one and the same instrument. Any executed documents sent to the other Party in portable document format (pdf) images via email will be considered the same as an original document.

[Signatures on following page.]

IN WITNESS WHEREOF, Wave and Customer, intending to be legally bound hereby, have duly executed this Agreement as of the date first above written.

WAVE:

Wave Business Solutions, LLC, a Washington limited liability company


By _____

Name: _____

Title: _____

CUSTOMER:

City of Marysville, a Washington municipal corporation

By 

Name: PAUL KOSS

Title: SUP BUSINESS SOLUTIONS

[The remainder of this page is intentionally left blank.]

EXHIBIT A
to
Dark Fiber IRU Agreement

Map Depicting Segment 1

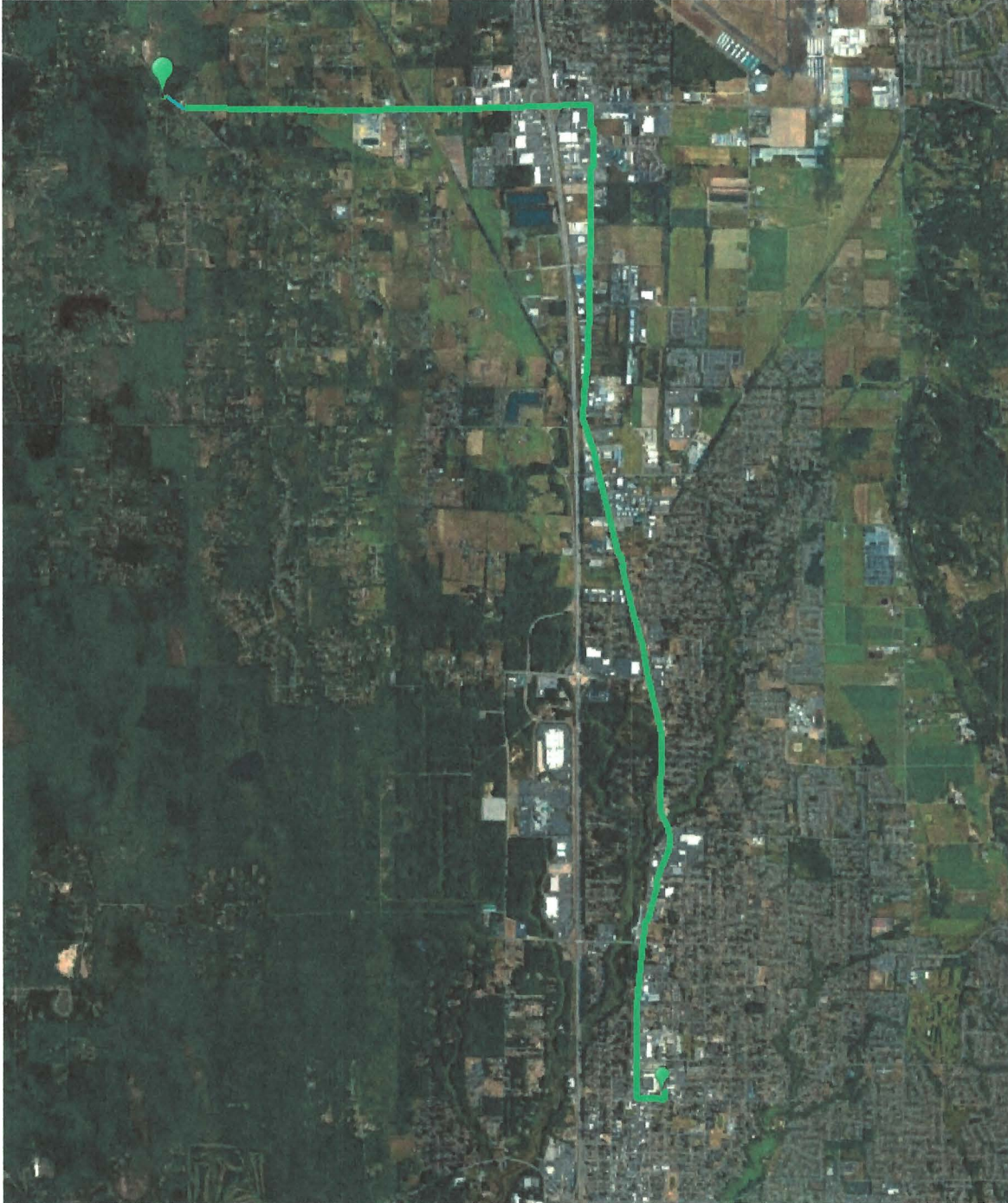


EXHIBIT B
to
Dark Fiber IRU Agreement

Fiber Specifications

OTDR traces will be taken in both directions at 1310 nm and 1550 nm for all circuits less than 50 Km. For circuits over 50 Km we take OTDR traces at 1550 nm. All circuits will be shot with a launch cable with a minimum length of .5 Km or the length agreed to in the customer's MSA. These traces will be reviewed before the circuit is handed off. For a circuit to be handed off it must comply with the specifications for splice, reflectance and span attenuation.

Splice Loss Specifications

Pig Tail - < .5 per connector or 1.0 per jumper

For values greater than this, the splice will be broken and re-spliced until an acceptable loss value is achieved. If, after three attempts is not able to produce a loss value less than 0.50 dB, the splice will be marked as Out-of-Spec ("OOS") on the OTDR report.

Splice Point - Bi-directional average loss of 0.15 dB or less.

The objective for each splice is a loss of 0.15 dB or less. If, after three attempts, we are not able to produce a loss value of less than 0.15 dB, then 0.25 dB will be acceptable. If, after two additional attempts, a value of less than 0.25 dB is not achievable, then the splice will be marked as OOS

Splice Point - Uni-directional OTDR testing, the objective for each splice is a loss of 0.15 dB or less. If, after three attempts, we are not able to produce a loss value of less than 0.15 dB, then 0.25 dB will be acceptable.

Connector Reflectance

Reflectance at jumper – Will be less than -40dB, we will work to achieve less than -40dB by cleaning & polishing fiber tips and/or fiber jumpers or provide alternative fiber strands that achieve results less than -40dB. If we are unable to do so after 3 attempts, the port will be marked as OOS.

Total loss for a circuit

Attenuation due to distance

At 1310nm: $(0.40 \text{ dB/km} \times \text{km of cable})$

At 1550nm: $(0.30 \text{ dB/km} \times \text{km of cable})$

Average Splice Loss per circuit

The standard for each fiber within a span shall be an average bi-directional loss of 0.10 dB or less for each splice. For example, if a given span has 10 splices, each flow shall have total bi-directional loss (due to the 10 splices) of 1.0 dB or less. Each individual splice may have a bi-directional loss of 0.15 dB or less, but the average bi-directional splice loss across the span must be 0.10 dB or less.

Acceptable Total loss per circuit will be calculated with the following formula:

At 1310nm: $(0.40 \text{ dB/km} \times \text{km of cable}) + (\text{number of connectors} \times 0.5 \text{ dB}) + (0.10 \text{ dB} \times \text{number of splices})$.

At 1550nm: $(0.30 \text{ dB/km} \times \text{km of cable}) + (\text{number of connectors} \times 0.5 \text{ dB}) + (0.10 \text{ dB} \times \text{number of splices})$.

Mass Fusion Splicing

Ribbon Fiber Bi-directional Splice Loss Standards

Fiber Type	Splicing Method	Splice Loss (dB)
Standard Single Mode	Mass fusion splicing	0.20 dB
Non-zero Dispersion-shifted	Mass fusion splicing	0.25 dB

In the event that the splice loss values listed cannot be achieved by at least 66% (8 out of the 12) of the fibers in the ribbon, the ribbon containing the OOS fiber(s) will be broken and re-spliced. The re-splice procedure and acceptable values are listed in the table below. Ribbons containing any splices above a 1.0 dB loss will be broken and re-spliced.

Mass Fusion Re-splice Acceptance

Ribbon Fiber	Standard Single Mode	Non-zero Dispersion Shifted
Acceptance Criteria	0.20 dB	0.25 dB
After 3 attempts	0.30 dB	0.35 dB
After 2 additional attempts	0.40 dB	0.50 dB

Note:

Five (5) attempts are to be performed and all non-successful splices will be recorded and marked as OSS.

[The remainder of this page is intentionally left blank.]

EXHIBIT C
to
Dark Fiber IRU Agreement

Service Level Agreement for Maintenance, Repair and Availability

1. DEFINITIONS

For purposes of this Exhibit C the following terms shall have the meanings set forth below.

“Availability” means the IRU Fibers are available to and accessible by Customer at the End Points, are capable of transmitting signals and can otherwise be used by Customer. Availability does not involve the quality of data transmission. Periods of Excused Outage are not included in the Availability metric. Wave does not monitor the use or availability of dark fiber services, thus any Outage must be reported to the Wave NOC by Customer.

“Credit” means a credit towards the amount of the monthly Scheduled Maintenance Fee that would otherwise be due and payable by Customer to Wave under this Agreement.

“Excused Outage” means any disruption to or unavailability of the IRU Fiber caused by or due to (i) Scheduled Maintenance, or (ii) circumstances beyond Wave’s reasonable control, such as, by way of example only, Force Majeure, acts or omissions of Customer or Customer’s agents, licensees or end users, electrical outages not caused by Wave, or any failure, unavailability, interruption or delay of third-party telecommunications network components the use of which are reasonably necessary for Wave’s delivery of the IRU Fiber to Customer.

“Force Majeure” means causes beyond Wave reasonable control including, but not limited to, acts of God, fire, explosion, vandalism, cable cut, flood, storm, or other similar natural disaster, terrorist acts, insurrection, riot, national emergency, war or other catastrophe, inability to obtain equipment, material or other supplies due to strike, lockout or work stoppage, or any law, order, regulation, direction, action or request of any civil or military governmental authority.

“Mean Time to Restore” or “MTTR” means the average time required to restore the IRU Fiber to a normally operating state in the event of an Outage. MTTR is calculated on a path/route basis, as a monthly average of the time it takes Wave to repair all service Outages on the specific path/route. MTTR is measured from the time Customer opens an Outage related Trouble Ticket is with the Wave NOC until the time the IRU Fiber is again Available. The cumulative length of service Outages per circuit is divided by the number of Trouble Tickets in the billing month to derive the monthly MTTR per circuit:

$$\text{MTTR in Hrs (per calendar month)} = \frac{\text{Cumulative Length of Service Outages Per Month Per Circuit}}{\text{Total Number of Trouble Tickets for Service Outages Per Month Per Circuit}}$$

Periods of Excused Outage are not included in MTTR metrics.

“Outage” means a disruption in the IRU Fiber making the IRU Fiber completely unavailable to Customer that is not an Excused Outage. For purposes of SLA-related Credits, the period of unavailability begins when an Outage-related Trouble Ticket is opened by the Customer and ends when the connection is restored, as measured by Wave. Unavailability does not include periods of service degradation, such as slow data transmission.

“Scheduled Maintenance” means any maintenance of the portion of the Wave Network to which Customer’s router is connected that is performed during a standard maintenance window (12:00AM – 6:00AM Pacific Time). Customer

will be notified via email at least ten (10) business days in advance of any scheduled maintenance that is likely to affect the IRU Fibers.

“Trouble Ticket” means a trouble ticket generated through the Wave NOC upon notification of a service-related problem. In order for Customer to be eligible for Credits under this SLA, Customer must contact the Wave NOC and open a Trouble Ticket regarding the problem.

“WAVE Network” means all equipment, facilities and infrastructure that Wave uses to provide services to Customer, and includes Customer’s access port. The “Wave Network” does not include Customer owned or leased equipment (unless leased from Wave), or any portion of Customer’s local area network after the demarcation point for the Services provided by Wave.

“WAVE’s Network Operations Center” or “WAVE’s NOC” means WAVE’s network operations center which is staffed 24x7x365 and can be reached at: 888-317-0488.

2. ROUTINE MAINTENANCE

Routine maintenance and repair of the IRU Fibers described in this Section shall be performed by or under the direction of Wave, at Wave’s reasonable discretion or at Customer’s reasonable request. Routine maintenance shall commence upon the IRU Effective Date. All common systems within facilities along the Cable for the IRU Fiber shall be maintained in accordance with manufacturer’s specifications, to include battery plants, generators, and HVAC units. Wave shall perform appropriate and routine testing on the Cable in which the IRU Fiber is located in accordance with Wave’s then current preventative maintenance procedures as agreed to by Customer, which shall not substantially deviate from standard industry practice. By way of example only, routine maintenance may include the following types of activities:

- (a) Patrol of IRU Fiber route on a regularly scheduled basis, which will be weekly unless hyrail access is necessary, in which case, it will be quarterly;
- (b) Maintenance of a “Call-Before-You-Dig” program and all required and related cable locates;
- (c) Maintenance of sign posts along the IRU Fiber route right-of-way with the number of the local “Call-Before-You-Dig” organization;
- (d) Assignment of fiber maintenance employees to locations along the IRU Fiber route at intervals dependent upon terrain, accessibility, locate ticket volume, etc. Wave shall decide the staffing of fiber maintenance employees for the IRU Fiber;
- (e) Wave shall have qualified representatives on site any time Wave has reasonable advance knowledge that another person or entity is engaging in construction activities or otherwise excavating within five (5) feet of the IRU Fiber; and
- (f) At Customer’s request, perform and provide Customer with results of annual quality test showing the IRU Fiber meets the Fiber Specifications in Exhibit B.

Routine maintenance may include Scheduled Maintenance, for which Customer will receive advance notice as described in Section 1 of this Exhibit C.

3. EMERGENCY MAINTENANCE

“Emergency Maintenance” means Wave’s efforts to correct conditions on the Wave Network that are likely to cause a material disruption to or outage in services provided by Wave and which require immediate action. Emergency Maintenance may degrade the quality of the services provided to Customer, including possible outages. Wave may undertake Emergency Maintenance at any time Wave deems necessary and will provide Customer with notice of such Emergency Maintenance as soon as commercially practicable under the circumstances. Emergency Maintenance and repair of the IRU Fiber shall be performed by or under the direction of Wave. Wave’s obligation to perform any necessary Emergency Maintenance shall commence upon the IRU Effective Date. Emergency Maintenance may be commenced in response to any of the following: (i) an alarm identification by Wave’s NOC; (ii) notification by Customer; or (iii) notification by any third party of any failure, interruption or impairment in the operation of the Cable in which the IRU Fiber is located, or any event imminently likely to cause the failure, interruption or impairment in the operation of the IRU Fiber.

Customer shall immediately report the need for Emergency Maintenance to Wave in accordance with procedures promulgated by Wave from time to time. Wave will log the time of Customer’s report, verify the problem and dispatch personnel immediately to take corrective action. Wave shall communicate with Customer during Emergency Maintenance in order to provide regular status updates during the restoration process.

4. NETWORK OPERATIONS CENTER

Wave shall operate and maintain the Wave NOC, capable of receiving alarms twenty-four (24) hours a day, seven (7) days a week. Wave’s maintenance employees shall be available for dispatch twenty-four (24) hours a day, seven (7) days a week. Wave shall have its first maintenance employee at the site requiring Emergency Maintenance activity within four (4) hours after the time Wave becomes aware of an event requiring Emergency Maintenance, unless delayed by circumstances beyond the reasonable control of Wave. Wave shall maintain a toll-free telephone number to contact personnel at the NOC. Wave’s NOC personnel shall dispatch maintenance and repair personnel to handle and repair problems detected in the IRU Fiber.

5. SERVICE LEVEL AGREEMENT

This Section 5 constitutes Wave’s “Service Level Agreement” or “SLA” with respect to the IRU Fiber.

5.1 Availability SLA

Wave’s dark fiber paths are designed to provide a target Availability of at least 99.9% per calendar month. If the Availability target is not met with respect to the IRU Fibers in a given calendar month, Customer will be entitled to a Credit in the amount set forth below, which must be claimed as described in this SLA.

Duration of Unavailability	Customer Credit as % of Scheduled Maintenance Fee
Less than 45 minutes	Target Met
45 Min. up to 8 hours	5%
> 8 hours up to 16 hours	10%
> 16 hours up to 24 hours	20%
> 24 hours	35%

5.2 Mean Time to Restore (“MTTR”) SLA

In the event of Outages in the IRU Fibers, Wave’s NOC is designed to provide a MTTR of **no greater than 4 hours**. If the target MTTR is not met for the IRU Fibers in a given calendar month, then Customer shall be entitled to Credit set forth in the table below, which must be claimed as described in this SLA.

Target MTTR	Actual MTTR	Customer Credit as % of Scheduled Maintenance Fee
4 hr MTTR	≤ 4 Hrs.	Target Met
	> 4 Hrs. to 6 Hrs.	5%
	> 6 Hrs. to 8 Hrs.	10%
	> 8 Hrs.	25%

5.3 Claiming Credits

(a) Requesting SLA Credits. To be eligible for any SLA-related Credit, Customer must be in good standing with Wave and current in its financial obligations to Wave. Credits are exclusive of any applicable taxes charged to Customer or collected by Wave. To claim SLA-related Credits, Customer must do the following:

- (i) Open a Trouble Ticket with the Wave NOC within twenty-four (24) hours of the occurrence giving rise to the claimed Credit(s);
- (ii) Submit a written request for the Credit(s) to WAVE’s customer service department within fifteen (15) days after the end of the calendar month in which the incident giving rise to the Credit(s) occurred; and
- (iii) Provide the following documentation when requesting the Credit(s):
 - Customer name and contact information;
 - Trouble Ticket number(s);
 - Date and beginning/end time of the claimed Outage or failed SLA metric;
 - Circuit IDs for each pertinent circuit/path; and
 - Brief description of the characteristics of the claimed Outage or failed SLA metric.

If Customer fails to timely submit, pursuant to the procedure described in this Section 5.3(a), a request for any SLA-related Credit for which Customer might otherwise be eligible under this SLA, Customer shall be deemed to have waived its right to receive such Credit. The Credits provided by this SLA are Customer’s sole and exclusive remedies for any and all claims or complaints regarding the quality and/or availability of the IRU Fibers.

(b) Wave’s Evaluation of Claims. All claims for SLA-related Credits are subject to evaluation and verification by Wave. Upon receiving a claim for SLA-related Credit, Wave will evaluate the claim and respond to Customer within thirty (30) days. If Wave requires additional information in order to evaluate Customer’s claim, Wave will notify Customer by email specifying what additional information is required. Customer will have fifteen (15) days from the date on which it receives Wave’s request for additional information in which to provide the requested information to Wave. If Customer fails to provide the additional information within that time period, Customer will be deemed to have abandoned its claim. Wave will promptly notify Customer of Wave’s resolution of each Customer claim. If Customer’s claim for an SLA-related Credit is rejected, the notification will specify the basis for the rejection. If Customer’s claim for a Credit is approved, Wave will issue the credit to Customer’s account, to appear on the next monthly invoice. Wave’s good faith determination regarding whether or not an SLA has been violated shall be final.

(c) Limits and Exclusions. Total Credits for any given calendar month shall not exceed 100% of the monthly Scheduled Maintenance Fee for the IRU Fiber. Credits shall not be cumulative with respect to any given incident; instead, if multiple SLAs are violated during a single incident, Customer shall be entitled only to the largest applicable Credit amount. This SLA will not apply and Customer will not be entitled to any Credit under this SLA for any impairment of the IRU Fiber that is caused by or due to any of the following: (i) The acts or omissions of Customer, its agents, employees, contractors, or Customer's end users, or other persons authorized by Customer to access, use or modify the IRU Fibers or the equipment used to provide the IRU Fiber, including Customer's use of the IRU Fiber in an unauthorized or unlawful manner; (ii) The failure of or refusal by Customer to reasonably cooperate with Wave in diagnosing and troubleshooting problems with the IRU Fiber, including the unavailability of required Customer personnel due to Customer's failure to keep Wave provided with current and accurate contact information for such personnel; (iii) Scheduled alteration, maintenance or implementation; (iv) The failure or malfunction of network equipment or facilities not owned or controlled by Wave or Wave's Affiliates; (v) Force Majeure events; (vi) Wave's inability (due to no fault of Wave) to access facilities or equipment as reasonably required to troubleshoot, repair, restore or prevent degradation of the IRU Fiber; or (ix) Improper or inaccurate network specifications provided by Customer.

[The remainder of this page is intentionally left blank.]