



**Resolution 2004-033**

**A RESOLUTION APPOINTING INDEPENDENT AUDITORS FOR FISCAL YEARS  
ENDING 2004-06**

**WHEREAS**, by law, the City must publish an annual financial report which is audited by independent Certified Public Accountants; and

**WHEREAS**, a request for proposals was issued in January 2004; and

**WHEREAS**, the selection committee recommended Grove, Mueller & Swank as the City's auditors for fiscal years ending 2004-06.

**NOW, THEREFORE, THE CITY RESOLVES AS FOLLOWS:**

**Section 1.** The City Manager or their designee is authorized to contract with Grove, Mueller & Swank as the City's auditors for fiscal years ending 2004-06;

**Section 2:** This Resolution shall be effective upon its approval and adoption.

**Duly passed by the City Council this 11th day of May 2004.**

  
Mark O. Cottle, Mayor

ATTEST:

  
C.L. Wiley, City Recorder

**Indefeasible Right to Use Agreement**

**Between**

**Portland General Distribution, LLC  
d/b/a Portland General Broadband**

**And**

**City of Sherwood**

**Dated As Of**

**May 1, 2004**

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## **EXHIBITS**

- Exhibit A**      **Fiber Optic Cable Description**
- Exhibit B**      **Splicing, Testing and Acceptance Standards**
- Exhibit C**      **Operations and Maintenance Specifications – Fiber**
- Exhibit D**      **Form of Bill of Sale**



## IRU AGREEMENT

THIS INDEFEASIBLE RIGHT to USE AGREEMENT ("Agreement") is made as of May 1, 2004, (the "Effective Date") by and between Portland General Distribution, LLC, an Oregon limited liability company, d/b/a Portland General Broadband (hereinafter referred to as "PGB"), having its principal office at 121 SW Salmon Street, Portland, Oregon 97204, and the City of Sherwood, an Oregon Municipal Corporation, having its principal office at \_\_\_\_\_ (herein after referred to as "Customer"). (PGB and Customer may hereinafter be referred to individually as a "Party" and collectively as the "Parties".) Certain capitalized terms used in this Agreement are defined in Article 27 of this Agreement.

### BACKGROUND

WHEREAS, PGB owns rights to four (4) fiber optic stands from the Pittock Block in Portland, Oregon to Tualatin, Oregon;

WHEREAS, the Customer desires to purchase an indefeasible right to use four (4) fiber optics strands from the Pittock Block in Portland, Oregon to Tualatin, Oregon;

WHEREAS, PGB intends to construct, operate, and maintain a fiber optic cable along a route from Tualatin Oregon to Sherwood, Oregon;

WHEREAS, the Customer desires to purchase an indefeasible right to use twelve (12) fiber optics strands from Sherwood, Oregon to Tualatin, Oregon;

WHEREAS, PGB intends to provide the Customer a continuous connection over four (4) fiber strands from the City of Sherwood to the Pittock Block in Portland, Oregon in order to meet its internal communication needs;

WHEREAS, upon the terms and conditions set forth below, Customer desires to acquire from PGB and PGB desires to grant to Customer an indefeasible right to use in PGB Fiber Optic Strands;

NOW, THEREFORE, in consideration of the mutual promises set forth below, the Parties hereby agree as follows:

### ARTICLE 1. CONVEYANCE OF IRU AND PAYMENT

1.1 Upon the terms, covenants and conditions contained in this Agreement, PGE hereby grants to Customer an exclusive IRU in and to the IRU Fibers more fully described in Exhibit A. After the Fiber Acceptance Testing for the IRU Fibers has been accepted or deemed accepted by Customer as described in Article 3 of this Agreement, Customer may exercise its rights to the IRU Fibers.

1.2 As consideration for the IRU granted to it hereunder, Customer shall pay to PGB \$242,680. Payment shall be via check or wire transfer as follows:

1.2.1 **Effective Date Payment.** On the Effective Date, Customer shall pay to PGB an amount equal to fifty percent (20%) of the payment for rights in PGB's existing fiber optic strands.

1.2.2 **Completion Payment:** Customer shall pay to PGB an amount equal to the balance of payment upon acceptance by Customer of the IRU Fiber. The payment described in this Section shall be due and payable within ten (10) days of acceptance of the fiber test results by Customer in accordance with Article 3. Payment shall be via check or wire transfer. Late payments shall accrue interest from the date due until paid at a rate equal to twelve percent (12%) per annum or, if lower, the highest percentage allowed by law.

1.3 It is understood and agreed that PGB must and does maintain legal title to the Cable, including the IRU Fibers, subject to the grant of the IRU contained in this Agreement, until such time as title to the IRU Fibers is conveyed to Customer in accordance with the provisions of Section 4.2, below. Notwithstanding the foregoing, it is understood and agreed as between the Parties that the grant of the IRU shall be treated for accounting and federal and all

applicable state and local tax purposes as the sale and purchase of the IRU Fibers, and that on or after the exercise of its IRU, Customer shall be treated as the owner of the IRU 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 Assessments on such basis and, except as otherwise required by law, not to take any positions inconsistent therewith.

## **ARTICLE 2. CONNECTION TO THE CABLE**

2.1 Subject to the provisions herein, Customer shall be responsible for all costs to connect its facilities with the IRU Fibers. Subject to Exhibit C, Customer may connect its cable or other fiber optic cable controlled by it with the IRU Fibers at Customer's sole cost, at splice and termination points approved by PGB, which approval will not be unreasonably withheld or delayed; provided, however, any connection requiring a splice to be entered shall be performed by PGB at Customer's sole expense. In order to schedule a connection through a splice point, Customer shall coordinate the work at least thirty (30) days in advance of the date the connection is requested to be completed. PGB shall use commercially reasonable efforts to accommodate the request. Such work shall be restricted to the planned (network) service work period set forth in Exhibit C to this Agreement unless otherwise agreed to in writing. Notwithstanding the above, PGB may prohibit Customer from making a connection at any Connecting Point if PGB can demonstrate to Customer's reasonable satisfaction that use of a proposed Connecting Point would materially and adversely affect the Cable.

## **ARTICLE 3. ACCEPTANCE AND TESTING OF IRU FIBERS**

3.1 Customer shall within five (5) days of executing this Agreement have the right to test the IRU Fibers in accordance with Exhibit B (the "Fiber Acceptance Testing") to verify that they are operating in accordance with the specifications in Exhibit B. PGB shall have the right, but not the obligation, to have a person or persons present to observe the Fiber Acceptance Testing and Customer agrees to provide PGB prior notice of Customer's testing schedule.

3.2 If Customer reasonably determines that the test results are unacceptable, Customer shall notify PGB, in writing, of such determination.

3.3 In the event the results of Customer's Fiber Acceptance Testing show the IRU Fibers are not operating within the parameters of the applicable specifications and Customer has so notified PGB in writing, PGB shall expeditiously take such action as shall be reasonably necessary with respect to such portion of the IRU Fibers that do not operate within the parameters of the specifications to bring the operating standards of such portion of the IRU Fibers within such parameters. After taking such actions, Customer shall again have the right to conduct its own Fiber Acceptance Testing as set forth above. The cycle described above of testing, taking corrective action and re-testing shall take place as many times as necessary to ensure that the IRU Fibers operate within the parameters of the applicable specifications.

3.4 Within ten (10) days of execution of this Agreement, Customer shall be deemed to have accepted the IRU Fibers unless it notifies PGB, as specified in this Article 3, that Fiber Acceptance Testing results are unacceptable. If the test results of Customer's Fiber Acceptance Testing are within the parameters of the specifications in Exhibit B, Customer shall, within five (5) days of Fiber Acceptance Testing, provide PGB with a written notice accepting the IRU Fibers. The earlier of (i) the date of Customer notice of acceptance for the IRU Fibers; or (ii) the date of deemed acceptance for the IRU Fibers; or (iii) the date Customer first connects any of the IRU Fibers to its equipment or facilities, except for the sole purpose of Fiber Acceptance Testing, shall be the acceptance date for the IRU Fibers.

## **ARTICLE 4. TERM AND TERMINATION**

4.1 The initial term of this Agreement shall begin on the Effective Date and shall end twenty (20) years from the Effective Date ("Initial Term"). Subject to the conditions and limitations set forth below, and subject to the extension of the PGB Required Rights, Customer may, by written notice, extend this Agreement for an additional ten (10) year period or such shorter period as required by the PGB Required Rights, and, if it has so elected to extend this Agreement, it may, by written notice, extend this Agreement for a second ten (10) year period or such shorter period as required by the PGB Required Rights. Customer shall provide the written notice at least one (1) year in advance of the date the Initial Term or the extension thereof would expire absent such notice. Subject only

to the charges for the Basic Maintenance Services as provided in Article 5, any extension of this Agreement shall be on the same terms and conditions as contained in this Agreement and for no additional consideration. Notwithstanding that PGB may be unable to extend the PGB Required Rights to a portion of the Customer Cable Segment, Customer may, nonetheless, extend this Agreement with respect to the remaining portion of the Customer Cable Segment on the same basis as provided in this Section 4.1. Customer may not extend this Agreement if, at least six (6) months prior to the date of the proposed extension, PGB, based on its reasonable opinion, notifies Customer that it is not commercially practical to: (a) maintain PGB Required Rights beyond the Initial Term (or beyond the first extension), or (b) continue maintenance of the Customer Cable Segment beyond the Initial Term or beyond the first extension, as applicable.

4.2 Subject to the extension rights described above, upon the expiration of the Term of this Agreement, PGB shall convey title to the IRU Fibers to Customer pursuant to a bill of sale substantially in the form of Exhibit D hereto. Upon conveyance of title to the IRU Fibers, this Agreement and the IRU granted under this Agreement shall immediately terminate and, except as provided in Section 4.3, below, neither Party shall owe the other any additional duties, obligations or consideration hereunder.

4.3 Notwithstanding the foregoing, no termination of this Agreement shall affect the rights or obligations of any Party hereto (a) with respect to any payment owing hereunder for services rendered prior to the date of termination, or (b) pursuant to Article 9, Article 11, Article 14, and Article 17 of this Agreement.

#### **ARTICLE 5. MAINTENANCE AND REPAIR OF THE CABLE**

5.1 PGB shall maintain the IRU Fibers at all times in good working order and in a safe condition, in conformity with the operations specifications set forth on Exhibit C and all applicable laws and regulations. During the Initial Term, PGB shall provide Basic Maintenance Services for the Customer Cable Segment and the IRU Fibers, pursuant to the operations specifications set forth in Exhibit C. Customer will be billed at a rate of \$3,000 per year, adjusted annually to reflect annual changes in the U.S. Producer Price Index (Bureau of Labor Standards "All Finished Goods" Series ID WPUSOP3000). Customer shall pay PGB's annual invoice for Basic Maintenance Services within thirty (30) days after receipt of invoice. Late payments of such amounts shall accrue interest from the date due until paid at a rate equal to twelve percent (12%) per annum or, if lower, the highest percentage allowed by law.

5.2 PGB, at Customer's sole expense and at PGB's then prevailing rates, shall repair damage to the IRU Fibers caused by Customer's negligence or willful misconduct or Customer's elective maintenance or repair requests.

5.3 Upon notification from Customer of any service interruption, PGB shall promptly make its best effort to achieve necessary repairs or restoration, in accordance with the procedures set forth in Exhibit C. For purposes hereof, "best efforts" means activities and performance consistent with prudent industry practice, and response times that do not jeopardize the health and safety of employees or agents of PGB or Customer.

5.4 In the event Customer notifies PGB of a need for repair to the IRU Fibers that results from a specific accident or disaster, or deterioration of the IRU Fibers requiring replacement of IRU Fibers ("Damage or Deterioration"), PGB shall promptly repair such Damage or Deterioration using its best efforts as defined in Section 5.3 above. However, if the Damage or Deterioration is due to the negligence or willful misconduct of PGB or Customer, the Party responsible for such Damage or Deterioration shall be responsible for the costs of repairing the IRU Fibers to the extent the Damage or Deterioration was caused by such Party. PGB and Customer shall reasonably cooperate with each other to collect any available insurance proceeds or other recoverable amounts and to resolve any disputes with insurance carriers regarding the availability of insurance proceeds to repair any Damage or Deterioration to the IRU Fibers. To the extent that repair of Damage or Deterioration is not caused by the negligence or willful misconduct of PGB or Customer, Customer shall pay PGB's invoice for Customer's proportionate share of the cost (based on the ratio between the number of Customer's IRU Fibers repaired or replaced to the total number of fibers repaired or replaced) to repair the Damage or Deterioration within thirty (30) days after receipt of the invoice. Upon request by Customer, PGB shall promptly provide the necessary substantiating information that will allow Customer to verify the accuracy of the invoice. To the extent any costs are recovered from a third party, Customer's share of such costs, if any, shall be reduced or refunded proportionately.

5.5 PGB may subcontract for repair, maintenance and restoration services hereunder, including Basic Maintenance services; provided such subcontracting shall not relieve PGB of its obligations hereunder. All such subcontractors

shall perform their work in accordance with the applicable specifications contained in this Agreement and Exhibit C attached here to, and industry standards.

#### **ARTICLE 6. PERMITS AND REQUIRED RIGHTS**

6.1 As of the Effective Date, PGB shall have obtained all permit, easement and Right of Way agreements as well as any other licenses, franchises, authorizations, indefeasible rights of use, leases and other agreements necessary for the operation, and maintenance of the Cable hereunder (all of which are referred to as the "PGB Required Rights"); provided, however, Customer acknowledges and agrees that, subject to Section 6.2, below, such PGB Required Rights may not extend for the Term.

6.2 Except as provided in and subject to the provisions of Articles 4, 7 and 16 of this Agreement, PGB shall cause all PGB Required Rights to remain effective through the Term; provided, however, that in the event PGB is unable to maintain or loses any PGB Required Rights during the Term, PGB shall have the obligation to use its reasonable best commercial efforts to reinstate the PGB Required Rights or otherwise enable (including by relocation as provided in Article 7) Customer to use the IRU Fibers for the remainder of the Term. In the event PGB is unable to do so, Customer shall have the right, at its option, to (i) independently seek to reinstate the PGB Required Right or otherwise acquire the right to use the IRU Fibers at PGB's reasonable cost, (ii) abandon the affected IRU Fibers and terminate this Agreement with respect thereto, after which this Agreement shall cease to apply thereto and, except as provided in Section 4.3, neither Party shall have any further obligation to or rights against the other with respect thereto, or (iii) take title to the IRU Fibers in accordance with the provisions of Section 4.2.

#### **ARTICLE 7. RELOCATION**

7.1 If, following the Effective Date, the Cable or any of the facilities used or required in providing Customer with the IRU Fibers is relocated, PGB shall give Customer prior notice of any such relocation as soon as reasonably possible, and shall proceed with such relocation. PGB shall have the right to direct such relocation, including, but not limited to, the right to determine the extent of, the timing of, and methods to be used for such relocation; provided that any such relocation: (a) shall be constructed and tested in accordance with the specifications and requirements set forth in Exhibit B; (b) shall not result in a materially adverse change to the operations, performance, Connecting Points with the network of Customer, or end points of the IRU Fibers; and (c) shall not unreasonably interrupt service on the IRU Fibers. If the relocation is required due to the circumstances described in Section 6.2, PGB shall pay the Relocation Costs. In all other circumstances, where the Relocation Costs exceed the coverage of Basic Maintenance Service, Customer shall reimburse PGB for Customer's proportionate share of the Relocation Costs (including, without limitation, fiber acquisition, splicing and testing) based on the ratio between the number of IRU Fibers to the total fiber count in the Cable Segment being relocated. PGB shall prepare a budget for the costs associated with such relocation and, except in the event of an emergency, at least thirty (30) days prior to beginning such relocation work, provide Customer a copy. PGB shall provide information and documentation to Customer sufficient to demonstrate the basis for and the proportionate amount of the Relocation Costs chargeable to Customer. Customer shall pay Customer's proportionate share of such Relocation Costs within thirty (30) days of receipt of the foregoing information.

#### **ARTICLE 8. USE OF THE FIBER**

8.1 Customer represents and warrants that its use of the IRU Fibers shall comply in all material respects with applicable government codes, ordinances, laws, rules, regulations and restrictions and shall not have an adverse effect on the Cable or its use.

8.2 Customer may use the IRU Fibers for Customer's business, including but not limited to the transport of Customer content for any lawful purpose. PGB agrees and acknowledges that PGB has no right to use the IRU Fibers during the Term, except as may be specifically provided to the contrary elsewhere in this Agreement.

8.3 Customer shall take all reasonable precautions against, and shall assume liability, subject to the terms of this Agreement, for any damage caused by Customer to the IRU Fibers or other fibers or portions of the Cable used or owned by PGB or third parties. PGB shall take all reasonable precautions against, and shall assume liability, subject to the terms of this Agreement, for, any damage caused by PGB to the IRU Fibers, or to fibers or other portions of the Cable used or owned by third parties.

## ARTICLE 9. INDEMNIFICATION; LIMITATION OF LIABILITY

9.1 Subject to Section 9.2 and 9.3 each Party (an "Indemnifying Party") hereby agrees to indemnify, defend (with counsel reasonably acceptable to the other), protect and hold harmless the other Party, its employees, officers, agents, contractors and affiliates, from and against, and assumes liability for:

- 9.1.1 Any injury, death, loss or damage to any person, tangible property or facilities of any person or entity (including reasonable attorneys' fees and costs at trial and appeal), to the extent arising out of or resulting from the acts or omissions, negligent or otherwise, of the Indemnifying Party, its officers, employees, servants, affiliates, agents or contractors in connection with its performance under this Agreement;
- 9.1.2 Any claims, liabilities, damages, or costs (including reasonable attorneys' fees and costs at trial and appeal) arising out of (1) the Indemnifying Party's breach of this Agreement; (2) any violation by the Indemnifying Party of regulations, rules, statutes or court orders of any local, state or federal governmental agency, court or body in connection with its performance under this Agreement; or (3) the Indemnifying Party's ownership or use of the IRU Fibers in which it has been granted an IRU under this Agreement.

9.2 Each Party agrees to promptly provide the other Party with notice of any claim which may result in an indemnification obligation hereunder. The Indemnifying Party may defend such claim with counsel reasonably acceptable to the Indemnified party. The Indemnifying Party shall not settle or compromise any claim without the prior written consent of the Indemnified Party, which consent shall not be unreasonably withheld or delayed.

9.3 NOTWITHSTANDING ANY PROVISION OF THIS AGREEMENT, IN NO EVENT SHALL EITHER PARTY BE LIABLE TO THE OTHER PARTY FOR ANY PUNITIVE, SPECIAL, CONSEQUENTIAL OR INDIRECT DAMAGES (INCLUDING BY WAY OF ILLUSTRATION, LOST REVENUES AND LOST PROFITS SUFFERED BY THE OTHER PARTY) ARISING OUT OF THIS AGREEMENT OR ANY OBLIGATION ARISING THEREUNDER, WHETHER IN AN ACTION FOR OR ARISING OUT OF BREACH OF CONTRACT, TORT OR OTHERWISE. EXCEPT AS SPECIFICALLY SET FORTH IN THIS AGREEMENT, NEITHER PARTY MAKES ANY WARRANTY TO THE OTHER PARTY OR ANY OTHER PERSON OR ENTITY, WHETHER EXPRESS, IMPLIED, OR STATUTORY, AND ALL SUCH WARRANTIES AS TO THE DESCRIPTION, QUALITY, MERCHANTABILITY, COMPLETENESS OR FITNESS FOR A PARTICULAR PURPOSE OF THE FIBERS OR ANY SERVICE PROVIDED HEREUNDER ARE HEREBY EXCLUDED AND DISCLAIMED.

## ARTICLE 10. INSURANCE

10.1 During the term of this Agreement, the Parties shall each obtain and maintain the following insurance:

- (i) Commercial General Liability Insurance with a combined single limit of \$1,000,000 for bodily injury and property damage. Additional umbrella liability coverage shall be evidenced which, when combined with commercial general liability, totals at least \$10,000,000.
- (ii) Worker's Compensation Insurance in amounts required by applicable law and Employers Liability Insurance with limits of \$1,000,000 each accident.
- (iii) Automobile Liability Insurance with a combined single limit of \$2,000,000 for bodily injury and property damage, to include coverage for all owned, non-owned and hired vehicles.

The limits set forth above are minimum limits and shall not be construed to limit the liability of either Party.

10.2 Each Party's insurance policies required under Section 10.1 above shall be obtained and maintained with companies rated A or better by Best's Key Rating Guide; provided however, that all or part of the Commercial General Liability Insurance provided by such Party may be provided through a self-insurance program. All such insurance or self-insurance shall, to the extent of the Party's indemnity obligations under this Agreement, be primary to any other available coverage. Upon request, the Party shall provide the other Party with an insurance certificate confirming compliance with the insurance requirements of this Article. The insurance certificate shall indicate that



the other Party shall be notified not less than thirty (30) days prior to any cancellation or material change in coverage.

10.3 In the event coverage is denied or reimbursement of a properly presented claim is disputed by the carrier for insurance provided above, the Party carrying such coverage shall make commercially reasonable efforts to pursue such claim with its carrier.

10.4 The Parties shall each obtain from the insurance companies providing the coverage required by this Agreement a waiver of all rights of subrogation or recovery in favor of the other Party and, as applicable, its parent corporation, shareholders, affiliates, subsidiaries, assignees, officers, directors, and employees or any other party entitled to indemnity under this Agreement.

#### **ARTICLE 11. TAXES AND FRANCHISE; LICENSE AND PERMIT FEES**

11.1 Subject to Section 11.2 below, Customer shall be responsible for and pay to any taxing authority any and all sales, use, income, gross receipts, excise, transfer, ad valorem or other taxes, and any and all franchise fees or similar fees ("Assessments"), excluding income taxes (or gross receipts taxes in lieu of income taxes) of PGB resulting from this transaction, assessed against Customer due to its ownership of an IRU, its use of the IRU fibers, including the providing of services over the IRU fibers, or its lease or use of any portion of the Cable, its ownership, lease or use of facilities connected to the IRU fibers, or the sale to Customer of the IRU fibers.

11.2 Subject to Section 11.1 above, PGB shall be responsible for and pay to any taxing authority any and all Assessments assessed against it due to its ownership or use of the Cable, including providing services over the Cable, or its ownership or use of facilities connected to the Cable other than any facilities owned by Customer.

11.3 In the event that PGB is assessed for any Assessments related to Customer's ownership of an IRU or Customer's use of the IRU Fibers or any portion of the Cable which may not feasibly be separately assessed, PGB, within thirty (30) days of receipt of an invoice therefor, shall provide information and documentation to Customer sufficient to demonstrate the basis for Customer's pro-rata share of the Assessments and the amount and due date for payment of the Assessments. In addition, PGB shall provide Customer with all information reasonably requested by Customer with respect to any such Assessments. After such thirty (30) day period, PGB, in its sole discretion, may pay such Assessment and invoice Customer for reimbursement. Customer shall reimburse PGB for such payment within ten (10) days of receipt of PGB's invoice. Notwithstanding such payment by PGB, Customer, at its option, shall have the right at its sole cost to contest any such Assessments and PGB will reasonably cooperate with Customer in pursuing any such contest; provided that Customer shall have reimbursed PGB for such Assessments. In the event PGB, in its sole discretion, elects to not pay such Assessment, it shall so notify Customer. Customer, at its option, may pay the Assessments, or contest the payment; provided, that such contest shall be resolved or such Assessments shall be paid so as to prevent any forfeiture of rights or property or the imposition of any lien on the Cable.

#### **ARTICLE 12. CABLE WARRANTIES**

12.1 EXCEPT AS OTHERWISE EXPRESSLY SET FORTH IN THE REPRESENTATIONS, WARRANTIES, COVENANTS AND CONDITIONS OF THIS AGREEMENT, PGB MAKES NO WARRANTY TO CUSTOMER OR ANY OTHER PERSON OR ENTITY, WHETHER EXPRESS, IMPLIED OR STATUTORY, AS TO THE INSTALLATION, DESCRIPTION, QUALITY, MERCHANTABILITY, COMPLETENESS OR FITNESS FOR ANY PURPOSE OF THE CABLE OR THE IRU FIBER OR ANY OTHER FIBERS OR ANY SERVICE OR FACILITY PROVIDED HEREUNDER OR DESCRIBED HEREIN, OR AS TO ANY OTHER MATTER, ALL OF WHICH WARRANTIES ARE HEREBY EXCLUDED AND DISCLAIMED.

12.2 In the event any maintenance or repairs to the Cable are required as a result of a breach of any warranty made by any manufacturer, contractor or vendor, PGB shall pursue any remedies it may have against such manufacturer, contractor or vendor, and PGB shall reimburse Customer for any maintenance or repair costs that Customer has incurred as a result of any such breach of warranty to the extent the manufacturer, contractor or vendor has paid such costs; provided that: (a) PGB shall be entitled to reduce such amount recovered from the manufacturer, contractor or vendor by legal and collection costs incurred; and (b) PGB shall have the right to prorate such amount so

recovered (as so reduced) among Customer, itself and other parties using the Cable, based on the proportionate use of strands in the Cable.

### ARTICLE 13. NOTICE

13.1 Unless otherwise provided in this Agreement, all notices and communications concerning this Agreement shall be in writing and addressed to the other Party as follows:

If to Customer:

Attn:  
Facsimile No.:

If to PGB:

Portland General Distribution, LLC d/b/a Portland General Broadband  
121 SW Salmon Street  
Portland, Oregon 97204  
Attn: Outside Plant Manager  
Facsimile No: (503) 464-7586

with a copy to:

Portland General Distribution, LLC d/b/a Portland General Broadband  
Attn: General Counsel  
121 SW Salmon Street  
Portland, Oregon 97204  
Facsimile No: (503) 464-2200

or at such other address as may be designated in writing to the other Party.

13.2 Unless otherwise provided in this Agreement, notices shall be sent by registered or certified U.S. Mail, postage prepaid, or by commercial overnight delivery service, or by facsimile, (with the original of such notice sent by commercial overnight delivery service) and shall be deemed served or delivered to the addressee at its office on the date of receipt acknowledgment or, if postal claim notices are given, on the date of its return marked "unclaimed," provided, however, that upon receipt of a returned notice marked "unclaimed," the sending Party shall make reasonable effort to contact and notify the other Party by telephone.

### ARTICLE 14. CONFIDENTIALITY

14.1 In the absence of a separate confidentiality agreement between the Parties, if either Party provides confidential information to the other in writing or electronic format and identified as such or if in the course of performing under this Agreement a Party learns information that it reasonably should know is confidential information of the other Party, the receiving Party shall protect the confidential information from disclosure to third parties with the same degree of care accorded its own confidential and proprietary information; provided, however, that the Parties shall each be entitled to provide such confidential information to their respective directors, officers, members, managers, employees, agents, representatives and contractors ("Representatives"), entities controlling, controlled by or under common control with ("Affiliates") PGB or Customer respectively, or the Representatives of such Affiliates, in each case whose access is reasonably necessary. Each such recipient of confidential information shall be informed by the Party disclosing confidential information of its confidential nature, and shall be directed to treat such information confidentially and shall agree to abide by these provisions. In any event, each Party shall be responsible for any breach of this provision by any person to whom that Party discloses confidential information. Neither PGB nor Customer shall be required to hold confidential any information that: (a) becomes publicly available other than through the recipient; (b) is independently developed by the disclosing Party; or (c) becomes available to the disclosing Party without restriction from a third party. These obligations shall survive expiration or termination of this Agreement for a period of two (2) years.

14.2 Notwithstanding Section 14.1 above, confidential information shall not include information disclosed by the receiving Party as required by applicable law or regulation; provided, however, that the information disclosed is limited to that required by such law or regulation and only to such persons as required by such law or regulation, and

the disclosing Party uses reasonable efforts to provide the other Party with advanced written notice of such potential disclosure, and provides the other Party with a reasonable opportunity to secure the protection of the confidentiality thereof.

14.3 Neither Party shall use the name, tradename, servicemark or trademark of the other, nor issue any press releases regarding this Agreement or the terms and conditions of this Agreement or use the other Party's name in any promotional or advertising material without the prior written consent of such Party.

#### **ARTICLE 15. DEFAULT**

15.1 A Party shall not be in default under this Agreement unless and until the other Party (the "Non-defaulting Party") shall have given the first Party (the "Defaulting Party") written notice of such default and the Defaulting Party shall have failed to cure the same within (i) three (3) days after receipt of such notice in the case of any payment default or (ii) thirty (30) days after receipt of such notice in the case of any other default; provided, however, that where such default cannot reasonably be cured within such thirty (30) day period, if the Defaulting Party shall proceed promptly to cure the same and prosecute such curing with due diligence, the time for curing such default shall be extended for a period no longer than ninety (90) days from the date of the receipt of the default notice. Events of default shall include, but not be limited to: (a) failure of the Defaulting Party to make any payment required under this Agreement when due; (b) the breach by the Defaulting Party of any other material term, covenant or condition of this Agreement; (c) the making by the Defaulting Party of a general assignment for the benefit of its creditors; (d) the filing of a voluntary petition in bankruptcy or the filing of a petition in bankruptcy or other insolvency protection against the Defaulting Party that is not dismissed within ninety (90) days thereafter; or (e) the filing by the Defaulting Party of any petition or answer seeking, consenting to, or acquiescing in reorganization, arrangement, adjustment, composition, liquidation, dissolution or similar relief. Any event of default by the Defaulting Party may be waived under the terms of this Agreement at the Non-defaulting Party's option. Upon the failure by the Defaulting Party to timely cure any such default after notice thereof from the Non-defaulting Party, the Non-defaulting Party may: (i) take such action as the Non-defaulting Party determines, in its sole discretion to be necessary to correct the default, including, but not limited to, using reasonable self-help opportunities; and (ii) pursue any legal remedies it may have under applicable law or principles of equity relating to such breach. Notwithstanding the above, if the Defaulting Party certifies to the Non-defaulting Party in writing that a default has been cured, such default shall be deemed to be cured unless the Non-defaulting Party otherwise notifies the Defaulting Party in writing within fifteen (15) days of receipt of such notice from the Defaulting Party; provided, however, that this provision shall not apply to a default with respect to the payment of money.

#### **ARTICLE 16. FORCE MAJEURE**

16.1 Neither Party shall be in default for its non-performance hereunder to the extent that such non-performance is attributable to any of the following events (each an event of "Force Majeure"): natural disasters, strikes, civil unrest, unavailability of equipment or transportation, or other events that are beyond the reasonable control of the Party. The Party claiming an event of Force Majeure shall provide notice to the other Party of the commencement and the termination of such event as soon as practicable, and shall exercise diligent efforts to overcome such event.

#### **ARTICLE 17. ARBITRATION**

17.1 Any dispute under this Agreement shall be submitted to binding arbitration in Portland, Oregon, before one (1) arbitrator chosen by the Parties (or, if the Parties cannot agree, chosen by the Arbitration Service of Portland), and any such arbitration shall employ the procedural rules of the Arbitration Service of Portland.

#### **ARTICLE 18. WAIVER**

18.1 The failure of either PGB or Customer to enforce any of the provisions of this Agreement, or the waiver thereof in any instance, shall not be construed as a general waiver or relinquishment on its part of any such provision, but the same shall nevertheless be and remain in full force and effect.



## **ARTICLE 19. GOVERNING LAW**

19.1 This Agreement shall be governed by and construed in accordance with the domestic laws of the State of Oregon without reference to its choice of law principles.

## **ARTICLE 20. ASSIGNMENT**

20.1 Neither Party may assign or otherwise convey any of its rights, obligations or interests under this Agreement without the prior written consent of the other Party, which consent shall not be unreasonably withheld, conditioned or delayed. Notwithstanding the foregoing, however, either Party may assign this Agreement without restriction, in whole or in part, to any Affiliate of the assigning Party, or in connection with a merger or sale of substantially all of the assigning Party's assets. This Agreement shall be binding upon the Parties, and their permitted successors and assigns.

## **ARTICLE 21. REPRESENTATIONS AND WARRANTIES**

21.1 Each Party hereto represents and warrants to the other that:

- 21.1.1 It has the full right and authority to enter into, execute, deliver and perform its obligations under this Agreement;
- 21.1.2 It has taken all requisite corporate action to approve the execution, delivery and performance of this Agreement;
- 21.1.3 This Agreement constitutes a legal, valid and binding obligation enforceable against such Party in accordance with its terms; and
- 21.1.4 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.

21.2 Neither Party shall cause or permit the Cable, IRU Fiber, or any portion thereof to become subject to any material mechanics lien, material lien, vendors lien, or any similar lien whether by operation of law or otherwise; provided, however, that PGB may encumber the Cable in a sale and lease-back or similar financing transaction in which the purchaser's or creditor's interest in the Cable is subordinate to Customer's rights in and to the IRU Fibers and Customer may encumber its rights in the IRU as collateral to a lender or any Affiliate of Customer. In the event either PGB or Customer breaches its obligations in this Section 21.2, it shall immediately notify the other in writing, shall promptly cause such lien to be discharged and released of record without cost to the other, and shall indemnify the other against all costs and expenses (including reasonable attorneys fees and court costs at trial and on appeal) incurred in discharging and releasing such lien; provided that: (a) PGB and Customer shall each have the right to contest such lien or the validity thereof in good faith by appropriate proceeding which shall operate to prevent the collection or foreclosure of the contested lien; and (b) the contesting Party shall cause any such lien to be discharged prior to the commencement of any foreclosure action on such lien.

## **ARTICLE 22. ENTIRE AGREEMENT**

22.1 This Agreement constitutes the entire and final agreement and understanding between PGB and Customer 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 and attachments referred to herein are integral parts hereof and are made a part of this Agreement by reference. This Agreement may be modified or supplemented only by an instrument in writing executed by duly authorized representatives of PGB and Customer.

## **ARTICLE 23. RELATIONSHIP OF THE PARTIES**

23.1 The relationship between PGB and Customer 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. PGB and Customer, in

performing any of their obligations hereunder, shall be independent contractors or independent parties and shall discharge their contractual obligations at their own risk.

#### **ARTICLE 24. SEVERABILITY**

24.1 If any term, covenant or condition in this Agreement shall, to any extent, be invalid or unenforceable in any respect under the laws governing this Agreement, 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.

#### **ARTICLE 25. COUNTERPARTS**

25.1 This Agreement may be executed in one or more counterparts, all of which taken together shall constitute one and the same instrument.

#### **ARTICLE 26. AUDIT RIGHTS**

26.1 Customer shall have the right to audit PGB's books and records relating to those costs and expenses that PGB, under the terms of this Agreement, seeks reimbursement or contribution therefor from Customer. PGB shall have the right to audit Customer's books and records relating to those costs and expenses that Customer, under the terms of this Agreement, seeks reimbursement or contribution therefor from PGB. All audits shall require a minimum of thirty (30) days prior written notice, may be conducted no more frequently than once in any twelve month period, and shall be performed at the expense of the Party requesting the audit. An auditing Party shall comply with all reasonable restrictions imposed by the audited Party to minimize any disruption to the audited Party's operations including restrictions to limit the audit to normal business hours. In no event shall Customer be entitled to audit, review or otherwise have access to the books and records of PGB with respect to PGB's use of or transfer of any fibers, ducts, conduit or other elements of the Cable other than the IRU Fibers.

#### **ARTICLE 27. CERTAIN DEFINITIONS**

The following terms shall have the stated definitions in this Agreement:

"Affiliates" shall have the definition set forth in Section 14.1 of Article 14 Confidentiality of this Agreement.

"Assessments" shall have the definition set forth in Section 11.1 of Article 11 Taxes and Franchise, License and Permit Fees of this Agreement.

"Basic Maintenance Services" means (1) general route maintenance, including visual inspections and routine maintenance; (2) disaster restoration; (3) minor relocations (including the first 1000 feet within the Cable per year).

"Cable" means the optical fiber cable containing the IRU Fibers and associated splicing connections, splice boxes and vaults.

"Claims" shall have the definition set forth in Section 9.1 of Article 9 Indemnification; Limitation of Liability of this Agreement.

"Connecting Point" means the point where the network or facilities of the Customer connect to the Cable. The Connecting Point may be, but is not limited to: (1) the fiber optic patch panel, if the connection is made in an existing building; (2) a splice in the "meet me" vault; or (3) a splice point at a hand hole or similar break in the Cable.

"Damage or Deterioration" shall have the definition set forth in Section 5.4 of Article 5 Maintenance and Repair of the Cable of this Agreement

"Defaulting Party" shall have the definition set forth in Section 15.1 of Article 15 Default of this Agreement

"Effective Date" means the date first given in the opening paragraph of this Agreement.

“Fiber Acceptance Testing” means the fiber acceptance testing described in Exhibit B and in Article 3 Acceptance and Testing of IRU Fibers of this Agreement.

“Force Majeure Event” shall have the definition set forth in Article 16 Force Majeure of this Agreement.

“Indefeasible Right to Use” or “IRU” means an unrestricted indefeasible right to use the IRU Fibers, as granted by this Agreement, provided however, that granting of such IRU alone does not convey title of the fibers.

“Indemnifying Party” shall have the definition set forth in Section 9.1 of Article 9 Indemnification; Limitation of Liability of this Agreement.

“Initial Term” shall have the definition set forth in Section 4.1 of Article 4 Term and Termination.

“IRU Fibers” means the optical fibers contained in a Cable in which PGB, pursuant to this Agreement, grants to Customer an exclusive IRU.

“Non-defaulting Party” shall have the definition set forth in Article 15 Default of this Agreement.

“PGE Required Rights” shall have the definition set forth in Section 6.1 of Article 6 Permits and Required Rights of this Agreement.

“Relocation Costs” means actual costs including, without limitation, the following: (1) labor costs, including wages and salaries, and benefits and overhead allocable to such labor costs (overhead allocation percentage shall not exceed the lesser of: (a) the percentage PGB allocates to its internal projects; and (b) thirty percent (30%); (2) travel costs incurred by PGB or by its employees and reimbursed in accordance with PGB policies and Internal Revenue Service regulations (such as air fare, personal automobile mileage, lodging, meals); and (3) other direct costs and out-of-pocket expenses on a pass-through basis (such as equipment, materials, supplies and contract services). All costs shall be computed in accordance with generally accepted accounting principles.

“Representative” shall have the definition set forth in Section 14.1 of Article 14 Confidentiality of this Agreement.

“Right of Way” means all agreements with right of way owners, property owners, utilities, government entities or other parties that PGB must reasonably obtain in order to have access to or the authority to undertake the activities on the Cable route.

“Term” shall mean the Initial Term of this Agreement and any extensions.

IN WITNESS WHEREOF, PGB and the Customer, confirming their consent to the terms and conditions contained in this Agreement and intending to be legally bound hereby, have executed this Agreement as of the Effective Date.

**Portland General Distribution, LLC d/b/a Portland  
General Broadband**

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

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**[INSERT CUSTOMER NAME]**

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

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**EXHIBIT A**

**Fiber Optic Cable Description**

## EXHIBIT B

### SPLICING, TESTING AND ACCEPTANCE STANDARDS

#### 1. STANDARDS

The work performed for splicing and testing of the Fiber shall be guided by and conform to the Society of Cable Telecommunications Engineers (SCTE) TR-13 document titled Recommended Practices for Optical Fiber Construction and Testing (2001), and any amendments thereto and replacements thereof.

#### 2. SPLICING STANDARDS

2.1. PGB and Customer shall ensure that the splicing of the fiber optic cable installed under the scope of this document complies in all respects with the standards set forth herein. Specifically, PGB and Customer will properly:

- Prepare the fiber cables
- Install the splice enclosure
- Fusion splice all fibers

2.2. PGB and Customer shall document the projected splice loss through each splice from the readings taken from the fusion splicer. Chapters 8, 9, and 11 of the then current version of the SCTE manual cover the recommended procedures for fiber optic cable splicing. In addition, PGB and Customer, upon completion of the fiber splicing, may oversee the end-to-end power readings and the bi-directional OTDR traces performed by the other Party. The OTDR traces will be relied on to determine the exact individual splice loss and the exact fiber cable footage.

2.3. PGB and Customer will be responsible for ensuring that all splicing is done in accordance with then current version of the SCTE procedures in Chapters 8 through 11.

#### 3. AS-BUILT RECORDS

PGB shall maintain copies of all maps and drawings of the Fiber. A complete set of project maps and drawings showing as-built conditions and complete splicing documentation will be provided by PGB to the Customer upon request.

#### 4. TESTING

4.1 Testing of the Fiber shall be done by Customer as follows:

4.1.a Take OTDR traces and recheck splice loss measurements. The traces will be saved to disk. OTDR traces will be measured at 1550nm.

4.1.b Record loss measurements and test Fiber continuity using a light source and a power meter set at 1550nm.

4.2 Customer shall measure and verify losses for the Fiber in both directions and average the loss values. The acceptable splice loss value will be .30 dB or less for fibers spliced using the individual fusion splice method. The average splice for a span cannot exceed .10 dB for single fusion splices.

4.3 Link loss shall not exceed  $-.30$  (number of kilometers) +  $1.3$  (jumper cables, etc) +  $.10$  (number of splices)

4.4 PGB may perform OTDR testing for comparison.

## **5. OUT OF SPECIFICATION SPLICES**

Out-of-Spec splices shall be noted, but shall not preclude acceptance of the Fiber by mutual agreement of Parties if the Out-of-Spec condition does not affect transmission capability (based on use of prevailing telecommunications industry standards applicable to equipment generally used with the relevant type of fiber) or create a significant possibility of an outage.

## **6. OTDR EQUIPMENT AND SETTINGS**

Customer shall use OTDR equipment and settings suitable for performing accurate measurements of the Fiber.

## **7. ACCEPTANCE TEST DELIVERABLES**

7.1 Customer shall provide electronic and hard copy test results to PGB. The test results will include:

7.1.a OTDR readings for each fiber taken at 1550nm only.

7.1.b Cable manufacturer, cable type (buffer/ribbon), and fiber type, number of fibers, number of fibers per buffer/ribbon.

7.2 Testing Acceptance Criteria.

7.2.a All testing documentation will be verified complete and exchanged between Customer and PGB.

7.2.b All testing will be within acceptable limits as specified in this Exhibit "B".

## **EXHIBIT C**

### **OPERATIONS AND MAINTENANCE SPECIFICATIONS - FIBER**

The following are maintenance specifications provided by PGB, as the requirements to assure the requisite minimum reliability needed.

#### **1. GENERAL REQUIREMENTS**

- 1.1 PGB shall use a degree of care in performing repair and maintenance pursuant to this Agreement that equals or exceeds that which is normal and customary in the communications industry.
- 1.2 PGB will provide, or assure that a third party Service Provider provides, all items specified in this document.
- 1.3 The term "Service Provider" is used hereafter in this document to designate PGB or its respective contractual third party maintenance providers, but does not release PGB from responsibility for all designated requirements.
- 1.4 Customer will have the right to have its personnel on site for any activities listed in this document. Service Provider will assure notification at the earliest possible time to Customer (normally not less than 15 minutes) of dispatching personnel to perform repairs on Customer fiber.
- 1.5 Service Provider shall comply with industry standard Cable splicing specifications, as guided by and conforming to the Society of Cable Telecommunications Engineers (SCTE) TR-13 document titled Recommended Practices for Optical Fiber Construction and Testing (2001).

#### **2. SERVICE PROVIDER REQUIREMENTS**

- 2.1 Service Provider will provide Customer with 7-day 24-hour contact numbers so the Service Provider's emergency repair personnel may be reached at any time. This will be a list of phone numbers/contact points in priority order for contact (e.g., Trouble Desk number, pager number, cell phone number, and alternate phone numbers for escalation).
- 2.2 Maintenance/repair personnel will be available for dispatch twenty-four (24) hours a day, seven (7) days a week.
- 2.3 Service Provider will ensure that all employees are properly qualified, and that documentation of the qualification is available for each employee, if requested by Customer.
- 2.4 Service Provider will provide evidence, if requested by Customer, of equipment calibration, and will provide test results that meet standards of Exhibit B of this Agreement (Splicing, Testing and Acceptance Standards).
- 2.5 Service Provider will share with Customer all available information related to analyzing disturbances or outages impacting Customer cable and/or fiber facilities.

#### **3. SCHEDULED SERVICE**

- 3.1 Service Provider will inspect aerial Cable a minimum of once per year to determine areas that may cause an unplanned outage or failure. Documentation, with signature of inspector, will be forwarded to Customer identifying any problems found and action taken to correct the problem within 90 days of the inspection date. Service Provider will correct and repair any Cable discontinuity or damage, including, but not limited to, the emergency repair of the Cable, as detailed in Article 4 (Emergency Services).



- 3.2 Service Provider will use best efforts to notify Customer ten (10) business days prior to the date of any planned non-emergency fiber activity such as splicing. In the event that a Service Provider planned activity is canceled or delayed, Service Provider shall notify Customer at the earliest opportunity and reschedule the delayed activity.

#### **4. EMERGENCY SERVICES**

- 4.1 The first maintenance employee is expected at the site requiring an emergency maintenance activity within two (2) hours from notification. The Service Provider shall splice fibers in accordance with the following described priority and rotation mechanics; provided that lit fibers in all buffer tubes or ribbons or fiber bundles shall have priority over any dark fibers in order to allow transmission systems to come back on line; and provided further that, Service Provider will continue such restoration efforts until all lit fibers in all buffer tubes or ribbons are spliced and all traffic restored. In general, priority shall be determined on a rotating basis, to provide fair and equitable restoration priority to all parties with fiber in the Cable. Note: Emergency maintenance is defined as any fiber outage causing communications traffic to be adversely affected.
- 4.2. Service Provider shall use its best efforts to repair Cable traffic discontinuity within four (4) hours after the Service Provider maintenance employee's arrival at the problem site and the area has been secured of any hazards. Service Provider shall maintain sufficient communication capability to provide status reports a minimum of each hour with Customer during an emergency repair. Within twenty-four (24) hours after completion of an emergency repair, Service Provider shall commence its planning for permanent repair, shall notify Customer of such plans, and shall implement a permanent repair within a mutually agreed time. Restoration of dark fibers on fiber strands not immediately required for service shall be completed on a mutually agreed upon schedule.
- 4.3 If at any time it becomes apparent that the service outage is going to extend beyond eight (8) hours, the corresponding management of each company will work together to determine a plan to restore the Cable.
- 4.4 To preclude excessively long duration of outages the Service Provider shall store, or have immediate access to, in the Portland metropolitan area, spare fiber optic cable, slice boots, innerduct, pole attachment hardware and all other ancillary installation material needed for restoration. Sufficient quantities of mentioned equipment shall be stored to accommodate simultaneous multiple cable breaks.

#### **5. PLANNED (NETWORK) SERVICE WORK PERIOD**

Non-emergency work, which will be expected to produce light signal discontinuity or service-affecting disruptions, must be coordinated between the parties. Service-affecting maintenance or splicing will be scheduled to start after midnight and completed before 6:00 a.m., local time. Major cable work such as fiber rolls and hot cuts will be scheduled for nonstandard workdays.

